

23rd September, 1993

MINUTES OF SPECIAL CONVOCATION

Thursday, 23rd September, 1993
9:30 a.m.

PRESENT:

The Treasurer (Paul S. A. Lamek), Bellamy, Bragagnolo, Brennan, Cullity, Elliott, Epstein, Feinstein, Furlong, Goudge, Graham, Hickey, Howie, Kiteley, Lamont, Lax, Lawrence, McKinnon, Mohideen, Moliner, Murphy, Murray, Palmer, Pepper, Peters, Scott, Scace, Sealy, Somerville, Thom, Topp, Wardlaw and Weaver.

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IN PUBLIC

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A statement was made by Mr. Topp regarding the earlier in camera session and his belief that the matters ought to have been considered in Open Convocation. The Treasurer explained that the debate took place in camera so that the Benchers would be able to have frank discussions about the ongoing negotiations with the government it being one of the criteria for matters to be considered by Convocation in camera.

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23rd September, 1993

RE: SUMMARY OF PROPOSAL TO AUTHORIZED THE LAW FOUNDATION TO POOL MIXED TRUST ACCOUNTS AND INVEST THE POOLED FUNDS

SUMMARY OF PROPOSAL TO AUTHORIZE THE LAW FOUNDATION
TO POOL MIXED TRUST ACCOUNTS AND INVEST THE POOLED FUNDS

Background

In recent years, the Foundation has been receiving interest on mixed trust accounts at rates negotiated with each financial institution but generally running around prime less 5%. When prime was at its peak in 1990/91, this formula generated about \$48 million. With prime between 5% and 6%, it is generating interest at around $\frac{3}{4}\%$ or between \$7 and \$8 million.

These variable interest rates are payable on mixed trust accounts which in the hands of the major banks alone have a daily total of approximately \$500 million.

The Proposal

The proposal is based on the assumption that a significant part of the \$500 million could be invested at higher yields of interest if it was controlled by the Foundation.

The Ministry of the Attorney General has explored the situation and has concluded that the *Law Society Act* could be amended to require lawyers who have mixed trust accounts in designated financial institutions (the major banks) to set up a joint mixed trust account with the Foundation being the other joint owner. This would allow the Foundation to direct the banks to pool all or a specified amount of the daily float in the mixed trust accounts and the Foundation would then invest in financial instruments bearing higher interest rates that are now being paid by the banks to the Foundation.

An overdraft arrangement would safe-guard any temporary shortage of funds caused by the pooling and investment.

Except for the initial requirement to set up the joint mixed trust account, the whole process would be transparent to the lawyer. The mixed trust account would function in the same way it does now and the lawyer would be unaware of the pooling and investing activities affecting the mixed trust account.

PROPOSED AMENDMENTS TO THE

LAW SOCIETY ACT

TO AUTHORIZE THE LAW FOUNDATION

TO POOL MIXED TRUST ACCOUNTS

AND INVEST THE POOLED FUNDS

NOTE: The proposed amendments are shown in bold type as they will appear in the current Act if they are enacted.

THE LAW FOUNDATION OF ONTARIO

(draft 2)

52 Definitions

53(1) Foundation continued

53(2) Corporations Act inapplicable

54(1) Board of trustees

54(2) Quorum

54(3) Vacancies

54(4) Remuneration

54(5) Audit

54(6) Annual report

55(1) Objects.- The objects of the Foundation are to establish and maintain a fund to be used for any or all of the following purposes:

1. Legal education and legal research.
2. Legal aid.
3. The establishment, maintenance and operation of law libraries.
4. The provision of costs assistance to parties to class proceedings and to proceedings commenced under the *Class Proceedings Act, 1992*.

55(2) Derivation of funds.- The funds of the Foundation shall be derived from,

- (a) money received from members under section 57;
- (b) gifts, bequests and devises referred to in section 56;
- (and)
- (b.1) **money received as interest or other gain on joint accounts held under section 57.1 and**
- (c) money resulting from the use, disposal or investment of property received under clauses (a), (b) **and (b.1).**

55(3) Application of funds.- The Board shall apply the funds of the Foundation for such of its purposes as the board considers appropriate, but at least 75 per cent of the net revenue received in each year under clauses (2)(a) **and (b.1)** shall be paid to the Legal Aid Fund established under the *Legal Aid Act, R.S.O. 1980, c.233, s.55; 1992, c.7, s.2.*

55(4) Investment Strategy.- In making investments and entering agreements under clauses 56(1)(a), (d) and (e), the board shall use its best efforts to maximize the return to the Foundation within the bounds of prudent financial management.

- 56(1) Powers of Foundation.- In addition to the powers and privileges mentioned in section 27 of the *Interpretation Act*, the Foundation has power,
- (a) to invest the funds of the Foundation in such classes of securities as trustees are authorized to invest trust funds;
 - (b) to pay out of the funds of the Foundation the costs, charges and expenses necessarily incurred in the administration of the Foundation and in carrying out its objects;
 - (c) to enter into agreements with any person and pay and apply any of its funds for the implementation of its objects;
 - (d) to invest the funds that it holds on joint account under section 57.1 in investments authorized for the investment of public money under subsection 3(1) of the *Financial Administration Act*;
 - (e) to enter into agreements with financial institutions related to the consolidation for investment purposes of funds held on joint accounts under section 57.1 and related to the use of those funds.
- 56(2) Gifts, devises, etc.-The Foundation has power to receive gifts, bequests and devises of property, real or personal, and to hold, use or dispose of such property in furtherance of the objects of the Foundation, subject to the terms of any trust affecting the same.
- 56(3) Idem.- Any form of words is sufficient to constitute a gift, bequest or devise to the Foundation so long as the person making the gift, bequest or devise indicates an intention to contribute presently or prospectively to the Foundation.
- 56(3.1) Service charges.- Service charges and other fees resulting from the exercise of its powers under clauses (1)(d) and (e) shall be paid out of the funds of the Foundation and shall not be charged to any joint account held under section 57.1.
- 56(3.2) Accounting.- All interest and other profits under the investments and agreements authorized under clauses (1)(d) and (e) accrue to and become funds of the Foundation and not to any member or any client of any member or to any person claiming through any member or client of a member.
- 56(3.3) Protection of joint accounts.- Despite subsection (3.2), the Foundation is responsible for all losses resulting from investments and agreements under clauses (1)(d) and (e) and shall ensure that losses in respect of particular investments are paid out of the funds of the Foundation and not out of funds held for the benefit of any client of a member.
- 56(3.4) Member's responsibility.- A member is responsible to his or her clients for the operation of a joint account established by the member under section 57.1 as if it were a trust account held solely by the member and the Foundation is not responsible to any person in respect of the joint account except to the extent that its exercise of its powers under clause (1)(d) or (e) have caused a loss to the person.

- 56(4) Powers of the board.- The board may pass by-laws not contrary to this Act to achieve the objects of the Foundation and to regulate and govern its procedure and the conduct and administration of the affairs of the Foundation. R.S.O. 1980, c.233, s.56.
- 57(1) Trust funds to bear interest.- Every member who holds money in trust for or on account of more than one client in one fund shall hold the money in an account at a bank listed in Schedule I or II to the *Bank Act (Canada)*, provincial savings office or registered trust corporation, bearing interest at a rate approved by the trustees.
- 57(2) Interest in trust.- The interest accruing on money held in an account referred to in subsection (1) shall be deemed to be held in trust for the Foundation.
- 57(3) Payment to Foundation.- Every member to whom subsection (1) applies shall,
- (a) file reports with the Foundation as to the interest referred to in subsection (2); and
 - (b) remit or cause to be remitted to the Foundation all interest money referred to in subsection (2),
- in the manner and at the times prescribed by the regulations.
- 57(4) Immunity.- Subject to subsection (5), a member is not liable, whether as solicitor or as trustee, to account to any person as client or as settlor or beneficiary of the trust other than the Foundation, for interest on money held under subsection (1).
- 57(5) Exceptions.- Nothing in this section shall be deemed to affect,
- (a) any arrangement in writing between a member and the person for whom the member holds money in trust as to the disposition of the interest accruing thereon; or
 - (b) any entitlement by a client to the interest accruing on money held in trust in an account separate from any other money. R.S.O. 1980, c.233, s.57.
- 57.1(1) Joint trust accounts.- When required to do so by the regulations, a member shall establish all accounts to which subsection 57(1) applies, as joint accounts in the name of the member and the Foundation.
- 57.1(2) The member shall establish the joint accounts at a financial institution designated by the regulations and shall immediately notify the Foundation that the account has been established and shall provide such details as may be required by the regulations and by the Foundation.
- 57.1(3) The member shall execute such documents as the Foundation considers necessary,
- (a) to permit the financial institution to pay interest accruing on money held in the joint account directly to the Foundation;
 - (b) to permit the Foundation to consolidate the funds in the joint account with other funds in which the Foundation has an interest.

- 57.1(4) The Foundation shall ensure that the member retains the power in his or her relationship with the financial institution in which a joint account is established to deposit funds to and make payments out of the joint account in the same manner as if it were a trust account solely in the name of the member.
- 57.1(5) Subsections 57(4) and (5) apply to the joint accounts but subsection 57(2) and (3) do not.
- 58(1) Report by Society
- 58(2) Report by Member
59. Regulations.- Subject to the approval of the Lieutenant Governor in Council, the board may make regulations,
- (a) governing the form, content and filing of the reports required under section 57;
 - (b) governing the time and manner of remitting the interest moneys referred to in section 57 to the Foundation;
 - (b.1) prescribing the information that shall be provided to the Foundation when a joint account is established under section 57.1 and prescribing and governing information that shall be provided by a member from time to time in respect of the joint account after it is established;
 - (c) prescribing the form and the time of filing of reports required under section 58. R.S.O. 1980, c.233, s.59.
63. Regulations.- Subject to the approval of the Lieutenant Governor in Council, Convocation may make regulations respecting any matter that is outside the scope of the rule-making powers specified in section 62 and, without limiting the generality of the foregoing,
- 10. designating any member or class of member who must establish joint accounts under section 57.1;
 - 11. designating any bank listed in Schedule I or II to the Bank Act (Canada), any registered trust corporation or any provincial savings office, or any class thereof, as a financial institution in which joint accounts must be established for the purposes of section 57.1.

It was moved by Mr. Howie, seconded by Mr. McKinnon that the Law Society adopt in principle the general purpose of the proposed amendments to the Law Society Act to authorize the Law Foundation to pool mixed trust accounts and invest the pooled funds. The motion was deferred in favour of the motion made by Mr. Bragagnolo and seconded by Ms. Elliott.

It was moved by Mr. Pepper, seconded by Mr. McKinnon that the matter be deferred to the next Convocation in order for Convocation to receive more information.

Carried

It was moved by Mr. Bragagnolo, seconded by Ms. Elliott that the Attorney General be advised that Convocation supports in principle some acceptable attempt to enhance the revenues of the Law Foundation but not the particular proposal in regard to the investment of pooled trust accounts.

Not Put

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CONVOCATION ADJOURNED FOR LUNCHEON AT 1:05 P.M.

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CONVOCATION RECONVENED AT 2:20 P.M.

PRESENT:

The Treasurer, Bragagnolo, Brennan, Cullity, Elliott, Epstein, Farquharson, Feinstein, Furlong, Goudge, Graham, Hickey, Howie, Kiteley, Lamont, Lawrence, Lax, McKinnon, Mohideen, Murray, Palmer, Peters, Scott, Somerville, Topp and Weaver.

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REPORT TO CONVOCATION ON ONTARIO GOVERNMENT PROPOSAL TO REQUIRE LICENSING BODIES TO ASSIST IN FAMILY SUPPORT ORDER ENFORCEMENT

Ms. Kiteley presented the Report on the Family Support Plan Enforcement.

REPORT TO CONVOCATION ON ONTARIO GOVERNMENT
PROPOSAL TO REQUIRE LICENSING BODIES
TO ASSIST IN FAMILY SUPPORT ORDER ENFORCEMENT

The Issue

The Ministry of the Attorney General is seeking the support of professional licensing bodies in the development and application of a program designed to assist in the enforcement of family support orders. The proposal could result in a member's licence to practise being suspended where the member after due notice has not reached a satisfactory arrangement with the Family Support Plan Office for the payment of support as required by a court order.

The Committee

The Treasurer appointed Fran Kiteley as Chair and Colin Campbell and Philip Epstein as members of a special committee to examine the government's proposal and to report with recommendations to Convocation.

Background

Prior to 1987, the enforcement of family support orders was left up to the individuals involved and the courts. This led to many orders being ignored.

In 1987, the government passed the *Support and Custody Order Enforcement Act* and established a branch of government to administer it. Under this Act, when a party obtained a court order for family support, it could be registered with a "SCOE" office which then undertook to collect the payments and forward them to the entitled party. The SCOE office kept track of payments and attempted to follow-up on defaults.

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The 1987 legislation did not cure the problem and it was replaced in 1992 by the *Family Support Plan Act*. Under the 1992 legislation a simplified procedure resulted in Support Deduction Orders being made which are in effect garnishee orders. As before, the enforcement office collected the money and attempted to deal with defaults.

The scope of the problem is indicated by the following statistics, applicable as of June 1993.

Case load of Family Support Plan Offices	114,696
Cases in full compliance	21%
Cases with money being paid including full compliance	49%
Receipts monthly	\$25 million
Arrears owing to recipients	\$377 million
Arrears owing to government to reimburse social assistance payments made to recipients in need	\$240 million
Total Arrears	\$617 million

Experience with Support Deduction Orders (SDO's)

Cases with SDO's in full compliance	9,529 (22%)
Cases with money being paid on SDO's including full compliance	24,552 (70%)
Cases with no remittance within 35 days	10,653 (30%)

Total number of cases with SDO's	35,205
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The 1992 plan has one major limitation in that there has to be an "income source" that can be seized. Where the payor is self-employed or very mobile, it is extremely difficult in some cases to locate the person and if located to identify monies that can be seized.

Government Proposal

The government proposes to intercept defaulters under family support orders at all points where they require a licence to carry on some activity. The proposal would require the licensor to run a list of licensees against a list of defaulters provided by the Family Support Plan Office. Where a match is made and confirmed, the defaulter would be advised the licence issued is valid for 150 days unless within that period arrangements satisfactory to the Family Support Plan office are made for the payment of support. The 150 day period is based on a California model and is intended to give the defaulter time to apply to the court for a variation in the support order where justified. If no satisfactory arrangements are made within the 150 day period, the defaulter's licence would be suspended.

Details are not yet available on the precise procedures to be followed in this process. It is intended, however, that it be entirely administrative. No hearing would be necessary by the licensing body; it would act on a direction from the Family Support Office. Any involvement with the defaulter and the court in respect of the support order would not involve the licensing body; this responsibility would rest with the Family Support Plan Offices.

The government's proposal would apply to all sorts of licences and licensing bodies including:

Professional licensing bodies
Trade licences
Automobile and Drivers' licences
Ministry of National Resources Outdoor Cards for hunting and fishing, etc.

The Ministry officials would like to see the scheme developed and approved by Cabinet this fall for introduction at the 1993/94 session of the Legislature.

At this stage in the proposal, the Ministry officials are looking for approval in principle and assistance in developing procedures that are simple to apply and which minimize the involvement of the licensing bodies.

Alternatives

The Special Committee concluded that there were really just two alternative positions the Law Society could take on the government's proposal. It could refuse to participate in the proposal or it could approve the proposal in principle and work to make it as efficient and appropriate as possible. The following are the factors the Special Committee considered in reaching its decision.

1. The proposal would permit a government department to determine that a lawyer's membership in the Law Society should be suspended.
2. The process for determining whether a membership should be suspended would not include the Law Society; and the Law Society would not be a party to any hearing or investigation leading up to the decision other than the matching of computer files to identify lawyers who are in default of support orders.
3. There would be no appeal to the Law Society from any decision of the government department. The Law Society would be required to act on a direction or certificate of the government department.
4. The Law Society would have to bear whatever costs were involved in carrying out its part of the suspension process. However, since the process is largely carried out by the government department, these costs will likely be nominal. The planning process could ensure that the costs do not reach a level that would justify a detailed cost analysis.
5. The government seems determined to proceed with this initiative. If the Law Society does not participate, the system put in place may be less desirable and more costly than would be the case if the Law Society uses its considerable skill and expertise to influence the design of the program.
6. Although the Rules of Professional Conduct do not specifically deal with the situation where a member is in default of court ordered family support payments, they do deal with the situation by implication. The duty imposed by Rule 1 to "discharge with integrity all duties owed to...the court (and) the public" can be reasonably interpreted to include the duty to make payments to their family especially where such payments are court ordered. In addition, Rule 11 states that "the lawyer should encourage public respect for and try to improve the administration of justice". Commentary 1 under this Rule points out that "The obligation outlined in

the Rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community. The lawyer's responsibilities are greater than those of a private citizen". A lawyer who deliberately and without just cause ignores a family support order, is not encouraging public respect for the administration of justice nor does the lawyer meet the greater responsibilities in this regard that are upon a lawyer.

7. The Special Committee believes that relatively few lawyers will be affected by the proposed legislation. Generally speaking, lawyers operating as they do in the public eye, cannot escape notice of persons seeking to enforce support orders. Very few complaints are received about lawyers defaulting on support orders. While this fact suggests that making lawyers subject to the new enforcement procedure will not result in a significant number of families benefitting, it also suggests that the legal profession and the Law Society will not be greatly affected.
8. The relatively few number of lawyers likely to be suspended under the legislation would indicate that the proposed legislation is not a threat to the level of service being provided to the public by the legal profession.
9. The high standards of conduct expected of lawyers under our Rules of Professional Conduct suggests that the Law Society should take a leadership role in developing and implementing legislation which has the highly desirable social goal of relieving the poverty of women and children brought about by persons defaulting on family support orders.

Conclusion

Having regard for all of the above considerations, the Committee concluded that it would be in the best interests of the Law Society to approve the proposed legislation in principle and to work with the government department in developing the most efficient and appropriate legislation possible.

Recommendations

1. It is recommended that the Law Society approve in principle the government's proposal for a scheme to use licensing bodies to assist in the enforcement of family support orders.
2. It is recommended that the Special Committee, consisting of Fran Kiteley as Chair and Colin Campbell and Philip Epstein as members, be authorized to work with the officials of the Ministry of the Attorney General and other professional licensing bodies to develop an efficient and appropriate system for using licensing systems to assist in the enforcement of family support orders.
3. It is recommended that the Special Committee be directed to bring back to Convocation for further consideration its more detailed recommendations for the design and implementation of the Family Support Plan Enforcement Program.

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It was moved by Ms. Kiteley, seconded by Mr. Epstein that the Report be adopted.

Lost

ROLL-CALL VOTE

Bragagnolo	Against
Brennan	For
Cullity	Against
Elliott	For
Epstein	For
Feinstein	Against
Goudge	For
Graham	For
Hickey	Against
Howie	For
Kiteley	For
Lamont	Against
Lax	For
McKinnon	Against
Mohideen	For
Murray	Against
Peters	Against
Scott	Against
Somerville	Against
Topp	Against
Weaver	Against

It was moved by Mr. Scott, seconded by Mr. Feinstein that the matter should be referred back to the Committee to devise a method of preserving the principle of self-government while serving the social interest in ensuring members honour their financial obligations pursuant to a support order.

Carried

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CONVOCATION ROSE AT 3:30 P.M.

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Confirmed in Convocation this day of , 1993.

Treasurer