

MINUTES OF CONVOCATION

Friday, 15th November, 1996  
9:00 a.m.

PRESENT:

The Treasurer (Susan E. Elliott), Aaron, Adams, Angeles, Armstrong, Backhouse, Banack, Bellamy, Bobesich, Carey, Carpenter-Gunn, R. Cass, Cole, Cronk, Curtis, DelZotto, Farquharson, Feinstein, Finkelstein, Gottlieb, Goudge, Harvey, Lamont, Lawrence, MacKenzie, Manes, Millar, Murphy, Murray, O'Brien, O'Connor, Pepper, Puccini, Ruby, Scott, Sealy, Stomp, Swaye, Thom, Topp, Wardlaw, Wilson and Wright.

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It was noted that Messrs. Chahbar and Crowe and Ms. Sachs were involved in a discipline hearing which had been set prior to the scheduling of this Convocation.

The reporter was sworn.

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IN PUBLIC

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REPORT OF THE DIRECTOR OF BAR ADMISSIONS

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The Director of Bar Admissions begs leave to report:

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 having successfully completed the Bar Admission Course now have filed the necessary documents and paid the required fee and apply to be called to the Bar and to be granted a Certificate of Fitness at Regular Convocation on Friday, November 15th, 1996:

Natalie Eldora Francis	37 BAC
Darryl Eric Robinson	37 BAC

15th November, 1996

B.1.3. Transfer from another Province - Section 4

B.1.4. The following candidate having completed successfully the Transfer Examination, filed the necessary documents and paid the required fee now applies for call to the Bar and to be granted a Certificate of Fitness at Regular Convocation on Friday, November 15th, 1996:

Stanley Frank Benda

Province of Alberta

ALL OF WHICH is respectfully submitted

DATED this 15th day of November, 1996

It was moved by Ms. Sealy, seconded by Mr. Carey that the Report of the Director of Bar Admissions containing the names of those candidates being called to the Bar, be adopted.

Carried

THE REPORT WAS ADOPTED

CALL TO THE BAR

The candidates listed in the Report of the Director of Bar Admissions were called to the Bar by the Treasurer and taken by Mr. Carey before Mr. Justice Douglas H. Lissaman to sign the Rolls and take the necessary oaths.

Natalie Eldora Francis  
Darryl Eric Robinson  
Stanley Frank Benda

37th Bar Admission Course  
37th Bar Admission Course  
Special, Transfer,  
Province of Alberta

TREASURER'S REMARKS

The Treasurer confirmed that the Competition Bureau was not commencing an inquiry with regard to title plus insurance.

The Treasurer advised that she travelled to Ottawa and attended at a meeting of the Canadian Heritage Committee which was studying amendments to the Copyright Act which included a section on copying and using materials by libraries. She advised that a brief was available on this issue.

Mr. Wayne Mowat introduced Ms. Janine Miller, the new Director of Libraries to Convocation.

CEO'S INTERIM REPORT

Mr. Saso presented his interim Report to Convocation and summarized the various developments and initiatives to date. Convocation was advised that a comprehensive briefing would be available in January 1997 regarding the Price Waterhouse review of the Society's administrative operations.

Mr. Saso called upon the Secretary, Richard Tinsley, Allan Treleaven, Executive Director of Education and Mr. Ruby to speak to various developments in the Complaints Department, Education and the Bank of Nova Scotia's Professional Plan which provides advice and capital financing for lawyers setting up practice.

CEO'S INTERIM REPORT - November 1996

Convocation will receive a regular, brief report from the CEO and the senior management team summarizing new developments, initiatives and refinements in Law Society operations. The intent of the report is to keep benchers informed about key recent administrative matters, especially those that impact on efficiency and service to key constituencies such as the public, members and government. Once each quarter, benchers will receive a more comprehensive report from management that will include comments regarding compliance with Convocation's Executive Limitations Policies. The CEO's report for the fourth quarter will be available at Convocation in January 1997. The third quarter report was received in September.

Corporate Transformation Initiative

Benchers will recall that on September committee day, consultants from Price Waterhouse made a presentation outlining the objectives and scope of the review of administrative operations to take place at the Law Society over the next six months.

The overall vision and objectives of the transformation initiative, as this review has come to be known, are four-fold:

- to catalogue all programs and services currently offered by the Law Society
- to instill within the Law Society a culture of quality service that focuses on the needs of members and the public
- to provide services cost effectively by ensuring internal business processes are efficient
- to empower people to focus on results, not process
- to build human resources processes that support staff accountability.

Since the September 12 briefing, our staff and consultants have gathered data and information from our operations from staff, benchers, financial documents, organizational charts, Convocation minutes, etc. Surveys, interviews and workshops have now been conducted. In mid-October the senior management team held a two-day planning session with our consultants to review and verify the findings of the information collection phase of the project, discuss issues and opportunities raised by the findings, and set priorities for the next phase.

On January 24 benchers will receive a comprehensive briefing that details:

- inventory of current services and programs and their origins
- cost breakdowns of core and non-core business processes
- the case-for-change in key areas of operations
- scope of projects to be conducted that will produce the desired changes
- the role of staff in the various stages of the change process and suggested methods in which benchers can support change.

Downward Trend Emerging in Complaints

Better screening and intake procedures implemented in the Complaints Department in the last two years are beginning to pay off with a sharp drop in the number of complaints making it to the formal investigation phase.

The number of new complaint files opened is continuing a downward trend which began in 1994 when 5,513 new complaint files were opened. That number fell to 4,852 in 1995 and if the current volume levels are maintained throughout the balance of 1996, just over 4,500 files will be opened in 1996. This represents a decline of about 20 per cent in two years.

Greater use of telephone complaints resolution (TCR) officers to mediate complaints between lawyers and complainants has resulted in more complaints being resolved at an earlier stage --before costly, time and document-intensive formal investigations are initiated.

Today, about 50 per cent of the complaint files involve an extended exchange of correspondence between a member and the Society -- compared to 70 per cent in 1994. Fewer formal investigations have also had the positive effect of reducing by 60 per cent the "turn around time" required to complete a complaints file. On average, a file now closes within four months compared to 10 months five years ago. New complaints screening procedures have improved the promptness and the quality of service provided to complainants and have substantially reduce the burden that full-fledged investigations place on members.

#### New Bank Initiative to Pay Off for Sole and Small-Firm Practitioners

The Department of Education has invited the Bank of Nova Scotia (BNS) to deliver seminars to bar admission students and lawyers who are thinking about setting up a practice or who already operate one. The seminars will teach participants how to prepare an effective business plan and the steps that can be taken to ensure that their law practice operates on a sound financial basis. The first seminar is scheduled for Monday, November 11 at Osgoode Hall.

Seminar participants will be able to take advantage of Scotia's Professional Plan (SPP) which provides advice, access to credit and capital financing for lawyers who set up their own practices. It is hoped that the partnership with BNS can be expanded in the future to provide assistance to members who are experiencing financial difficulties in their practice.

#### Partnership with University of Western Ontario to Benefit Area Lawyers

Lawyers in Southwestern Ontario will benefit from a recent partnership agreement between the Law Society of Upper Canada and The University of Western Ontario's Faculty of Law that was signed on October 18th. Among other things, the partnership gives local law association members access to the university's law library.

As part of the agreement, the Law Society will partner with the university to help develop a work area in UWO's law library for use by association members. It will offer local lawyers private office space from which to fax and make phone calls. The project also includes the addition of four computer work stations for priority use by members.

The UWO law library gives local members access to first-rate technology and resources including electronic legal resources such as Quicklaw, Westlaw, Lexis/Nexis and a quickly expanding collection of CD-ROM based law report databases. The UWO law library includes about 200,000 volumes, and study space for almost 400 people. Significant holdings in US, British and Commonwealth report series, a comprehensive Canadian collection, and broad resources covering tax law are key features of the library's collections. Lawyers will also be able to access UWO's catalogues from their computers via the Internet.

The Law Society and UWO have also agreed to expand the scope and delivery methods of CLE courses in London. Over the short term, the Law Society is developing CLE courses that will be conducted live in London -- reducing costs and time for members who would normally have had to travel to Toronto. As well, members will be able to take computer courses so they can get the most out of UWO's facilities. In the future, UWO's technological edge will help deliver CLE courses across the province using the latest interactive and computer assisted teaching methods.

The bar admission course will eventually physically move to the university, where it will continue to be administered and delivered by the Law Society. This is expected to take place before 2001 -- when the lease on current office space in London expires. Putting everything under one roof will make the legal education process more cost effective and seamless.

#### Performance Management System Initiated

Starting this year, performance reviews are being conducted regularly in order to measure accountability and cultivate an environment that appreciates, recognizes and rewards continuous improvement. Both the employee and manager will share joint responsibility in the performance review process.

Performance reviews will be based on past and future goals and will allow for continuous improvement. Employees and managers will set the year's objectives and goals, define performance measures and establish target dates for annual review.

Feedback will come from a variety of sources. Goal setting will be participatory, based on the employee's development plans and the organization's desired results.

#### Librarian Joins Law Society

The Law Society's new Director of Libraries came on board effective October 28. Janine Miller, formerly director of library and information services at the law firm Meighen Demers, brings 14 year's experience to her new job with the Great Library. Before joining Meighen Demers, Ms. Miller was the principal in a library consulting firm which provided services to over 25 clients. She is a graduate of the Master of Library Science program at the University of Toronto and chairs the electronic information committee of the Canadian Association of Law Libraries and is a member of the editorial board of *Canadian Law Library Journal*.

#### Upcoming CLE Initiatives

A series of upcoming CLE initiatives will exploit the potential of new technology to reach distant audiences more effectively and will respond to the needs of sole practitioners. For example:

- On November 11, CLE will experiment with "simulcast" technology when it presents -- jointly with the CBAO -- a program on the new Child Support Guidelines. The program will broadcast live from Toronto to centres in Barrie, Hamilton, Kingston, Kitchener, London, Niagara Falls, North Bay, Ottawa, Peterborough, Sault Ste. Marie, Sudbury, Thunder Bay, Timmins (South Porcupine) and Windsor.
- A series of programs aimed at enabling sole practitioners to better manage and develop their practices are currently in the development stage. The series' working title is *Lone Stars*. The chairs are benchers Gary Gottlieb and Patricia Rogerson, the director of the Law Society's Practice Advisory Service.
- CLE is beginning to advertise its bursary policy which enables lawyers with gross incomes of \$35,000 or less to attend up to four CLE programs annually at half price.

#### Law Society and CBAO to Promote Estate Planning

A week-long campaign to raise consumer awareness about the need to make a will is being planned for early 1997 by the Law Society, with the CBAO acting as associate sponsor of the campaign. Two charities -- the Canadian Cancer Society and the Heart & Stroke Foundation -- are also involved and will be lending their expertise and assistance.

Statistics indicate a need to increase knowledge and public awareness about making a will. Only 44 per cent of Ontarians have wills and many are unaware of the consequences that dying intestate may have on their families. "Make a Will Week" is based on a popular English campaign which began in the early '90s to explain the importance of wills in ensuring that assets are gifted as intended.

#### Budget Preparation Exercise Mandates Cutbacks in Expenses

The annual budget preparation process has begun and the Finance Committee received in early November a draft budget that provides for a five per cent reduction in the general fund portion of members' annual fees. The draft budget will be presented to Convocation at the end of the month.

Departments have been asked to cut operating expenses in order to achieve the fee reduction target and provide a contingency for corporate initiatives that cross departmental boundaries.

#### Articling Positions Required

Thirty students representing 2.6 per cent of the students scheduled to enter the articling phase of the bar admission course in September continued to seek positions as of October 11. The Law Society's placement office is currently advertising 25 articling positions for 1996-1997. These figures compare favourably with our position in 1995 and 1994, when by December 31 we achieved placement rates of 98.4 and 99 per cent, respectively. The Law Society is optimistic that the placement rate for this year will attain or exceed past benchmarks.

#### Law'N More Generates Revenue

The Society's own legal memorabilia emporium, Law'N More, generated almost \$3,000 in sales in the period spanning 19 business days from September 27 to October 22. Net profit from sales is \$1,350.

### GOVERNANCE MATTERS

#### Report - Policy Governance: First Steps (Purpose of Report - Decision-Making)

The Treasurer reviewed the governance concepts so that Convocation could begin to develop its "ends" statements by determining who are the "Owners" and "Customers" of the Law Society and the role of the Society.

Following Mr. Feinstein's presentation of the Policy Governance Report Convocation entered into discussions as a Committee of the whole.

## Policy Governance: First Steps

### POLICY GOVERNANCE: FIRST STEPS

1. The implementation of the Policy Governance model requires Convocation to begin developing 'ends' statements. These statements reflect Convocation's response to the three fundamental questions, "What results do we wish to achieve? For what people? At what cost?"
2. Before Convocation can answer those fundamental questions, it must determine two things -
  - ♦ "Who are the 'Owners'<sup>1</sup> of the Law Society," and
  - ♦ "Given our 'Ownership', what is the mission or role of the Law Society?"

#### OWNERS

##### WHY IS IT IMPORTANT TO DETERMINE THE 'OWNERS' OF THE LAW SOCIETY?

3. Owners are those people on whose behalf Convocation governs. Convocation can only properly develop its "ends" statements if it has determined what results it wants to achieve for its Owners. Selected excerpts of materials written by John Carver, discussing the importance of identifying the Owners of an organization are set out in *Appendix A*, which starts at page 9.
4. Convocation's primary obligation is to its Owners, to whom it is accountable. Benchers represent the Owners and, on their behalf, decide what 'business' the Law Society will be in, and what 'Customers'<sup>2</sup> the Law Society will serve.

##### HOW IS AN OWNER DIFFERENT FROM A CUSTOMER?

5. Who to serve is an Ownership question. What benefits to provide to Customers is an Ownership question. The recipient of the benefit or service is a Customer. Customers come first for staff, whose job it is to provide board-defined benefits to Customers. Owners must come first for Convocation.
6. Customers speak only for themselves, from their own viewpoint, whether individually or as a group. They are not obligated to speak for others.

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<sup>1</sup> The word 'Owner' has special meaning in Policy Governance language and is not the same as in everyday business usage. Convocation considers its 'moral Ownership', not 'legal Ownership' - see further discussion in *Appendix A*.

<sup>2</sup> The word 'Customer' in Policy Governance language is, in the case of the Law Society, a 'customer-equivalent' but, for simplicity is shortened to 'Customer'.

Owners must consider the overall good of the whole and reach out to hear the needs and desires of others in the group.

7. The determination of 'who is the owner' and 'who is/are the customer(s)' is of fundamental importance as the answer sets a direction or course for the whole organization. Acting in the interest of the Owners means that long-range planning, overall corporate direction and philosophy is considered ahead of individual, particular needs of Customers, even if the customer group is very large.
8. Owners and Customers may be the same groups, or, they may be entirely different groups. While Owners, once determined, should remain the same over time, Customers may change each time a policy decision is made. Different Customers can be identified as targets of different benefits or services.

#### HOW DO WE DETERMINE WHO THE OWNERS ARE?

10. The *Law Society Act* does not explicitly set out on whose behalf Convocation governs. Section 10 of the Act empowers the benchers to govern the affairs of the Society. Section 13 appoints the Attorney General for Ontario as the guardian of the public interest in all matters within the scope of the Act.
11. Convocation has recognized and confirmed that the Law Society's duty is to govern the legal profession in the interest of the public. This is borne out by the current Role Statement of the Law Society and the commentary to it, which is set out in *Appendix B*, at page 26.
12. Convocation may determine that the Owners of the Law Society are the public, members of the profession, the provincial government or just members of the public seeking legal advice. Once Ownership is identified, Convocation decides which Customers are served by the Society (who is to benefit from the services) and, what goals are to be achieved for those Customers.
13. The only way to determine the answer to the questions of 'Who is the Owner' and 'Who are the Customers' is to discuss them in the context of our legislative structure, our 'moral Ownership', and our collective view about why the Law Society is here.

#### IMPORTANCE OF THE ROLE STATEMENT

14. Once the Owners are identified, Convocation must re-examine the Role Statement, which is the broadest statement about the difference the Law Society wants to make in the world. It is our 'highest level' ends statement from which all other ends statements emanate. Convocation must continually refer to the Role Statement when setting priorities.
15. The Role Statement, like all our ends statements, should be re-examined often. It currently speaks about what the Law Society will *do*, i.e. "ensure that the people of Ontario are served by lawyers..." The Role Statement, rather than detailing what the Law Society will *do*, should set out the result the Law Society wishes to *accomplish* or the *difference* it wishes to make in the world. Some examples of possible role statements are:
  - ♦ The mission of the Law Society of Upper Canada is that the people of Ontario are well served by a competent, honourable legal profession.



- ♦ The mission of the Law Society of Upper Canada is that quality legal services are available to the people of Ontario.

16. In his book, *Boards that Make a Difference*, John Carver identifies six critical characteristics of a role or mission statement. See page 24 of Appendix A for the details.

#### ROLE STATEMENTS IN OTHER PROVINCES

17. British Columbia has a different legislative framework than Ontario. Section 3 of the *Legal Profession Act* reads:

"3. It is the object and duty of the society

- (a) to uphold and protect the public interest in the administration of justice by
  - (i) preserving and protecting the rights and freedoms of all persons,
  - (ii) ensuring the independence, integrity and honour of its members, and
  - (iii) establishing standards for the education, professional responsibility and competence of its members and applicants for membership, and
- (b) subject to paragraph (a),
  - (i) to regulate the practice of law, and
  - (ii) to uphold and protect the interests of its members."

18. The mission statement of the Law Society of British Columbia, which draws significantly from the mandate set out in the relevant legislation, is as follows:

"The principal aim of the Law Society of British Columbia is a public well-served by a competent, honourable and independent profession. The secondary aim is the promotion and protection of lawyers' interests provided it does not derogate from the principal aim."

19. The relevant legislation in Manitoba does not clearly set out the mandate of the Law Society of Manitoba, and in that sense is more similar to the situation in Ontario. The mission statement of the Law Society of Manitoba is:

"The aim of the Law Society of Manitoba is a public well-served by a competent, honourable and independent legal profession."

#### APPLICATION OF CONCEPTS TO CURRENT ISSUES

20. The first steps in implementing Policy Governance are determining the Owners and Customers of the Society and using that information to review and develop the Role or Mission Statement. At a very practical level, the information will be instantly useful to Convocation given that at this Convocation we are dealing with two major pieces of information, being:

- a) an information report outlining services provided to and regulations imposed upon lawyers by the Society; and

- b) a request for direction about whether to become involved, and if so, how and to what extent, with a government consultation process regarding a particular solicitor-client function (fee assessments).
- 21. Convocation should evaluate these reports with the basic questions in mind - "Who are we here representing? To whom are we accountable?" (Owners) and, "What group of people should be served by the Society? What benefits should we seek to provide to them to fulfill our accountability?" (Customers).
- 22. Convocation should then look to the Role Statement to determine whether we are "in the business" under consideration. If Convocation decides that pursuing a particular course a) meets the criteria of being an end or outcome,<sup>3</sup> b) is consistent with our Ownership responsibilities, and c) is directed to providing a benefit to our Customers, then d) the Role Statement should be reviewed. If the Role Statement does not adequately articulate the reason for wishing to pursue the course being considered, then the Role Statement requires modification. The Role Statement may require amendment or, it may be necessary for Convocation to further elaborate upon one of the phrases in the statement. (What Policy Governance calls "going down a level" or developing the "mixing bowl" statements.)
- 23. There are a number of common questions that should be kept in mind when examining possible policy decisions under Policy Governance. These include:
  - a) Why do we want to have this service/result?
  - b) How are the effects to be apportioned among competing needs or need groups?<sup>4</sup>
  - c) What is the range of benefits we could bring to pass?
  - d) What is the range of recipients?
  - e) What information is needed to consider these decisions competently and wisely, keeping in mind that perfect information is probably too costly, but operating in ignorance is costly in other ways.

#### NEXT STEPS

#### ENDS

- 24. After confirming the "mega-ends" of the Role Statement, the next step is to elaborate on it by developing more detailed ends statements. In developing ends statements, Convocation must a) look at the limitations to be placed on the CEO in carrying out those ends and b) consider the monitoring mechanisms for reviewing the accomplishment of the ends statements.

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<sup>3</sup> An outcome is essentially an "end" - it is about a value or result that Convocation wants to achieve. The test of "What benefit, for which people, at what cost" only requires one of the three components to be present to qualify as an "end", but one of them must exist. If the outcome is about a specific activity or program it is a "means" and should be re-stated at a more value-based level. For example, an "end" could be "quality legal services" but a "means" would be "to provide one lawyer per person in need of legal services".

<sup>4</sup> The essence of any organization lies in what it believes, what it stands for, and what and how it values. Setting values and running an organization is often referred to as having a "value-swap" machine - we take in resources of one kind and produce something for the benefit of someone - a swap of values has taken place.

25. We must constantly review, update and adjust our ends statements in light of further information, changing circumstances, and our ability to better articulate what result we wish to achieve.
26. While being focussed on ends, and keeping in mind our accountability to Owners, it is important to think in terms of long-range planning. Convocation needs to look at the lifetime needs of the Customer(s) and its overall accountability to Owners. Staff puts the interests of the Customer(s) first but Convocation puts the interest of the Owners first. Staff are therefore more concerned with immediate issues of implementation while Convocation is concerned with the future and the needs that will be present years hence.

#### PRIORITIES

27. To establish priorities, we must use our ends statements and take an annual assessment of them. Convocation is to set the course of the Society so that, for example, the CEO's budget can be built around the organizational goals rather than have the budget determine what those goals will be. The deployment of resources - time, staff, money etc. - is a priority decision that should be made in the context of *what result are we trying to achieve, for what group of people, at what cost?* It is an ongoing process of discussion and of updating our stated values and beliefs so that a clear course is set.
28. The further detail of ends statements arising out of the Role Statement will inevitably set a series of priorities for Convocation and for staff. Answering who we wish to serve and what benefits should be bestowed upon which group of people will define in relative terms, over the course of several months and years, what is most important and what is less important and why that is so. Convocation will be in charge of establishing the sort of Law Society that exists 5, 10 and 200 years from now because we will have expressed in clear terms the values and perspectives of the Law Society, the *difference* we expect to make in the world.

#### SUMMARY

29. The next steps, after determination of Customers/Owners and review of the Role Statement are:
  - a) Ends arising from the Role Statement - state further details of the Role Statement;
  - b) Start the annual planning cycle and annual examination of the ends so the budget can be set around the organizational goals and values;
  - c) Set the limitations on the means which can be used to achieve the ends;
  - d) Establish monitoring requirements to ensure policies are working and to keep information up to date.

#### APPENDIX A

(Appendix A contains excerpts written by Mr. John Carver)

*Direct Work: Linkage with the Ownership*

Six Critical Characteristics of a Role Statement

- (1) *Results terminology:* mission should not be couched in terms of the activities necessary to achieve some change. *It is the change itself that is the mission.*

- (2) *Succinctness*: A long statement usually means that a board has not come to terms with its mission. Long statements clutter and muddle the actual mission with explanation, intended methods, and excess verbiage. The real mission is often buried in the several paragraphs, but boards are hard pressed to identify it, and CEOs are not able to organize around it. Ideally, the mission should be stated in a few words, no more than a sentence.
- (3) *Authoritative generation*: The mission is too close to the heart of governance for the board to act passively and simply approve another's statement. If the board is not actively involved in determining the mission, why should it be involved in anything else?
- (4) *Horizontal integration*: The mission is developed from the extra organizational context by a board accountable to an 'Ownership.' That same Ownership may have boards doing its business. There is disjointedness in public service and weakening of the public fabric when boards do not speak with other boards. There is no more meaningful subject about which community boards can converse than mission.
- (5) *Ubiquity*: Unless a mission is pervasive, it will lose its compelling power in organizational affairs. It simply cannot be repeated too much (which is another reason for succinctness). The mission should appear on all documents, on the phones, and in the conference rooms. *Live with the mission.*
- (6) *Vertical integration*: The mission must be the theme and the backbone of the organization. An elegant mission does little good if it is not connected to the goings-on of the organization. The mission connects the board's job with the CEO's job and thence to all others. Every department, every program, every job, and every
- (7) objective must be tied to the mission. Placing the mission on this pedestal is comparable in a summative sense to a "bottom line" mentality. Because of their peculiar market status, non-profit and public organizations have been able to develop disjointed, internal islands of excellence that are not forced to sum to a bottom line.

#### APPENDIX B

#### LAW SOCIETY OF UPPER CANADA

#### ROLE STATEMENT

Adopted by Convocation, October 27, 1994

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.

The Role Statement is designed to,

- define the proper role of the Law Society and inform members of the profession and the public of that role;

- assist Convocation to establish goals and to concentrate on policy issues at the core of the Law Society's responsibilities;
- assist Convocation when discussing the continuation of established programs or the commencement of new activities.

The Role Statement is a necessarily short mission statement. The accompanying Commentary explains elements of the Role Statement and the thinking which lies behind those elements.

#### COMMENTARY

Adopted by Convocation, October 27, 1994.

#### 1 Governance

- 1.1 The statement declares that Law Society exists to govern its members<sup>5</sup> in the public interest. Section 10 of the *Law Society Act* declares that the benchers are to govern the affairs of the Society.
- 1.2 The concept of governance (the act, office or function of governing - of exercising authority) is central to the role of the Law Society. It conveys the idea that the Society has authority over its members (but always and only in the public interest). The responsibility of governance is the principle which legitimizes the authority which the Society exercises over its members, and prospective members, in respect of entry to the profession, standards, insurance requirements, professional conduct and discipline.
- 1.3 Governance can also be a useful limiting concept. We can ask in respect of every program and activity of the Law Society (actual or proposed): "Does it qualify as governance of the profession?" or "Is it an essential function of governing the profession?"
- 1.4 At times of economic restraint or retrenchment, the "governance test" ("Is this activity an essential function of governing the profession?") can be employed to identify activities which are central to the role of the Society (and therefore essential) and those which are peripheral (and therefore perhaps dispensable).

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<sup>5</sup> In practice, the self-governing profession has had to delegate the actual function of governance to a small group. The 1797 statute of Upper Canada (37 Geo. III, c. XIII) *An Act for the better Regulating of the Practice of Law*, authorized the appointment of six or more senior lawyers "as Governors or Benchers of the said Society". That tradition has been continued in subsequent legislation. The current *Law Society Act*, R.S.O. 1990, c. L.8., s.10 states:

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.

The majority of the benchers of the Law Society are elected; all elected benchers must, themselves, be members in good standing; all members in good standing are eligible to vote in an election of benchers. The profession may therefore justly claim to be self-governing.

- 1.5 It is not the proper function of this commentary to suggest what specific programs and activities satisfy the "governance test". The role statement, however, identifies certain purposes for which the power of governance is to be exercised. Thus it may be asserted that activities which uphold the independence, integrity and honour of the legal profession, and programs designed to ensure that the people of Ontario are served by lawyers who meet high standards of learning, competence and professional conduct, insofar as they involve governance of the profession, can be said to fall squarely within the essential activities of the Law Society.

2 The public interest

- 2.1 The statement declares that the Law Society is to govern its members "in the public interest" and thereby advance the cause of justice and the rule of law. Judicial endorsement of this principle will be found in the judgment of Callaghan J. (as he then was) in *Re Klein and the Law Society of Upper Canada* (1985), 50 O.R. (2d) 118 (Ont. Div. Ct.) at 157:

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 in the public interest.... The Law Society is a statutory authority exercising its jurisdiction in the public interest....

- 2.2 In his dissenting judgment in the same case, at 132, Henry J. agreed:

The statute [the *Law Society Act*] ... confers powers (and corresponding duties) to regulate the profession in the public interest.

- 2.3 In 1968, the McRuer Royal Commission Inquiry into Civil Rights declared that the public interest was the only justification for the self-government of the professions:

The granting of self-government is a delegation of legislative and judicial functions and can only be justified as a safeguard to the public interest. The power is not conferred to give or reinforce a professional or occupational status. The relevant question is not "do the practitioners of this occupation desire the power of self-government?" but "is self-government necessary for the protection of the public?" No right of self-government should be claimed merely because the term "profession" has been attached to the occupation. The power of self-government should not be extended beyond the present limitations, unless it is clearly established that the public interest demands it.<sup>6</sup>

- 2.4 The public interest was central to the 1797 statute (*supra* note 1) which extended recognition to the Society for the purpose of "securing to the Province ... a ... body, to assist their fellow subjects as occasion may require...."
- 2.5 The public interest remains central to the present statute. It is explicitly recognized in s. 13 of the *Law Society Act* which designates the Attorney General for Ontario as "guardian of the public interest". It is implicitly recognized in s. 23 which provides for the Lieutenant Governor in Council to appoint a number of persons who are not lawyers to be benchers of the Society. Most other sections of the act are primarily designed to protect the interests of the public, particularly those which concern admission, legal education, complaints, discipline, standards, professional conduct, insurance and compensation.

- 2.6 The duty to govern in the public interest implies a responsibility to ensure that members of the public may inform themselves as to the manner in which that duty is being discharged. It is therefore important that the Law Society continue conducting its proceedings in public and communicating its decisions not only to the profession but also to the public. Such openness is important for the Law Society in carrying out its duties as a democratic institution.
- 2.7 The duty to govern the legal profession in the public interest suggests a role for the Law Society in the development of public policy. That role, however, is a limited one: it must be restricted to matters which relate to the Society's core responsibilities as expressed in the role statement.
- 2.8 It may therefore be appropriate for the Law Society to comment on matters of public policy, or to take an initiative in making representations to the Government,

- when the public interest in the matter is directly tied to an aspect of the administration of justice that falls within the responsibilities of the Law Society as defined in the role statement;
- when the matter may have an effect on the way members of the Law Society deal with, and provide professional services to, their clients;
- when the matter may affect the ability of counsel to meet the needs of clients or may affect the relationship between counsel and client;
- when the outcome of the matter might effect significant changes in an area in which lawyers may have special knowledge or unique insight; or
- when significant and traditional rights and remedies of the public may be diminished or eliminated if the Law Society does not intervene in the matter.

3 The public interest and the interest of the profession: a false antithesis

- 3.1 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.
- 3.2 For example, it is in the interests of both public and profession that lawyers meet high standards of learning, competence and conduct: Law Society programs which serve those ends are serving both the public and the profession. The same point is expressed by the proposition that the public interest is served by a legal profession with access to excellent resources in terms of continuing education, practice assistance and ethical advice.

- 3.3 The statute of 1797 implicitly recognized that the interests of the profession were not necessarily incompatible with those of the public. One of the purposes of the Law Society, recited in the preamble to the statute, was to secure "a learned and honourable body" "to the Province and the profession".
- 3.4 A special situation also arises when the Government, which must be assumed to be acting in the public interest, invites the Law Society to respond to proposals for governmental action. In such a situation, depending on the circumstances, it might be proper for the Law Society to give priority to the interests of the legal profession.
- 3.5 It needs to be made clear, however, that it is not the role of the Law Society to act as a professional association or trade union which exists actively to advance the interests of its members in society. In the words of the McRuer Report: "The power [of self-government] is not conferred to give or reinforce a professional or occupational status" (*supra* note 2). If the Law Society were to promote the interests of the profession for its own sake, it would call into question the powers with which the Law Society has been entrusted.
- 3.6 In the final analysis, the public interest will always be paramount in determining the activities, policies and programs of the Law Society. It is only if the profession is seen to be serving the public interest that it will maintain public confidence and command public respect.

#### 4 Access to legal services

- 4.1 The statement declares that the Law Society is responsible for ensuring that the people of Ontario are served by lawyers who meet high professional standards.
- 4.2 The concept that the Society must govern its members in the public interest is inseparable from the idea that one of the distinguishing features of a profession is that it exists to put its specialist skills at the service of the public. The obligation is more compelling where the public has given the profession a monopoly on the delivery of those services (a topic addressed in greater detail in paragraph 5.2 below). The governing body of the legal profession therefore has a responsibility to ensure that members of the public have access to legal services and know how to avail themselves of those services.
- 4.3 The professional responsibility to make legal services available has long been acknowledged in the words of the Barristers Oath: "You shall not refuse causes of complaint reasonably founded...." It is also a tradition of the profession that, where people are unable to afford the cost of necessary legal representation, lawyers should make their professional services available, free of charge, *pro bono publico*. Today, these ideals find expression in the Law Society's Rules of Professional Conduct.<sup>7</sup>

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<sup>7</sup> See Law Society of Upper Canada, *Rules of Professional Conduct* (as amended to 10 July, 1992), Rule 12 ("Advertising and Making Legal Services Available") and Commentary 2 to Rule 9 ("It is in keeping with the best traditions of the legal profession to reduce or waive a fee in a situation where there is hardship or poverty, or the client or prospective client would otherwise effectively be deprived of legal advice or representation.") It was in fulfilment of these public obligations that the Law Society established the Ontario Legal Aid Plan in 1967. Under the terms of the *Legal Aid Act*, R.S.O. 1990, c. L.9, s. 2., the Law Society continues to be responsible for the administration of the Plan.



5 High standards of learning, competence and professional conduct

5.1 The statement declares that the Law Society is to advance the cause of justice and the rule of law by ensuring that the people of Ontario are served by lawyers who meet *high standards of learning, competence and professional conduct*.

5.2 As suggested in paragraph 4.2, one of the distinguishing features of a profession is that its members possess specialist knowledge and skills which they put at the service of the public. Usually, the members of the profession have a monopoly on the provision of these specialist services - a monopoly conferred for the purpose of protecting the public from self-appointed practitioners who may lack the necessary learning, competence or ethical standards. Section 50 of the *Law Society Act* confers such a monopoly on members of the Law Society. It reads in part:

50. - (1) Except where otherwise provided by law,

(a) no person, other than a member whose rights and privileges are not suspended, shall act as a barrister or solicitor or hold himself out as or represent himself to be a barrister or solicitor or practise as a barrister or solicitor....

5.3 The Law Society has a public obligation, arising from this monopoly, to ensure that the people whom it admits to membership and on whom it confers the right to practise law, are indeed fit to practise and competent to offer legal services. The Law Society also has an obligation to ensure that its members *continue* to be fit, qualified and competent.

5.4 A member of the public will not necessarily be in a position to evaluate the competence of a person who claims to be qualified to practise law. Membership of the Law Society of Upper Canada certifies to the world at large that the person is fit, qualified and competent.

5.5 Examples of the ways in which the *Law Society Act* requires and authorizes the Society to ensure *high standards of professional conduct* can be found in section 7 of this commentary where integrity and honour are discussed.

5.6 Examples of the statutory and regulatory provisions which require and authorize the Society to ensure *high standards of learning and competence* are:

- the power to make regulations with regard to the admission of members and respecting legal education;<sup>8</sup>
- the requirement that all applicants for call to the bar and admission as solicitors be graduates of an approved university law course and pass the Bar Admission Course;<sup>9</sup>
- the authority to publish law reports;<sup>10</sup> and

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<sup>8</sup> *Law Society Act*, s. 63, paras. 1 and 7.

<sup>9</sup> Regulation 708, R.R.O. 1990, s. 23. Certain exceptions apply to (i) lawyers who are qualified in other Canadian jurisdictions; (ii) faculty members in Ontario law schools; and (iii) applicants with law degrees from other universities.

<sup>10</sup> *Law Society Act*, s. 63, para. 5; Regulation 708, ss. 21, 22.

- the power to regulate and provide financial support to County Law Libraries.<sup>11</sup>

5.7 Competence to perform legal tasks undertaken on a client's behalf is also specified as an ethical requirement for the practice of law in the Society's *Rules of Professional Conduct*. Practice at an unsatisfactory standard of competence may therefore attract disciplinary sanctions.

6 The independence of the legal profession

6.1 The role statement declares that the Law Society is to govern the legal profession in the public interest by upholding the *independence* of the legal profession.

6.2 The principle of the independence of the legal profession is grounded in the public interest. It springs from the conviction that if we wish to maintain a free and democratic society, it is essential that lawyers be independent of government, and of any other group.

6.3 The state is not the only force in society from which the citizen needs protection. Whether working in private practice, government service or an in-house legal department, a lawyer's first allegiance must be to the cause of justice and the rule of law. It is in this broad sense that the independence of the legal profession must be upheld.

6.4 The principle was expressed by Estey J., writing for a unanimous, nine-judge court, in *Attorney General of Canada v. Law Society of B.C.*, [1982] 2 S.C.R. 307 at 335-336:

The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. 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.

6.5 The same principle was asserted vigorously by the Law Society in its submission to the Professional Organizations Committee in 1979. Chapter 1 of the Submission, entitled "The Independence of the Legal Profession" opens with these words:

The legal profession has a unique position in the community. The distinguishing feature is that alone among the professions it is concerned with protecting the personal and property rights of citizens from whatever quarter they may be threatened and pre-eminently against the threat of encroachment by the state. The protection of rights has been an historic function of the law and it is the responsibility of lawyers to carry out that function....

A vital role of the lawyer is to stand between the citizen and the state and this role is more important now than ever before. The extent of government interference in the lives of citizens can only be described as massive.... The law is the instrument of governments and lawyers form the only profession trained in the law.

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<sup>11</sup> *Law Society Act*, s. 62(1) para. 24; s. 63 para. 8; Regulation 708, ss. 24-34.

Lawyers could not advise citizens as to their responsibilities with respect to particular legislation or governmental action if lawyers are not completely independent of government. For this reason lawyers must maintain their independence as individuals.... It is imperative that the public have a perception of the legal profession as entirely separate from and independent of government, otherwise they will not have confidence that lawyers can truly represent them in their dealings with government.

....

The necessity of the independence of the judiciary is well recognized. The significance of the independence of the profession is often not fully understood. The profession is the source and training ground of the judiciary. It is not enough that the judiciary enjoy constitutional protection from interference; those appointed to the Bench must have instilled into their characters from their professional training and experience the instincts of a fully independent person.

- 6.6 In its report, the Professional Organizations Committee commented on this, and similar submissions from other representatives of the legal profession:

Stress was rightly laid on the high value that free societies have placed historically on an independent judiciary, free of political interference and influence in its decisions, and an independent bar, free to represent citizens without fear or favour in the protection of individual rights and civil liberties against incursions from any source, including the state.<sup>12</sup>

- 6.7 The role of the Law Society in maintaining the essential independence of the profession was stated by Henry J. (dissenting, but not on this point) in *Re Klein and the Law Society of Upper Canada*, (*supra* par. 2.1) at 143:

Society as a whole needs the legal profession to assist the citizen in his dealing with others and with the state. The role of the Law Society is to ensure that that service is available through the profession, and that it will be seen as a body of professionals acting with competence, integrity and independence.

7 The integrity and honour of the legal profession

- 7.1 The statement declares that the Law Society is to govern the legal profession in the public interest by upholding the *integrity and honour* of the legal profession. "Integrity" is a personal trait or attribute describing one's moral character; "honour" is the respect or esteem in which one is held by others.
- 7.2 The concepts of integrity and honour are interdependent. The reputation of the profession depends on its integrity. Without integrity there can be no honour.

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<sup>12</sup> The Report of the Professional Organizations Committee (Toronto: Ministry of the Attorney General, 1980), at 26.

- 7.3 The integrity and honour of the profession as a whole depend on the integrity of its individual members. Integrity is "the fundamental quality of any person who seeks to practise as a member of the legal profession."<sup>13</sup> The Canadian Bar Association notes that the principle of integrity is a key element of each rule in its *Code of Professional Conduct*.<sup>14</sup> In the preface to its 1992 Discussion Draft of a *Proposed Code of Professional Conduct* the Law Society of Alberta states:

... a lawyer must establish and maintain a reputation for integrity, the most fundamental attribute of a member of the legal profession. Integrity encompasses trustworthiness, loyalty, fairness, honour and honesty.

- 7.4 The fact that a lawyer may be entrusted with the liberty, confidences, property, well-being and livelihood of a client, puts beyond question the proposition that integrity is a quality essential for the practice of law.
- 7.5 As with the duty to uphold the independence of the profession, so with the duty to uphold its integrity and honour: it is grounded in the public interest. The integrity of the legal profession is essential to the well-being of a free and democratic society. In the words of Iacobucci J., writing for a unanimous, nine-judge court in *Pearlman v. Manitoba Law Society*, "The general public has a vested interest in the ethical integrity of the legal profession."<sup>15</sup> The integrity of the justice system depends on the integrity of lawyers:<sup>16</sup> without lawyers of integrity there can be no system of justice properly so called.
- 7.6 Many of the provisions of the *Law Society Act* and its regulations arise from the Society's obligation to uphold the integrity and honour of the legal profession - for example:
- the requirement that every applicant for admission to the Society be "of good character";<sup>17</sup>

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<sup>13</sup> *Rules of Professional Conduct*, Rule 1, commentary 1. Note 2 to this rule quotes from F.A.R. Bennion, *Professional Ethics* (London: Charles Knight, 1969) at 112: "Integrity is the fundamental quality, whose absence vitiates all others." At 108 Bennion states: "The professions exact a higher standard of integrity than is to be found in many other walks of life."

<sup>14</sup> Canadian Bar Association, *Code of Professional Conduct* (Ottawa: CBA, 1987), Rule 1, commentary 2.

<sup>15</sup> *Pearlman v. Manitoba Law Society*, *supra* note 11, at 889. In the same judgment, Iacobucci J. illustrates the connection between the integrity of the profession and its independence:

To my mind, a large part of effective self-government depends on the concept of peer review. If an autonomous Law Society is to enforce a code of conduct among its members, as indeed is required by the public interest, a power to discipline its members is essential. It is entirely appropriate that an individual whose conduct is to be judged should be assessed by a group of his or her peers who are themselves subject to the rules and standards that are being enforced. (*Ibid.* at 890).

<sup>16</sup> "Good character in the members of the bar is essential to the preservation of the integrity of the courts." *In re Monaghan*, 126 Vt. 53, 222 A.2d 665 at 670 (1966) quoted in American Bar Association, *Model Code of Professional Responsibility* (1985), at 7. In a dissenting opinion in the same case, Holden C.J. wrote "Attorneys are officers of the court appointed to assist the court in the administration of justice. Into their hands are committed the property, the liberty and sometimes the lives of their clients. This commitment demands ... above all else, integrity of character in private and professional conduct." *In re Monaghan*, 222 A. 2d at 676.

<sup>17</sup> *Law Society Act*, s. 27(2).

- the power to prepare and publish a code of professional conduct and ethics;<sup>18</sup>
- the power to prescribe the financial books, records and accounts to be maintained by members who practise, and the power to examine and audit those records;<sup>19</sup>
- the duty to investigate complaints of professional misconduct or conduct unbecoming a barrister and solicitor;<sup>20</sup>
- the prescription of procedures to be followed in investigating and hearing complaints;<sup>21</sup>
- the power to impose disciplinary sanctions (up to and including disbarment and cancellation of membership) on members guilty of professional misconduct or conduct unbecoming;<sup>22</sup> and
- the power to maintain a fund to be used to compensate clients and beneficiaries of trusts who have suffered loss as a result of a lawyer's dishonesty.<sup>23</sup>

## 8 Justice and the rule of law

- 8.1 The role statement concludes by declaring that the overriding purpose for which the Law Society exists is to *advance the cause of justice and the rule of law*.
- 8.2 The advancement of justice and the rule of law is a concept embedded in the Canadian Constitution. It provides the context in which the Law Society is to fulfil its role. It is the fundamental reason for the existence of the Law Society.
- 8.3 Every activity and program of the Law Society must therefore contribute to the advancement of justice and the rule of law. If it fails to serve that purpose it cannot be a legitimate activity of the Law Society.
- 8.4 The fact that a particular activity can be said to advance the cause of justice and the rule of law, however, is not sufficient to qualify it as an appropriate activity of the Law Society. Many other organizations and individuals share responsibility for advancing the cause of justice and the rule of law in Canada. For example, every individual lawyer has that duty. Other bodies with responsibility for justice and the rule of law include the judiciary, the courts, and government at all its levels.
- 8.5 To fall within the proper role of the Law Society, an activity must not only advance the cause of justice and the rule of law: it must also be an activity which,
- promotes high standards of learning, competence or professional conduct among lawyers; or
  - upholds the independence, integrity and honour of the legal profession,

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<sup>18</sup> Law Society Act, s. 63, para. 4; Regulation 708, s. 20.

<sup>19</sup> Law Society Act, s. 63, paras. 2 & 3; Regulation 708, sections 13-19.

<sup>20</sup> Regulation 708, s. 9.

<sup>21</sup> Law Society Act, s. 33; Regulation 708, s. 9.

<sup>22</sup> Law Society Act, s. 34.

<sup>23</sup> Law Society Act, s. 51.

- the two means by which the Law Society governs the legal profession in the public interest.

Convocation took a brief recess at 10:45 a.m. and continued with the Policy Governance Report at 11:00 a.m.

The Treasurer moved into Regular Convocation.

It was moved by Mr. Gottlieb, seconded by Mr. Aaron that the current Role Statement and Commentary be replaced by the following: that the Law Society govern the legal profession by reasonably balancing the interests of the profession and the public.

Withdrawn

It was moved by Mr. Aaron, seconded by Mr. Gottlieb that the following statement be added to the existing Role Statement:

The Law Society of Upper Canada exists to govern the legal profession in the public interest by,

"reasonably balancing the interests of the profession and the public. In the event of conflict between the public's interests and the profession's interests the interests of the public will be paramount."

Lost

ROLL-CALL VOTE

Aaron	For
Adams	Against
Angeles	Against
Armstrong	Against
Backhouse	Against
Banack	Against
Bellamy	Against
Bobesich	For
Carey	For
Carpenter-Gunn	Against
Cronk	Against
Curtis	Against
DelZotto	Against
Feinstein	Against
Finkelstein	Against
Gottlieb	For
Goudge	Against
MacKenzie	Against
Manes	Against
Millar	Against
Murphy	Against
O'Brien	Against
Puccini	Against
Scott	Against
Sealy	Against
Swaye	For
Thom	Against
Topp	Against
Wilson	Against
Wardlaw	Against

It was moved by Mr. Wright, seconded by Mr. Manes that notwithstanding the defeat of the motion to amend the Role Statement, it is recognized by all Benchers that the existing Role Statement is not contrary to the interests of the profession, and that nothing in the Role Statement is antithetical to the Law Society and Convocation actively striving to strengthen and render healthy the profession and its members.

Carried

ROLL-CALL VOTE

Aaron	Abstain
Adams	For
Angeles	For
Armstrong	For
Banack	For
Bellamy	For
Bobesich	For
Carey	For
Carpenter-Gunn	For
Cronk	For
Curtis	Against
DelZotto	For
Feinstein	For
Finkelstein	For
Gottlieb	For
Goudge	For
MacKenzie	For
Manes	For
Millar	For
Murphy	For
Murray	For
O'Brien	For
Puccini	For
Scott	For
Sealy	For
Swaye	For
Thom	For
Topp	For
Wilson	For
Wright	For

It was moved by Mr. Aaron but ruled out of Order that the Wright/Manes motion be added to the Role Statement.

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

CONVOCATION RECONVENED AT 2:00 P.M.

PRESENT:

The Treasurer, Aaron, Adams, Angeles, Armstrong, Backhouse, Bellamy, Bobesich, Carpenter-Gunn, R. Cass, Cronk, Crowe, Curtis, DelZotto, Feinstein, Gottlieb, Goudge, Lawrence, MacKenzie, Manes, Millar, Murphy, Murray, Puccini, Sachs, Scott, Sealy, Swaye, Thom, Topp, Wardlaw, Wilson and Wright.

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IN PUBLIC

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GOVERNANCE MATTERS (cont'd)

Report - Member Services & Regulation (Eberts/Ross)

The Member Services & Regulation Report was deferred.

Suspension of Members

It was moved by Mr. Murray, seconded by Mr. Feinstein THAT the rights and privileges of each member who has not paid the Errors and Omissions Insurance Levy, and whose name appears on the attached list, be suspended from November, 15th, 1996 and until their levy is paid together with any other fee or levy owing to the Society which has then been owing for four months or longer.

Carried

(See list in Convocation file)

It was moved by Mr. Gottlieb, seconded by Ms. Puccini that the members be given another 15 days to file LPIC returns.

Withdrawn

Finance & Audit - Investment Policy

The item on Investment Policy was deferred to the next Convocation in November at which time the backup materials would be available.

Report - Solicitor-client Fee Assessments (Goudge/Curtis)  
(Purpose of Report - Direction from Convocation)

The Treasurer sought direction from Convocation on the question of whether the Society should engage in consultation with the government, who the representatives of the Society should be and whether Convocation was ready to formulate its position.

November 1996

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Solicitor-Client Fee Assessments



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TERMS OF REFERENCE

1. The issue discussed in this report was generated by the government's decision to change the way in which fee assessments under the *Solicitor's Act* are handled.
2. In brief discussion at Convocation in September, 1996 about the government's initiative, it was decided to refer the issue to the Professional Regulation Committee for further consideration. This report contains information collected by staff and arising from the Committee's review on October 10, 1996.

INFORMATION FOR CONVOCAATION'S DIRECTION

A. NATURE AND SCOPE OF THE ISSUE TO BE ADDRESSED

The Government's Initiative

3. The current statutory fee assessment procedure under the *Solicitor's Act* by which clients and lawyers can have a legal account assessed by the court is to be discontinued by the Ontario Government. The changes proposed by the government initially involved repeal of the relevant sections of the *Solicitor's Act*, but now the Ministry of the Attorney General is proposing a new scheme within the current statutory framework.
4. Key aspects of the government's proposal are as follows:
  - a fee mediation/arbitration/assessment service performed by assessment officers appointed by the Governor in Council proceeding on a user pay basis, based on a prescribed fee schedule.
  - assessment officers would not be salaried employees of the Ministry, but would be paid privately through a corporation or similar entity created for that purpose.
  - appointments for assessments would continue to be made through Ministry staff as an administrative measure.

- the results of the assessments would have the same force and effect as the existing orders of assessments officers and would continue to be subject to confirmation by the court.

#### The Law Society's Involvement

5. The Ministry, through its representative, Mr. Brock Grant, Director of Special Projects, has extended an invitation to the Society, among other groups<sup>24</sup>, to consult on the proposal. The earlier anticipated time line for implementation of changes to the process, originally scheduled for December 1, 1996, has been extended with no fixed date, although Mr. Grant expects that his consultations with interested parties will take place through the balance of 1996 after which he will advise the Deputy Minister on the results.
6. Appendix 1 includes the draft consultation letter and various appendices outlining in more detail the above proposal provided to the Society by Brock Grant for consideration by the Professional Regulation Committee. Included is statistical information respecting assessments, including a chart outlining the assessment procedures in other jurisdictions in Canada. The statistics clearly show that more lawyers than clients access the assessment process. Appendix 1 also includes at pages 40 to 48 a copy of a draft consultation document which Mr. Grant provided to a CBAO meeting on October 28, 1996, discussed later in this report. The document likely represents the type of material to be provided to the Society at the consultation to which the Society has been invited.

#### **B. BACKGROUND**

##### Previous Consideration of the Issue by the Law Society

7. As the government of Ontario has always "occupied the field" of solicitor fee assessments, the precise issue has not previously been debated by the Law Society. Fees-related issues and questions, however, arise at the Society chiefly as a result of the following:
8. Rule 9                      As a matter of professional conduct, the Rule of Professional Conduct 9 provides guidance to the profession on issues relating to fees. Of relevance to the issue of assessment is the provision of Rule 9 which prohibits lawyers from charging fee that is not "fair and reasonable", and that is defined with some particularity in the Commentary to the Rule.
9. Complaints                Currently, if a complaint about a lawyer relates purely to fees, the Society would not usually accept jurisdiction to investigate it unless there was proof, usually in the form of a decision of an assessment officer or the courts, that the fee was unreasonable in the circumstances. The complainant would be advised, in the absence of such proof, to seek his or her remedies elsewhere, typically through the assessment procedure.

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<sup>24</sup>Mr. Grant advised the Society that he would also pursue consultations with the CBAO, the Advocate's Society, CDLPA, the judiciary and the public. Information respecting his contact with the first three groups mentioned above is included in this report.

Historically, however, complaints about fees are often one issue among many that a complainant may refer to the Society. In those cases, again the complainant is advised of the assessment remedy and is provided with an information sheet prepared by the Complaints Department which describes in summary fashion the features of the assessment process.<sup>25</sup>

Other Groups Considering the Issue

CBAO<sup>26</sup>

10. As result of the government's proposals to change the current assessment system, the CBAO struck a special Assessment of Costs Committee, co-chaired by Igor Ellyn and Robert Schipper.
11. The Committee has had four meetings to date, and has reviewed issues relating to the following:
  - what would occur with respect to assessment of party and party costs
  - mediation as a first and possibly compulsory step in any new system
  - use of facilities for the proposed "private" as opposed to government-funded assessments

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<sup>25</sup>It is complaints where numerous issues are disclosed which makes the statistics on fee-related complaints unreliable as an indication of exactly how many complaints the Society receives about fees. In 1995, there were 402 complaints about fees (out of a total of 4852). But according to Scott Kerr, manager of the Complaint Department, that number is of little value given that many complaints which are identified statistically from the computer records may indicate another nature of complaint although they have a fees component. He has indicated that 30% of the complaints received yearly may include a fee complaint. The Society has disciplined lawyers for breaches of the professional obligations outlined in Rule 9. One lawyer found guilty of professional misconduct under the rule was suspended for four months commencing January 1, 1993 and ordered to pay costs of \$10,000.00.

<sup>26</sup>As reported to Convocation through the January 1996 Discipline Policy Committee report, the CBAO initiated a fee dispute mediation service through the ADR Section. It is a pilot project which commenced January 1, 1996 offering mediation as an alternative to fee assessment, with the anticipation that it could also be used to mediate party and party costs disputes. The initial complement of 25 mediators are all members of the ADR Section. An administration fee of \$15.00 is charged to each party. The cost of the mediation is a flat fee of \$150.00 for a session lasting up to two hours, payable by one or both of the parties, as agreed between them.

15th November, 1996

the impact on the courts<sup>27</sup>, particularly if, when a lawyer commences an action on an account, the client counter-claims for negligent performance of duty. This may involve LPIC on a large scale, and perhaps initiate that involvement at the mediation stage through counsel.

12. The Committee at its last meeting on October 28, 1996 met with Brock Grant and two other Ministry representatives to begin the consultation with the CBAO. Mr Grant provided the new draft consultation document referred to earlier in this report in Appendix 1. In brief:

- The committee learned that nothing has been decided in terms of the new assessment system
- The discussions did not centre on the document, but were more general given that the Committee advised Mr. Grant that it required more information about any other initiatives of the government similar to that respecting assessments and also required a clearer understanding of what core and non-core services of the Ministry are before it chose to comment on the information in the consultation document
- The Committee made it known that the proposed user pay system is not consistent with equal access for justice and discussed numerous problems with the current system and ways that it could conceivably be improved.
- The Committee's sub-committee struck to explore the constitutional issue arising from the government's proposal also relayed its findings, in that it believed there were definite constitutional issues arising from the government's proposed action.

13. The Committee adjourned pending receipt of further information from the government.

Advocate's Society

14. Alexandra Chyczij, the Executive Director of the Advocate's Society, who also attended the October 28 CBAO meeting by invitation, advised that:

- beyond an initial discussion with Mr. Grant, who brought her up-to-date on the government's initiative and gave her a copy of the first consultation document received by the Society, he has not yet arranged a consultation meeting
- before consulting, her organization is trying to get an overall picture of the impact, and is focussing on the question of balancing/allocating resources most effectively and whether there are any costs savings to be effected

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<sup>27</sup>Government statistics indicate that approximately 120,000 cases a year are pending before the Small Claims Court in Ontario. Last year, over 6000 requests were made for appointments for assessments. Depending on the efficacy of the new system proposed by the government, it could readily be anticipated that many of those individuals who would normally proceed with an assessment would choose the courts as the forum for resolution, give the user pay component of the new scheme. The addition of even one-half to two-thirds of the current assessment numbers to the Small Claims Court system, however, would not appear to amount to a significant impact on the caseload, given that the entire number of assessments amounts to 5% of the caseload.

- as a matter of discussion at a recent executive meeting, the idea was raised of a joint retainer raised with the Law Society (possibly to be discussed at the next Treasurer's Liaison Meeting), the CBAO and others respecting the constitutional question arising from what appears to be the downsizing and privatization initiatives of the government (Peter Hogg's name was suggested for an opinion).

CDLPA

15. Staff were advised by Mr. Grant that he would be consulting with the CDLPA, but information could not be obtained from Harrison Arrell, the president of the CDLPA, prior to the issuance of this report to Convocation about the status of contact with government.

Status of the Issue in other Provinces and Other Professions

16. The Ministry of the Attorney General prepared a chart, found at pages 33 to 39 in Appendix 1, showing the fee assessment process in each of the other provinces.
17. The professional organizations for chartered accountants, engineers, architects and land surveyors were canvassed for information on their fee review or assessment procedures. Information in that respect is found at Appendix 2.

C. OPTIONS ANALYSIS

Relationship of the Issue to the Law Society's Role Statement

18. Before any position is taken in response to the government's proposal, the Society will obviously have to assess the government's information (through the proposed consultation, if that is deemed appropriate) against the current system and decide what impact that has on the interests the Society seeks to protect.
19. From the perspective of governance of the profession, with reference to the Society's Mission or Role Statement, the following paragraphs of the various Commentaries to the Role Statement may be of assistance in determining how the Society may approach the question of interacting with the government:
20. 1.2 *The concept of governance (the act, office or function of governing - of exercising authority) is central to the role of the Law Society. It conveys the idea that the Society has authority over its members (but always and only in the public interest). The responsibility of governance is the principle which legitimizes the authority which the Society exercises over its members, and prospective members, in respect of entry to the profession, standards, insurance requirements, professional conduct and discipline.*
21. 1.4 *At times of economic restraint or retrenchment, the "governance test" ("Is this activity an essential function of governing the profession?") can be employed to identify activities which are central to the role of the Society (and therefore essential) and those which are peripheral (and therefore perhaps dispensable).*
22. 2.7 *The duty to govern the legal profession in the public interest suggests a role for the Law Society in the development of public policy. That role, however, is a limited one: it must be restricted to matters which relate to the Society's core responsibilities as expressed in the role statement.*

23. 2.8 *It may therefore be appropriate for the Law Society to comment on matters of public policy, or to take initiative in making representations to the Government,*
- *when the public interest in the matter is directly tied to an aspect of the administration of justice that falls within the responsibilities of the Law Society as defined in the role statement;*
  - *when the matter may have an effect on the way members of the Law Society deal with, and provide professional services to, their clients;*
  - *when the matter may affect the ability of counsel to meet the needs of clients or may affect the relationship between counsel and client;*
  - *when the outcome of the matter might effect significant changes in an area in which lawyers may have special knowledge or unique insight; or*
  - *when significant and traditional rights and remedies of the public may be diminished or eliminated if the Law Society does not intervene in the matter.*
24. 3.4 *A special situation also arises when the Government, which must be assumed to be acting in the public interest, invites the Law society to respond to proposals for government action. In such a situation, depending on the circumstances, it might be proper for the Law Society to give priority to the interests of the legal profession.*
25. 8.3 *Every activity and program of the Law Society must therefore contribute to the advancement of justice and the rule of law. If it fails to serve that purpose it cannot be a legitimate activity of the Law Society.*
26. 8.4 *The fact that a particular activity can be said to advance the cause of justice and the rule of law, however, is not sufficient to qualify it as an appropriate activity of the Law Society. Many other organizations and individuals share responsibility for advancing the cause of justice and the rule of law in Canada. For example, every individual lawyer has that duty.<sup>28</sup> Other bodies with responsibility for justice and the rule of law include the judiciary, the courts, and government at all its levels. "*
27. *Commentary 2.8 above arose from the recommendations of the February 18, 1993 report of the Special Committee on Court Reform. That report summarized from a series of reports on related subjects the tests to measure the appropriateness of the Society's involvement in what the Committee said could be loosely termed "political issues" but which are properly defined as "public interest issues". Those tests formed the basis for the language in Commentary 2.8.*

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<sup>28</sup>Section 29 of the *Law Society Act* declares every member of the Law Society to be an officer of every court of record in Ontario. The Society's *Rules of Professional Conduct* address the individual lawyer's ethical responsibilities in respect of the administration of justice: see Rule 11 ("The Lawyer and the Administration of Justice") and section 4 of Rule 21 ("The lawyer should, where possible, encourage public respect for and try to improve the administration of justice.").

Policy and Related Issues Identified

28. The following questions have been identified for decision:

*Question 1 Should the Society accept the invitation of the government to consult on the changes to be made to the current assessment system?*

*Question 2 If the answer to 2. is yes, how should the Law Society's position be developed and who should put forward that position?*

*Question 3 Should the Society do anything, apart from the decision on whether it should consult with the government, in response to the government's initiative?*

Question 1

*Should the Society accept the invitation of the government to consult on the changes to be made to the current assessment system?*

29. The Law Society could accept the government's invitation to consult on the new assessment procedure as a matter of ensuring its input to the change process. Factors to be considered include the following:

Allocation of resources

30. Convocation must assess whether the consultation is about a matter which is sufficiently important to require the allocation of resources and the time of Convocation or staff to it.

The Need for Input

31. The fact that other organizations are consulting with the government with respect to the issue may weigh in favour of or against further involvement by the Law Society, depending on Convocation's view of whether there is a unique Law Society perspective which would assist the government and meet the responsibilities of the Law Society as set out in the Role Statement.

32. The Role Statement commentary points out that:

*8.5 To fall within the proper role of the Law Society, an activity must not only advance the cause of justice and the rule of law: it must also be an activity which,*

- promotes high standards of learning, competence or professional conduct among lawyers; or*
- upholds the independence, integrity and honour of the legal profession,*

*- the two means by which the Law Society governs the legal profession in the public interest.*

#### Sufficiency of Information

33. It may not be possible to determine whether to engage in the consultation until both the Law Society's position and the government's position are better articulated. It may be, however, that the consultation process itself is the only way to obtain more information. If that is the case, the question revolves around how the Society can or should properly prepare for the consultations (discussed below).

#### Government Relationships

34. Depending on the manner in which consultations are undertaken, this could affect the Law Society's position with the government. There are sensitivities surrounding other current issues on the Society's agenda with the government, namely, title insurance and the legislative reform package, and it may be necessary to ensure that the Society's position respecting those matters is not negatively affected.

#### Responsibility to the Public and the Profession

35. The public and the profession may be looking to the Law Society for its position on the change to the assessment process. Engaging in consultations could indicate that the Society at a minimum is interested in what the government is proposing. This may become an important consideration especially given the Society's mandate respecting the public interest.
36. However, the whole question of the Law Society's involvement in fee assessments themselves could be viewed by the membership as an instance of regulation which could alienate members of the Society from the governing body. The question becomes how will the consultation be perceived.

#### The Law Society's Interests

37. Depending on what may result from the change process within the government, it may be important for the Law Society to be involved in the process at the earliest possible time, to ensure that its perspective is articulated. The Society's review of the government's proposal may satisfy it that from a governance perspective, the public interest is being served. But if the answer to that question is in doubt, the Society may wish to take further steps and formulate a position on the issue if it sees the government's initiative significantly impacting on any element of the Society's jurisdiction. In formulating a response, the Society may wish to examine the feasibility of assuming a role in fees dispute resolution<sup>29</sup>, or in reviewing the options, decide if it would be appropriate to endorse a particular structure for assessments. The sooner information is obtained, the more effective the planning process, if it is required, will be.

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<sup>29</sup>Appendix 3 describes how the new Complaints Resolution Commissioner, as established through the legislative reforms currently pending before the government, could perform a role similar to the those whom the government proposes now sit on assessments.



38. Questions remains, however, about the real value of the consultation. Is the government's initiative a *fait accompli* in which the Society will appear to have participated in development of a proposal with which it disagrees? What scope is there to criticize the outcome if the Society participates in the formulation of the new scheme? Is it any different if the Society does not participate at all?

Question 2

If the answer to 1. is yes, how should the Law Society's position be developed and who should put forward that position?

39. Convocation may wish to adopt a policy as to the nature of any consultation in this area, regardless of the merits of the proposal or the Society's position with respect to any proposal, including development of its own position. Factors to be considered include the following (the first three items discussed below were positions taken by staff and the Treasurer over the summer when the government first approached the Society, and should be reviewed):

Public as Opposed to Private Consultations

40. The Society's position consistently was that it should not engage in any confidential consultation. It must be an open and public process. The developments in the fall of 1996 concerning the fee assessment issue do not appear to have affected the basis for that decision.

Preliminary Information Prior to Consultation

41. The nature of the consultation requested should be clearly understood. If a determination has already been made and the government's decision is not open to discussion or review, it would not really be a consultation and the Society's participation would be considerably different than if issues were "live" and open for discussion. According to the latest information from Mr. Grant, it would appear that no decision has been made on the new process. Further, the Society now has in its possession two draft consultation documents from the government which explain, albeit in cursory fashion, the direction in which the government is headed and an outline of the consultations it envisages with various groups. If the Society needs more information from the government<sup>30</sup>, the nature of that information should be defined and communicated to the government.

Parameters of and Participants in the Consultations

42. Flowing from 2. above, it would be helpful to know exactly what was expected of the participants in the consultation in an effort to determine who the participants should be and the appropriate resources to be allocated. Would it be more appropriate to have benchers or staff attend? How far should the Society's representative go in placing a position on the policy questions arising from the government's proposal before its representative? This last question relates to the effect the consultations may have on government relations with the Society, already discussed.

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<sup>30</sup>This was the experience of the CBAO as will be noted from the information discussed earlier in this report emanating from its October 28 meeting. The Society has a copy of the May 1996 Ministry of the Attorney General Business Plan but as the CBAO found, it lacked in detail and further information about the plans of the Ministry as they affected the provision of public systems for the administration of justice was requested.

Question 3

*Should the Society do anything, apart from the decision on whether it should consult with the government, in response to the government's initiative?*

Factors to be considered include the following:

The Need for a Law Society Policy Position Related to the Governance Issue

43. As a matter of policy, the Society through Convocation may eventually wish to decide whether it should enter the realm of fee assessments if it concludes that the government's proposals do not adequately meet the needs of the public in providing a reasonably accessible and workable system. That decision, however, may have to await any consultations the Society enters into with the government, which should provide at least the minimum information necessary for the Society to formulate a basis for its decision. A lack of meaningful information at this stage would likely make it difficult, if not impossible, for the Society to comprehensively address whether there is a requirement, from its governance perspective, to fill any gap created by the government's initiative.
44. At the time such a decision is made, however, the Society should be prepared to examine its role and identified mission. The general question will be whether the Society's mandate includes governance of the profession in the public interest to the extent that it must ensure, even if through one its own programs, that the public has access to a fee review/mediation/assessment process. What should be remembered are the following:
- According to the government's statistics, on average, 80% of those seeking appointments for assessment are lawyers, not clients. At the CBAO meeting on October 16, 1996, however, it was indicated that that figure is more accurately 60%. Even with that change, the majority of individuals accessing the service are lawyers.
  - If the Society decided to devise its own program to fill the gap created by the government, a conflict of interest would exist between the Society and the member, where the Society would play decision-maker in a field which overlaps with professional regulation given the rule of professional conduct on fees. Beyond that are the questions of an adequate infrastructure and resources.
  - The Society could still respond to egregious cases of over-charging in the absence of its own fee assessment program through the discipline process.

The Need for a Stated Position

45. While the issue respecting assessments is not strictly confined to the public interest, that element cannot be ignored. Further, as Society has exercised and will continue to exercise its jurisdiction to address as a matter of professional conduct unreasonable fees where proof is offered, it has an interest in that aspect of professional practice as a matter of governance.

46. The Law Society could indicate to the government that its decision to institute a user pay assessment process creates a two-tier justice system, where impecunious individuals will be denied access to this part of the system. It is an argument that relates to an access to justice issue where the rich can pay and the poor are disadvantaged, and that this may be part of a larger initiative on the part of the government to essentially privatize parts of the justice system. This view could be expressed notwithstanding that the Society may eventually decide for itself that it should not enter the assessment field.<sup>31</sup>
47. As mentioned earlier in this report, because of other initiatives involving the Society and the government, the manner in which such views are communicated to the government may require careful review.

Details of Written and Oral Communications/Meetings with Others

Government of Ontario

48. October 4, 1996                      Staff met with Brock Grant of the Ministry of the Attorney General on October 4, 1996 at which time he outlined the intention of the government to discontinue the current assessment scheme and provided the documents at Appendix 1 (pages 20 to 39).

CBAO

49. October 8, 16, and 28, 1996      Staff attended the meetings of the Assessment of Costs Committee at the CBAO offices. Stephen Goudge attended the meeting on the 16th with staff. Brock Grant attended the meeting on the 28th to initiate consultations with the CBAO on the government's initiative.

APPENDICES

Appendix 1

Outline of the Government's Proposal

Appendix 2

Other Professions

1. Architects, Engineers and Land Surveyors

Statutory provisions govern the procedures for fee disputes in these professions. Each has a Fees Mediation Committee which will "mediate any written complaint by a client... in respect of a fee charged for

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<sup>31</sup>If such a decision were taken, a sophisticated explanation and justification for the decision for public consumption should be prepared, relying on the premise that certain matters such as adjudicating on fee disputes is not a matter for the governing body of the legal profession.

services...". With the written consent of the parties, the Committee may also arbitrate a dispute respecting fees and in that case the decision of the Committee is final and binding on the parties. The decision on arbitration when filed with the court may be enforced in the same manner as a judgment.

The Association of Ontario Land Surveyors advised that in practice their system, which is not used extensively, is not workable, given that often the surveyor will not agree to participate. The majority of the fee-related disputes involve matters which fall to consideration by the Complaints Committee (failure to communicate the level or escalation of fees to be charged, for example), which does not have jurisdiction to resolve fee disputes. In such cases, the Complaints Committee, if the complaint can be proved, may recommend that the account be restricted to the original amount.

## 2. Chartered Accountants

While chartered accountants have no statutory or other regulatory scheme in place, the Institute of Chartered Accountants of Ontario offers a free voluntary fees mediation service. Both the accountant and the client must agree to mediation, and arbitration is available if mediation fails for a cost of \$250.00. It is not binding on the parties unless they otherwise agree. Representatives of the profession (and lay representation at the arbitration level) perform the review. The Institute advised that only one case has ever gone to arbitration.

## Appendix 3

### Provisions of the Legislative Reform Package Relevant to the Issue

If any thought is given to an initiative by the Society to perform the assessment function, and if the Society were to consider in even a preliminary fashion the issue of an infrastructure to handle assessments, one feature of the legislative reform package for the appointment of a Complaints Resolution Commissioner may be relevant. It was recognized by Society staff who worked on the package that there were thematic links between at least one of the original proposals of the Ministry and the described role of the Commissioner.

The proposed amendments to the *Law Society Act* and Regulations describe the Commissioner's duties. The Commissioner is not an employee of the Society, but is appointed by Convocation and is paid on a per diem basis. As the title suggests, the office is designed to resolve complaints, but also empowers the Commissioner to investigate the conduct of a member or student member. The Commissioner may also delegate the investigative powers of his or her office to employees of the Commissioner or of the Society. Notice requirements to the parties of the decision to attempt resolution of the complaint are described in new proposed s.45(1) of Regulation 708.

The Commissioner can also review the decisions of complaints investigations conducted by the Society, thus continuing the function currently performed by lay benchers sitting as Complaints Review Commissioners.

The above provisions obviously were not drafted to address the role of the Commissioner in an initiative on the scale of fee assessments. However, aside from consideration of an entirely new structure, the role defined in the package provides at least a concept of what could be expanded, admittedly in considerable terms, as an office within the Society to deal with assessments as a Society program if that direction were pursued.

15th November, 1996

Any expansion of the role of the Commissioner would require a further amendment to the provisions being proposed. According to staff who have worked on the legislative reforms, the government's position is that it wants to ensure that some closure is brought to process before they deal with the package as a whole, and currently, the review process on the government side is at a very preliminary stage. For the Society to propose further amendments may delay that process even further, and that would have to be considered if any movement were taken in this respect.

Attachments: Draft Consultation letter and various appendices outlining the proposal provided by Brock Grant, Director of Special Projects. Also attached is statistical information respecting assessments including a chart of assessment procedures in other jurisdictions in Canada.

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A discussion followed.

It was moved by Mr. Swaye, seconded by Ms. Curtis that the Society engage in the process of consultation with the government for the time being.

Carried

The general consensus was that the representatives be a combination of staff and Benchers, that a user fee system was unacceptable and that a working group of the Professional Regulation Committee continue to work on the issue.

Policy Discussion Paper - Summary Suspension for failure to file insurance documents

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IN CAMERA

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IN PUBLIC

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Mr. Andrew Brockett, Director of Research presented the policy question to be decided by Convocation.

THE LAW SOCIETY OF UPPER CANADA

POLICY DISCUSSION PAPER FOR CONVOCATION

PREPARED BY THE RESEARCH AND LEGISLATION DEPARTMENT

October 28, 1996

SUMMARY SUSPENSION  
FOR FAILURE TO FILE INSURANCE DOCUMENTS

POLICY QUESTION TO BE DECIDED BY CONVOCATION

Should the Attorney General be asked to introduce an amendment to the *Law Society Act* that would confer on the Law Society a summary power to suspend the rights and privileges of a member who has failed to file with the Society's professional liability insurer (or with the operator of an indemnity plan<sup>32</sup> approved by the Society) "any application, certificate, report, form or other document which the member is required to file by such insurer or plan"?

DEFINITIONS AND EXPLANATIONS

1.1 Summary suspension

- 1.1.1 In this document a "summary" power of suspension means the power to suspend a member's rights and privileges without a hearing.
- 1.1.2 Such a power is currently conferred upon Convocation by section 36 of the *Law Society Act* which gives power to suspend "if a member fails to pay any fee or levy payable to the Society within four months after the day on which payment is due".
- 1.1.3 Under the proposals contained in the package of proposed amendments recently approved by Convocation, the power of summary suspension will no longer be exercised by Convocation as a whole but by a "summary disposition bench". There will be a right of appeal from the decision of the summary disposition bench to the seven-bencher Appeal Panel.
- 1.1.4 The package of proposed amendments approved by Convocation retains the power of summary suspension for failure to pay fees or levies and extends it to the following situations:

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<sup>32</sup>At present, the Society arranges professional liability coverage through an insurance company (LPIC). An insurance company is subject to the provisions of the *Insurance Act*. At the request of LPIC, the package of proposed amendments to the *Law Society Act* (which Convocation has already approved) will permit the Society, if it so wishes, to arrange for "coverage" by means of an indemnity plan. It is understood that an indemnity plan would not be subject to the provisions of the *Insurance Act*.

- Failure to pay a premium or deductible under the Society's professional liability insurance or indemnity plan.
- Failure to complete and file with the Society "any certificate, report, form or other document" which the member is required to file pursuant to the Act or regulations (e.g. Form 3 — the annual public accountant's report).
- Failure to meet such continuing legal education requirements as may be specified in the regulations.

## 1.2 Four-month grace period

- 1.2.1 Under the existing Act there is a four-month "grace period". The power of summary suspension may not be exercised until at least four months have elapsed from the date on which payment of the fees and levies was due.
- 1.2.2 The proposed amendments (those in the package already approved as well as those discussed in this document) will preserve the principle of a four-month grace period.

## 1.3 Investigation

- 1.3.1 Although not strictly relevant to the discussion in this paper, it may be useful to bear in mind that the package of proposed amendments already approved by Convocation includes a power to make by-laws,
  - providing for the enforcement of the obligations of members in connection with an insurance or indemnity plan and conferring powers of investigation and audit on employees of the Society or of any corporation operating an insurance or indemnity plan established or sponsored by the Society.

## 2 BACKGROUND AND DISCUSSION

- 2.1 In 1995, LPIC introduced three new "levy surcharges" — a real estate transaction levy surcharge, a civil litigation transaction levy surcharge and a volume levy surcharge.
- 2.2 Collection and administration of the levy surcharges is dependent upon insured members submitting reports to LPIC giving the necessary details of their real estate transactions, civil litigation transactions and annual gross billings.
- 2.3 As of June 1996, "hundreds" of members had failed to file with LPIC the required reports for 1995.
- 2.4 Under the provisions of the existing Law Society Act if, despite reminders, a member fails to file such a report with LPIC, there is no enforcement procedure short of a formal discipline complaint and a formal discipline hearing.
- 2.5 The members concerned have not necessarily failed to pay a levy (a failure which would permit a summary suspension under section 36 of the Act): they have failed to file certain reports and it is therefore not known whether they are liable to pay a levy surcharge.

- 2.6 In a normal commercial insurance situation, failure to submit applications or reports required under the insurance policy would probably result in cancellation of coverage. The possibility of cancellation will persuade most insureds that it is in their interest to provide the information required by the insurer.
- 2.7 In the case of the Law Society's professional liability insurance program, cancellation of a practising member's insurance coverage is not, in most cases, an acceptable option. A major public interest purpose of the insurance program is to provide protection for clients.<sup>33</sup> Cancellation of a practising lawyer's liability insurance might endanger clients' interests.<sup>34</sup>
- 2.8 If reporting requirements under the Society's professional liability insurance program are to be enforced without resort to the cumbersome and time-consuming method of a disciplinary prosecution, it appears that a summary power of suspension is required.
- 2.9 LPIC has therefore proposed that the *Law Society Act* should be amended to give the Society summary power to suspend a member for failure to file

any application, certificate, report, form or other document which the member is required to file by the Society's professional liability insurer or indemnity plan within four months after the day of such filing specified by the liability insurer or indemnity plan.

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<sup>33</sup>Note that this principle is enunciated in the September 1996 LPIC Report to Convocation, at page 22, paragraph 64, in the context of a discussion of claims management policy:

"Claims management is especially important to the Law Society because of the strong public policy element inherent in its insurance program. [An]...approach to claims management that left insured members without coverage could have repercussions for the Law Society. The Law Society would inevitably have to respond to public outcry about the insurable errors committed by uninsured lawyers."

The same concerns would apply if the insurer were to cancel the coverage of practising lawyers who had failed to file certain report forms.

<sup>34</sup>Under the existing provisions of the *Law Society Act*, assuming that the member has paid the required base insurance levy, it is an open question whether the Law Society could prevent the member from continuing to practise even if LPIC had cancelled the members insurance coverage — assuming LPIC has power to cancel an individual member's coverage under the current policy. There is no requirement in the *Law Society Act*, regulations or rules, that a member be insured — simply a requirement that the member pay the insurance levy. Until the member files the necessary reports, it will not be known whether she has a liability to pay any surcharge beyond the base levy which she has already paid.



- 2.10 It is important to bear in mind that the failure of certain members to file the required surcharge reports is only one example of the type of non-compliance problem that the Society's professional liability insurer might face. The summary power of suspension for failure to file is not proposed simply to deal with members' failure to file surcharge reports; it is proposed because it will permit enforcement of other (perhaps as yet unforeseen) filing requirements. However, non-compliance with the filing requirements of the current levy surcharges has served to demonstrate that the Society lacks power (short of formal disciplinary proceedings) to enforce compliance with the requirements of its insurance plan.

3 SOME DOUBTS ABOUT ENFORCEMENT OF INSURANCE REPORTING REQUIREMENTS BY SUMMARY SUSPENSION

- 3.1 The doubts as to whether it is appropriate to enforce reporting requirements under the insurance program by means of summary suspension arise from the following underlying question:

*As the Law Society transfers more and more of its responsibility for the insurance program to a separate insurance company, is it appropriate for the Society to use its regulatory powers to enforce compliance with the insurer's requirements?*

- 3.2 Under the earlier scheme whereby the Law Society purchased insurance for all of its practising members and then turned to its members for reimbursement of its premium costs (by means of levy), a power of summary suspension was an appropriate way to enforce payment of the levies. The levies were owed by the members to the Society.
- 3.3 The logic of using the Society's regulatory powers to enforce compliance with the insurer's requirements is less obvious as the Society moves to a system in which,
- individual members have a more direct relationship with the insurer;
  - levies become more like individual premiums; and
  - the insurer (rather than the Society) sends out notices of payment and requires members to apply to it for insurance.
- 3.4 At some point in the devolution of responsibility to a separate insurer, use of the Law Society's summary power of suspension could become tantamount to giving the insurer access to the Law Society's disciplinary powers in order to enable the insurer to run its business.
- 3.5 It is not easy to decide at what point — if any — such use of the Society's powers would become inappropriate. It may help, however, to consider the possibility that in the future the Society might permit its members to choose to purchase insurance from among several insurers. In such a situation, would it be appropriate for the Society to use the regulatory power of summary suspension where a member fails to return certain forms (or, indeed, to make certain payments) to one of the insurers?

4 AN EXPLANATION OF HOW THE POWER MIGHT BE EXERCISED IN PRACTICE

- 4.1 If Convocation decides to seek a summary power of suspension for failure to file insurance forms, and if such a power is included in the *Law Society Act*, it is doubtful whether it would be proper or lawful for the Law Society simply to suspend the rights and privileges of every member identified on a list submitted by an insurer.
- 4.2 If the Society were to suspend a member's rights and privileges without satisfying itself that the statutory grounds for suspension had been established, it would probably amount to an unlawful delegation of statutory powers to the insurer — or an abdication of responsibility by the Law Society.
- 4.3 As one safeguard, the Society might require the insurer to attest by affidavit as to the accuracy of the list of members who had failed to file.
- 4.4 As an additional and more significant safeguard, the Society could serve, on each member identified by the insurer, notice that his or her rights and privileges are to be suspended unless, before a certain date, the member shows cause to the Society why suspension should not be ordered.
- 4.5 Formal notice, placing the onus on the member to show cause, would probably be sufficient to ensure that the subsequent suspension of the rights and privileges of every member who had failed to show cause was a proper and lawful exercise of the summary power of suspension.

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It was moved by Mr. Scott, seconded by Ms. Sealy that the Attorney General be asked to introduce an amendment to the *Law Society Act* that would confer on the Law Society a summary power to suspend the rights and privileges of a member who has failed to file with the Society's professional liability insurer (or with the operator of an indemnity plan approved by the Society) "any application, certificate, report, form or other document which the member is required to file by such insurer or plan and that there be a regulatory provision that would involve a show cause."

Carried

ROLL-CALL VOTE

Adams	For
Bellamy	For
Carpenter-Gunn	For
Cronk	For
Crowe	For
DelZotto	For
Feinstein	For
Gottlieb	Against
Goudge	For
MacKenzie	For
Manes	For
Millar	For
Murphy	For
Murray	For
Puccini	Against
Sachs	For
Scott	For
Sealy	For
Swaye	For

15th November, 1996

Thom	Against
Topp	Against
Wilson	For
Wright	For

Legislative Subcommittee - Policy Governance Changes

Mr. Brockett presented for Convocation's approval of those proposed amendments in the Report to make the Act consonant with the Policy Governance Model.

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The LEGISLATIVE SUBCOMMITTEE begs leave to report:

The Legislative Subcommittee met on Friday, the 27th of September, 1996, at 8:00 a.m, the following members being present: D.Scott (Chair), S. Goudge, G. MacKenzie, G. Swaye .

Staff: A. Brockett, J. Brooks, S. McCaffrey, D. McKillop, R. Tinsley, J. Yakimovich.

1 AMENDMENT OF THE LAW SOCIETY ACT TO MAKE THE ACT CONSONANT WITH THE POLICY GOVERNANCE MODEL

- 1.1 The *Law Society Act* includes a number of provisions which are incompatible with the policy governance model.

- 1.2 The package of proposed amendments to the Act, already adopted by Convocation, includes changes which provide for a Chief Executive Officer whose accountability is consistent with the policy governance model.<sup>35</sup>
- 1.3 There remain, however, a number of provisions in the Act giving Convocation administrative functions which are neither political (in the sense of policy-making) nor quasi-judicial. In addition, several administrative functions were assigned to Convocation in the proposed package of amendments before the full implications of the policy governance model were properly understood.
- 1.4 The accompanying table outlines proposed amendments to the following sections of the existing *Law Society Act* : sections 28.1, 30, 31 and 32. It also outlines proposed changes to the following sections of the package of proposed amendments: sections 33.3, 50.1, 51(4) [the preceding section numbers refer to provisions set out in the "Green Book" of March 11, 1996] and 58.5 [which was based on principles approved by Convocation in April, 1996].
- 1.5 In every case where the proposed changes will give staff power to make an administrative decision denying an applicant the right to practise law (e.g. a decision that an applicant for admission or re-admission has not met the statutory requirements) there will always be a right to a hearing before a committee of benchers and a subsequent right of appeal to the seven-bencher Appeal Panel.

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<sup>35</sup>These changes are accomplished by an amendment to section 8.

Section 8 of the existing Act reads as follows:

8.—(1) The Under Treasurer shall, under the control of the Treasurer and Convocation, manage the affairs and functions of the Society as its chief operating officer.

(2) The Secretary shall carry out his or her duties under this Act, the regulations and rules and such other duties as the Secretary may be instructed to undertake by the Treasurer, Under Treasurer and Convocation.

The package of amendments already approved by Convocation includes the following proposed text for section 8:

8.—(1) The Chief Executive Officer shall, under the direction of Convocation, manage the affairs and functions of the Society.

(2) The Secretary shall carry out his or her duties under this Act, the regulations and by-laws and such other duties as the Secretary may be instructed to undertake by the Chief Executive Officer.

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2 RECOMMENDATION

- 2.1 The Legislative Subcommittee recommends that Convocation approve the proposed amendments and changes as set out in the accompanying table.

ALL OF WHICH is respectfully submitted

DATED this 15th day of November, 1996

D. Scott  
Chair

THE LAW SOCIETY OF UPPER CANADA

AMENDMENTS TO THE *LAW SOCIETY ACT*

PROPOSED AMENDMENTS TO MAKE THE ACT CONSONANT WITH THE  
POLICY GOVERNANCE MODEL

DRAFT OF OCTOBER 29, 1996

Text in existing Act or in current package of amendments	Proposed amendments and changes to accord with policy governance model	Explanation/comment
<p>Existing Act, s. 28.1(1) [Admission of temporary members].</p> <p>28.1-(1) On the request of the Attorney General, a person who is of good character and who is qualified to practise law outside Ontario may be admitted by Convocation as a temporary member of the Society for a specified period.</p>	<p>28.1-(1) On the request of the Attorney General, a person who is of good character and who is qualified to practise law outside Ontario may be admitted as a temporary member of the Society for a specified period.</p> <p>Add new subsections 28(2.1) and 28(2.2) as follows:</p> <p>(2.1) No person on whose behalf the Attorney General has made a request under subsection (1) shall be refused admission as a temporary member until a hearing has been held before a committee of benchers at which it will be determined whether the person has met all admission requirements.</p> <p>(2.2) Subsections 27 (5) to (6.1) apply, with necessary modifications, to a hearing under subsection (1).</p>	<p>The proposed amendment omits the words "by Convocation" from the clause "may be admitted by Convocation".</p> <p>There is no other express reference in the Act to persons being admitted to membership "by Convocation".</p> <p>The omission of reference to admission "by Convocation" will permit the staff to admit to temporary membership those persons who meet the qualifications specified in the Act.</p> <p>Subsection 28 (2.1) is modelled on subsection 27(4) (as it will be when amended). The effect of subsections (2.1) and (2.2) is to provide for applicants for temporary membership a right to a hearing similar to the right afforded to applicants for regular membership (including a right of appeal to the Appeal Panel). This seems an appropriate substitution for the discretion currently given to Convocation.</p>

Text in existing Act or in current package of amendments	Proposed amendments and changes to accord with policy governance model	Explanation/comment
<p>Existing Act, s. 30 [Resignation].</p> <p>30. Convocation may accept the resignation of a member or student member who has applied in writing to resign whereupon the applicant's membership is cancelled.</p>	<p>30. A member may apply in writing to resign his or her membership in the Society and where the application is accepted in accordance with the regulations the applicant's membership is cancelled.</p>	<p>The proposed amendment removes the explicit role of Convocation in accepting (or, by implication, refusing to accept) an application for resignation. It provides that applications for resignation are to be disposed of "in accordance with the regulations".</p> <p>Section 63 of the Act already gives Convocation power to make regulations "respecting ... the resignation of members".</p> <p>Section 12 of the present regulation requires the Finance and Administration Committee to consider every application for resignation and to report to Convocation.</p> <p>The regulation can be amended so as to provide that resignations are to be fully disposed of either by a committee or by staff.</p>

Text in existing Act or in current package of amendments	Proposed amendments and changes to accord with policy governance model	Explanation/comment
<p>Existing Act, s. 31(3) - (5) [Refusal to restore the membership of a former judge whose membership has been in abeyance].</p> <p>31.-(3) Convocation may by order refuse to restore the membership of a person whose membership is in abeyance if, after due investigation by a committee of Convocation, it is found that the person was removed or resigned from an office described in subsection (1) because of,</p> <p>(a) conduct that was incompatible with the execution of the office;</p> <p>(b) a failure to perform the duties of the office;</p> <p>(c) conduct that, if done by a member, would be professional misconduct or conduct unbecoming a barrister and solicitor.</p> <p>(4) A committee appointed for the purposes of subsection (3) shall give the applicant an opportunity to be heard.</p> <p>(5) Subsections 33(2) to (13) apply to proceedings under this section.</p>	<p>31.-(3) A committee of benchers, having the same composition as a three-member reinstatement hearing panel provided for in subsection 45.2(1), may by order refuse to restore the membership of a person whose membership is in abeyance if the committee, having held a hearing, finds that the person was removed or resigned from an office described in subsection (1) because of,</p> <p>(a) conduct that was incompatible with the execution of the office;</p> <p>(b) a failure to perform the duties of the office;</p> <p>(c) conduct that, if done by a member, would be professional misconduct or conduct unbecoming a barrister and solicitor.</p> <p>(4) The following provisions apply, with necessary modifications, to a hearing conducted by a committee pursuant to subsection (3): section 33.7; subsection 45.2.(2); clause 45.4(a); section 45.9; sections 46 to 46.12; section 46.14.</p> <p>(5) Any of the parties to a hearing conducted by a committee pursuant to subsection (3) may appeal the committee's decision to the Appeal Panel established under section 44.</p>	<p>The proposed amendment brings this particular hearing into line with all other admission, discipline and reinstatement hearings. In other words, instead of a hearing before a committee which has power only to make a recommendation to Convocation, there will be a hearing <u>and a decision</u> by a three-bencher hearing panel. As in admission, discipline and reinstatement cases, the decision of the hearing panel can be appealed to the seven-bencher Appeal Panel.</p> <p>Refusal to reinstate former judge is one of the circumstances in which the amendments have preserved a right of appeal (beyond the Appeal Panel) to the Divisional Court. This right of appeal will remain and it will therefore be necessary to make certain minor textual amendments to sections 44.10 and 44..13.</p> <p>Proposed subsection 31(4) applies certain common procedural provisions to the hearing. It therefore corresponds to subsection 33(5) in the existing Act (see left-hand column).</p>



Text in existing Act or in current package of amendments	Proposed amendments and changes to accord with policy governance model	Explanation/comment
<p>Existing Act, s. 32(3) [Readmission of person whose membership is terminated by reason of ceasing to be a Canadian citizen or permanent resident of Canada].</p> <p>32.-(3) Any person whose membership is terminated under subsection (1) or (2) may, upon becoming a Canadian citizen or a permanent resident of Canada, make application for readmission as a member and Convocation may readmit the person.</p>	<p>32.-(3) Any person whose membership is terminated under subsection (1) or (2) may be readmitted to membership in the Society upon,</p> <p>(a) becoming a Canadian citizen or a permanent resident of Canada; and</p> <p>(b) making application for readmission.</p> <p>(4) No person who has made application under subsection (3) shall be refused readmission to membership until a hearing has been held before a committee of benchers at which it will be determined whether the person has met all readmission requirements.</p> <p>(5) Subsections 27 (5) to (5.2) apply, with necessary modifications, to a hearing under subsection (4).</p>	<p>The proposed amendment treats applications for readmission upon regaining citizenship or permanent residency in the same manner as an initial application for membership. Before an application for readmission under this section can be denied, the applicant will have a right to a hearing similar to the right afforded to first-time applicants for membership (including a right of appeal to the Appeal Panel). These protections seem an appropriate substitution for the discretion currently given to Convocation.</p> <p>Applications for readmission upon regaining citizenship or permanent residency are one of the circumstances in which the present Act gives a right of appeal to the Divisional Court. This right of appeal will be replaced by the right of appeal to the seven-bencher Appeal Panel. It will therefore be necessary to make certain amendments to section 44.13.</p>

Text in existing Act or in current package of amendments	Proposed amendments and changes to accord with policy governance model	Explanation/comment
<p>Amendment package, s. 33.3(1) [Independence of investigation and prosecution].</p> <p>33.3-(1) An investigation and prosecution under this Part, and any appeal arising from it is the responsibility of the Secretary and counsel employed or retained by the Society and shall be conducted in accordance with policies adopted by Convocation consistent with the provisions of this Act and regulations, but shall be independent of involvement by any benchers except as provided by this Act.</p>	<p>33.3-(1) An investigation and prosecution under this Part, and any appeal or other proceeding arising from it, are the responsibility of the Secretary and counsel employed or retained by the Society and shall be independent of involvement by any benchers except as provided by this Act.</p>	<p>The proposed amendment removes any reference to investigations and prosecutions being "conducted in accordance with policies adopted by Convocation". It seems unnecessary to state this. Indeed, its inclusion might be seen as <u>requiring</u> Convocation to adopt such policies.</p> <p>There will be nothing to prevent Convocation from adopting policies respecting investigations and prosecutions if it so wishes.</p> <p>For greater clarity, the words "or other proceeding" have been added after "appeal" in the third line. The wording makes clear that, responsibility for seeking judicial review of a decision of a discipline hearing panel (or of the Appeal Panel) would rest with the Secretary and counsel.</p>

Text in existing Act or in current package of amendments	Proposed amendments and changes to accord with policy governance model	Explanation/comment
<p>Amendment package, s. 50.1(1) [Licensing of foreign legal consultants].</p> <p>50.1-(1) Convocation may, in its discretion, license as a foreign legal consultant, any person who,</p> <p>(a) is qualified to practise law in a jurisdiction outside of Canada; and</p> <p>(b) meets the requirements, including the payment of a fee, prescribed in the regulations.</p>	<p>50.1-(1) The Secretary shall issue a licence to act as a foreign legal consultant to any person who applies therefor if the applicant,</p> <p>(a) is qualified to practise law in a jurisdiction outside of Canada; and</p> <p>(b) meets the requirements, including the payment of a fee, prescribed in the regulations.</p> <p>Add new subsections (2) and (3) as follows:</p> <p>(2) No applicant for a licence to act as a foreign legal consultant shall be refused until a hearing has been held before a committee of benchers at which it shall be determined whether all licensing requirements have been met by the applicant.</p> <p>(3) Subsections 27 (5) to (5.2) apply, with necessary modifications, to a hearing under subsection (2).</p> <p>Renumber subsection (2) in current package as subsection (4).</p>	<p>The proposed amendment removes the licensing of foreign legal correspondents from the discretionary power of Convocation. It provides that any applicant who meets the statutory requirements is to be licensed by the Secretary (no longer is there any discretion).</p> <p>The proposed amendment is modelled closely on section 61.2(1) (as yet unproclaimed) in the existing Act which states:</p> <p><i>"61.2-(1) The Secretary shall issue a certificate of authorization [permitting a corporation to practise as a barrister and solicitor] to, or renew the certificate of authorization of, a corporation that applies therefor, if, [the applicant corporation meets certain statutory requirements]."</i></p> <p>Subsection 50.1 (2) is modelled on subsection 27(4) (as it will be when amended). The effect of subsections (2) and (3) is to provide for applicants for a foreign legal consultant a right to a hearing similar to the right afforded to applicants for membership in the Society (including a right of appeal to the Appeal Panel). This seems an appropriate substitution for the discretion currently given to Convocation.</p>

Text in existing Act or in current package of amendments	Proposed amendments and changes to accord with policy governance model	Explanation/comment
<p>Amendment package, s. 51(4) [Lawyers Fund for Client Compensation].</p> <p>51.-(4) The Society may insure with any insurer licensed to carry on business in Ontario for such purposes and on such terms as Convocation considers expedient in relation to the Fund, and, in such event, the money in the Fund may be used for the payment of premiums.</p> <p>[Note: the only difference between the wording above (from the amendment package) and the text in the existing Act is that the word "Compensation" (in the existing Act) has been omitted from line 6 above before the word "Fund".]</p>	<p>51.-(4) The Society may insure with any insurer licensed to carry on business in Ontario for any purposes in relation to the Fund, and, in such event, the money in the Fund may be used for the payment of premiums.</p>	<p>In the proposed amendment, the words "and on such terms as Convocation considers expedient" have been omitted and the word "such" has been changed to "any".</p> <p>Under the proposed wording, Convocation will not have to approve the purposes and terms of insurance obtained by the Compensation Fund.</p> <p>Please see the further note (on page 7) on the power to make grants from the Compensation Fund.</p>
<p>Amendment package, s. 58.5(3) -(4) [Unclaimed trust funds under trusteeship of Law Society: procedures for adjudicating and paying claims].</p> <p>58.5-(3) The Society shall adjudicate claims under this section in accordance with procedures prescribed in the by-laws but no claim shall be paid until approved by Convocation.</p> <p>(4) Claims approved by Convocation shall be paid by the Society.</p>	<p>58.5-(3) The Society shall adjudicate claims under this section in accordance with procedures prescribed in the by-laws and no claim shall be paid unless approved in accordance with those procedures.</p> <p>(4) Claims approved in accordance with the procedures prescribed in the by-laws shall be paid by the Society.</p>	<p>The proposed amendment removes any explicit approval role for Convocation. Claims are to be adjudicated and paid in accordance with procedures prescribed in the by-laws. (The by-laws, of course, are made by Convocation.)</p>

**A NOTE ON THE POWER TO MAKE GRANTS FROM THE LAWYERS FUND FOR CLIENT COMPENSATION**

Although section 51(5) of the existing Act confers on Convocation, in its absolute discretion, power to make grants from the Compensation Fund, it is not considered necessary to make any amendments to bring the provision into conformity with the policy governance model because subsection 51(10) reads as follows:

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*"(10) Convocation may delegate any of the powers conferred upon it by this section to a committee of Convocation and, whether or not Convocation has made any such delegation, it may appoint any member as a referee and delegate to the member any of the powers conferred upon it by this section that are not delegated to a committee."*

Furthermore, although subsection 51(11) provides that, where Convocation has delegated its powers in relation to the Compensation Fund, the committee or referee "shall" report to Convocation, the reporting is only "as required".

It is envisaged that, under the policy governance model, Convocation will delegate its grant-making power under section 51(5) to certain members who will be named as referees.

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It was moved by Mr. Topp, seconded by Ms. Backhouse that the changes in the Report be adopted except for the amendment on page 5 re: Independence of Investigation and prosecution.

Carried

Section 33.3-(1) [Independence of Investigation and prosecution] would remain in the package of amendments in its current text.

It was moved by Ms. Puccini, seconded by Mr. Wright that the present amendments be held back until the tariffs recommendation was ready.

Lost

It was moved by Mr. Scott, seconded by Mr. Swaye that the Report as amended be adopted.

Carried

THE REPORT AS AMENDED WAS ADOPTED

Consent Agenda Items

It was moved by Mr. Millar, seconded by Ms. Sealy that the Draft Minutes for September 26th and 27th, 1996 be taken as read.

Carried

(See Draft Minutes in Convocation file)

REPORT OF THE DIRECTOR OF BAR ADMISSIONS

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The Director of Bar Admissions begs leave to report:

15th November, 1996

PROCEDURES GOVERNING THE RECRUITMENT OF SUMMER STUDENTS FOR THE SUMMER OF 1997

1. A draft document entitled "Procedures Governing the Recruitment of Summer Students for the Summer of 1997" is attached. (pages 1 - 2)
2. The Summer Student Recruitment Procedures govern the recruitment of summer students within Metropolitan Toronto only.
3. Based on general satisfaction on the part of firms and students with the summer student recruitment process, adoption of the same procedures in place in prior years is recommended, subject only to the changes in date.
4. Recommendation: It is recommended that the document entitled "Procedures Governing the Recruitment of Summer Students for the Summer of 1997" be approved.

ALL OF WHICH is respectfully submitted

DATED this 15th day of November, 1996

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

1. Draft Document entitled "Procedures Governing the Recruitment of Summer Students for the Summer of 1997.

It was moved by Mr. Millar, seconded by Ms. Sealy that the Report of the Director of Bar Admissions re: Summer student recruitment, be adopted.

Carried

THE REPORT WAS ADOPTED

LEGAL AID REPORT RE: APPOINTMENTS

ADMINISTRATION

Area Committees - Appointments and Resignations

Approved Legal Aid Committee Meeting - October 9, 1996

Appointments

Brant

Donald Andrew Archi, Solicitor  
Donald Charles Calder, Solicitor  
Sandra Jean Harris, Solicitor  
A. Michelle Hill, Office Administrator, Prison Arts Foundation

Halton

Karen D. Chan, Director of Children's Services, Regional Municipality of Halton  
David A. Harris, Solicitor

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Thunder Bay

James L. Murray, Solicitor  
Joyce L. Pelletier, Solicitor

Approved Legal Aid Committee Meeting - November 13, 1996

Appointments

Peel

Linda Alexander, Barrister and Solicitor

Peterborough

Mary Laurine Burton, Social Worker

Resignations

York

Carolyn J. Jones

Etobicoke

Joyce Chan

Appointment of new Area Director - Nipissing

It is recommended that Louis-Marc Hurtubise be appointed to the position of Area Director for the district of Nipissing to replace Selma Colvin. Mr. Hurtubise's curriculum vitae is attached hereto.

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

Curriculum Vitae of Louis-Marc Hurtubise

It was moved by Ms. Curtis, seconded by Mr. Millar that the Legal Aid Area Committees' Appointments set out in the Report be adopted.

Carried

THE REPORT WAS ADOPTED

COMMITTEE APPOINTMENT - CIVIL RULES COMMITTEE

It was moved by Mr. Millar, seconded by Mr. Adams that Peter Webb and Ron Rolls continue as members on the Civil Rules Committee.

Carried

REPORT OF THE PROFESSIONAL REGULATION COMMITTEE - NEW FORMS

The Professional Regulation Committee Report was deferred to the next Convocation in November.

LEGAL AID FINANCIAL REPORTS

The Legal Aid Financial Reports - October 1996 were distributed to the Benchers for information.

(Copies of Financial Reports in Convocation file)

Notice of Motion - Rule 50

THE LAW SOCIETY OF UPPER CANADA

NOTICE OF MOTION

Pursuant to subrule 1(1) of the Rules made under subsection 62(1) of the *Law Society Act*

AMENDMENT OF RULES  
MADE UNDER SUBSECTION 62(1) OF THE *LAW SOCIETY ACT*

(RULE 50: PROFESSIONAL LIABILITY LEVIES  
EXEMPTION APPLICABLE TO IN-HOUSE AND OTHER EMPLOYED COUNSEL)

WHEREAS

1. On September 27, 1996, the Board of Directors of the Lawyers' Professional Indemnity Company presented a report to Convocation which was adopted.
2. Included in the report was a recommendation that Convocation amend the part of Rule 50 (of the Rules made under subsection 62(1) of the *Law Society Act*) entitled "PROFESSIONAL LIABILITY LEVIES" to alter the exemption from insurance premiums and levies applicable to in-house counsel and other employed counsel.<sup>36</sup>

IT WILL BE MOVED BY: HARVEY T. STROSBURG

THAT CONVOCAION AMEND RULE 50 OF THE RULES MADE UNDER SUBSECTION 62(1) OF THE *LAW SOCIETY ACT* AS FOLLOWS:<sup>37</sup>

1. In clause (k) of the part of Rule 50 entitled "PROFESSIONAL LIABILITY LEVIES", revoke subclause (iii) and replace it by a new subclause (iii) to read:  
  
Any member who, during the course of the year for which the levy is payable,  
  
(A) will be employed by a single employer;  
  
(B) will provide legal service only for and on behalf of the employer as,  
  
(i) counsel or solicitor to the Government of Canada or the Government of Ontario,  
  
(ii) a Crown Attorney,

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<sup>36</sup>Relevant extracts from the September 27, 1996 report to Convocation from the Board of Directors of the Lawyers' Professional Indemnity Company are contained in Attachment A to the Motion.

<sup>37</sup>The present text of the part of Rule 50 entitled "PROFESSIONAL LIABILITY LEVIES" is contained in Attachment B to the Motion.



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- (iii) counsel to a corporation other than a law corporation,  
or
  - (iv) a city solicitor; and
  - (C) will not engage in the practice of law in Ontario so as to provide legal services to persons other than the employer.
2. In clause (k) of the part of Rule 50 entitled "PROFESSIONAL LIABILITY LEVIES", add new subclauses (iv), (v) and (vi) to read:
- (iv) Any member employed as a law teacher who, during the course of the year for which the levy is payable, will not engage in the practice of law in Ontario so as to provide legal services other than teaching.
  - (v) For the purposes of sub-paragraph (iii), "employer" shall include a corporation, as well as affiliated, controlled and subsidiary companies of the corporation or other entity employing the member.
  - (vi) In this rule, "affiliated", "controlled" and "subsidiary" shall have the meanings defined in the *Securities Act*, R.S.O. 1990, c. S.5, as amended from time to time.

Attached to the original Notice of Motion in Convocation file, copies of:

- Attachment A Extract from the report of the Board of Directors of the Lawyers' Profession Indemnity Company adopted by Convocation on September 27, 1996.
- Attachment B Extract from the Rules made under subsection 62(1) of the Law Society Act Rule 50: Professional Liability Levies.

The Notice of Motion was deferred to the next November Convocation.

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CONVOCATION ROSE AT 4:35 P.M.

Confirmed in Convocation this 24 day of January 1996.

  
Treasurer