Appendix B to the Research Directorate's
Staff Study

History and Organization of the Legal Profession in Ontario

APPENDIX B TO THE RESEARCH DIRECTORATE'S

STAFF STUDY

HISTORY AND ORGANIZATION OF THE LEGAL PROFESSION IN ONTARIO

1978

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NOTE

The information contained herein was prepared primarily to provide background for the work of the Professional Organizations Committee, and accordingly describes circumstances as of 1976 (unless otherwise indicated).

I. HISTORY OF THE LAW SOCIETY

The history of professional and paraprofessional legal associations would be incomplete without a short history of the legal setting in which they were created.

I.1 HISTORY - PRE-1797

Civil courts were established in what is now Ontario in 1764, a few years after the conquest of Canada by the British. With the introduction of existing English law into Canada, there was an implication that, as in England, no Roman Catholic could act in any court for a litigant. However, since the Court of Common Pleas, as inferior court of judicature, was established primarily for the French-speaking members of the population and, because no English barristers or attorneys spoke French, French-speaking "advocates and proctors" were allowed to practise in that court, even though they were Roman Catholics.

As a result of the commotion caused by this concession, an ordinance was passed in 1766 permitting all of His Majesty's Canadian subjects to practise as barristers, advocates, attorneys and proctors in any courts within the province of Canada.[1]

In 1774 The Quebec Act[2] was passed to ensure the French their right to retain their religion, their customs and their laws. Most of the

territory that is now Ontario became part of the Province of Quebec.

The right to practise law was treated differently in the English and French systems. In England there were barristers called by one of the four Inns of Court, attorneys admitted by the Courts of Common Law, solicitors admitted by the Court of Chancery, and proctors in the Admiralty and Ecclesiastical Courts. "A barrister was a member of one of the four Inns of Court which gave him the exclusive right of audience in the House of Lords sitting as a tribunal of appeal, the Privy Council and the Supreme Court (except at sittings of the High Court in bankruptcy and at matters heard in chambers)."[3] "A solicitor was a person employed to conduct the prosecution or defence of an action or other legal proceeding on behalf of another or to advise him on legal questions, or to frame documents intended to have a legal operation or generally to assist him in matters affecting his legal position. In England, solicitors practised as advocates before magistrates at petty sessions, at quarter sessions where there is no bar, in county courts, at arbitration, at judge's chambers, at coroner's inquests, in sheriff's and secondary courts, in the Court of Bankruptcy and before the Land Tribunal."[4]

"Attorneys at law were formerly persons permitted to practise in the superior courts of common law; they conducted proceedings in those courts for suitors who did not appear in person. They answered to the solicitors in the Court of Chancery and the proctors in the Admiralty, Ecclesiastical, Probate and Divorce Courts. In practice, every attorney was also a solicitor and was called an attorney only in formal proceedings

in the common law courts."[5] No barrister could be an attorney, solicitor or proctor. However, the British governors of Quebec, while keeping the British classifications, chose to follow the French system of Crown grants of the right to practise and kept in their own hands the right and power of granting licences for all of the professions corresponding to what were known as barristers, solicitors, attorneys or notaries public. On occasion they appointed the same person to more than one office, i.e. barrister and solicitor.

The lawyers became dissatisfied with the number of licences the governor was granting. At the same time, the governor felt convinced that a combination of the two professions of advocate and notary public led to what he regarded as excessive litigation. Thus, in 1778 he began refusing licences to the same person to practise as advocate and notary. In 1785 an ordinance[6] was passed which recited in its preamble:

> "WHEREAS the welfare and tranquility of families and the peace of individuals require as an object of the greatest importance that such persons only should be appointed to act and practise as barristers, advocates, solicitors, proctors and notaries, who are properly qualified to perform the duties of those respective employments, ..."

The ordinance went on to prescribe that no one be commissioned or permitted to practise as a barrister, advocate, solicitor, attorney or proctor-at-law who should not have served the regular and continued clerkship for five years and after examination by the bar in the presence of the Chief Justice and two or more other judges. Furthermore, each person had to be approved and certified by the judges to be of fit capacity and character. The same ordinance permitted those persons to practise who had been called to the bar within some part

of His Majesty's dominions. Also, the ordinance separated the professions of notary, public land surveyor and a third category collectively called barrister, advocate, attorney or proctor-at-law.

Records show that Walter Roe, who was called to the bar at Montreal in 1789, was the first lawyer to practise in the area of Detroit which was then in Ontario. Those parties not represented by him continued to use agents who acted under the authority of a "power of attorney."

Loyalists, concerned over their rights of self-government, sought revisions to The Quebec Act. Accordingly, in 1791 The Constitutional Act[7] was passed creating Upper and Lower Canada out of the old Province of Quebec. John White, an English barrister, became the first Attorney-General of Upper Canada. Although he and Walter Roe were the only lawyers in Upper Canada, White, being accustomed to English ways and English courts, strongly objected to the appearance in court of lay advocates who had no professional status.

Although agents could follow the relatively informal procedure of the Court of Common Pleas, with the establishment in 1794 of the Court of King's Bench with complicated and technical rules and practice borrowed from the English courts, professional lawyers became a practical necessity. It became obvious as well that two advocates could not satisfy the requirements of litigants in the entire province. Accordingly, to meet the need for competent lawyers, the Lieutenant-Governor, by the Act of 1794,[8] was authorized to license up to sixteen

advocates and attorneys. The licensees had to be British subjects who "from their probity, education and condition in life" were best qualified to act as advocates and attorneys in the conduct of all legal business in the province. These "heaven-born lawyers", as they were popularly known, were of course the favourites of the Lieutenant-Governor and their number included John White and Walter Roe. The court was empowered to strike from the rolls any licensee who was guilty of any malversation or corrupt practice.

I.2 1797 : THE YEAR AND THE ACT

White, still pre-occupied with imitating the English model of the courts and the bar, promoted An Act for the Better Regulating the Practice of the Law[9] which was passed and received Royal Assent on 3rd July 1797. By that Act, barristers, advocates, attorneys and solicitors then admitted to practice and practising at the bar were enabled to form the Law Society of Upper Canada (hereinafter called the "Law Society"). Section 1 of the Act stated that the purpose of the Society was:

> "as well for the establishment of order among themselves, as for the purpose of securing to the Province a learned and honourable body, to assist their fellow subjects as occasion may require, and to support and maintain the constitution of the said Province."

The recognition of other jurisdictions was covered in the provision for admission to practice of those duly qualified to practise at the bar of any of His Majesty's courts in England, Scotland, Ireland or

any of His Majesty's provinces of North America, i.e. Lower Canada.[10]

Under An Act for the Better Regulating the Practice of the Law, ten lawyers gathered on 17th July 1797 to call each other to the bar, along with five others known to be actually practising in the courts. They elected six governors of the Society called "Benchers" and elected John White "Treasurer" and head of the Society. Both terms "Benchers" and "Treasurer" were borrowed from their model, the English Inns. Thus, this body of fifteen lawyers appointed by statute assumed responsibility for the future development of the legal profession.

> "Although by the Act of 1797 the Law Society was authorized to appoint benchers, it became the practice, after the passing of the 1799 rules, for the benchers to themselves elect them and this self-perpetuating system was retained until 1871[11] when a statute was passed which provided for the election, by the members of the bar, of thirty benchers, in every fifth year." [12]

However, the benchers were not given absolute authority over the Law Society. Section 2 of the Act of 1797 "authorized the Law Society to form a body of rules and regulations for its own government under the inspection of the Judges of the Province for the time being as Visitors ... of the Society, and in its early days the rules made by the Benchers were submitted to the Judges for approval."[13] The consolidation of the Law Society statute defines the Visitors and their supervisory power (see C.S.U.C. c.33).

> s.3 "The Chief Justices and Puisne Justices of the Superior Courts of Common Law, and the Chancellor and Vice-Chancellors of the Court of Chancery shall be Visitors of the Society."
>
> s.5 "The Benchers may from time to time in convocation make rules for the government of the Law Society, and other purposes connected therewith, under the inspection of the Visitors."

Section 8 also gave the Visitors supervisory power over admission requirements. While the benchers were given power over the discipline of members, it was not clear until 1881 and the passage of An Act to extend the powers of the Law Society of Upper Canada that the benchers had absolute power over discipline of the members of the Law Society. Section 4 of that act provided:

> "Any powers which the visitors of the said Law Society may have in the said matters of discipline, and the powers by this Act given to the said Benchers may be exercised by them without reference to, or concurrence in, by the said visitors."

The judges, as visitors, maintained their supervisory power with respect to rule making until 1934[14] and they were not deleted entirely from the statute until the 1970 amendment to The Law Society Act.

I.3 THE LAW SOCIETY OF UPPER CANADA IN ACTION : AFTER 1797

The Law Society, as an unincorporated association, was unable to hold land. Thus, in 1822, in order to acquire a permanent home for the Law Society, the Treasurer and Benchers were incorporated and declared to be "one body corporate and politic in deed and in law by the Name of the 'Law Society of Upper Canada' with perpetual succession and common seal."[15] As of 1822 there existed a corporation of the Law Society of Upper Canada (hereinafter called the "Corporation") made up of the Treasurer and Benchers as incorporated trustees of property for the Law Society as well as the older organization, the Law Society, which continued in existence. The members of the Law Society, although

duly entered into the Law Society as students or barristers-at-law, were not members of the Corporation. The Benchers, however, continued to have "full power to make such rules and regulations from time to time as may be necessary for the welfare of the Law Society by their powers as a governing body as derived from other statutory provisions."[16]

Again, in an effort to emulate the English system, the Act of 1822 contained a provision which dispensed with the necessity for attorneys to become members of the Law Society and put them back under the supervision of the courts. Accordingly, a person could become a barrister through call by the Law Society and become an attorney by admission by the court. There was, however, still no restriction on a person acquiring both functions.

The Corporation purchased property in 1828 which was declared by Convocation in 1830 to be the permanent seat of the Law Society.[17] The building was named Osgoode Hall after the first Chief Justice of the Province of Upper Canada. As a condition of a grant from the Parliament of Canada in 1846 to contribute to the cost of additions to the permanent building, the Law Society covenanted, as owner of the whole structure, to provide the accommodation for the courts for all time. The Law Society was released from the covenant later in 1874 when it surrendered to the Crown the centre part and west wing of Osgoode Hall which housed the courts.

As early as 1823[18] the importance of keeping a public record of the judicial opinion of judges was reinforced by a statute providing that

the governor appoint a reporter of the Court of King's Bench. In 1840[19] the Law Society was given the power to appoint a reporter who should be responsible to it. Later the Law Society appointed reporters for the Court of Chancery in 1845 and the new Court of Common Pleas in 1849.

Although the Law Society Act of 1797 referred to "solicitor", no solicitors were admitted to practice until after The Chancery Act of 1837[20] which constituted the Court of Chancery, also called the court of equity, and introduced a new branch of the profession, the solicitor. The name solicitor was borrowed from England where it meant one who practised in the courts of equity, although as a general practice a solicitor was also qualified as an attorney practising in the common law courts, also called the Court of Common Pleas. By that Act, barristers and attorneys admitted to practise in the Courts of Common Law were authorized to practise as solicitors in the Court of Chancery. Later, The Judicature Act of 1881[21] united the Courts of Queen's Bench, Common Pleas and Chancery, and provided that all attorneys and solicitors should be called Solicitors of the Supreme Court of Ontario. Thus it is today that we only refer to two classifications of lawyers, namely, barristers and solicitors.

I.4 HISTORY : FUSION - TO FUSE OR NOT TO FUSE[22]

The transportation of the English legal system to Canada and the immigration of English trained barristers and solicitors put pressure

on the developing Canadian legal system to imitate the motherland model. Nevertheless, the English system was not completely adaptable to the Canadian environment. The English model maintained a sharp distinction between barristers and solicitors where, as early as 1614, it was resolved by the Inns of Court "that there ought always to be preserved a difference between Councillors at law, which is the privileged person in the administration of justice, and attorneys and solicitors, which are but ministerial persons and of an inferior nature."[23] However, for geographic reasons alone, the fusion of the professions of barristers and solicitors became a practical necessity in Ontario. Many large areas in the province were served by a small number of lawyers who had to be able to serve all the legal needs of the area. It was not feasible for the entire province to be served by barristers situated in Toronto, which was historically the home of half the province's lawyers.

The history of the Law Society, however, contains several indications of the agitation to promote separation. From its formation in 1797, the Law Society recognized the distinction between barristers and attorneys or solicitors by allowing the latter two groups to practise with only three years on the rolls of the Law Society, whereas the former required five years on the rolls.

By the Act of 1822, which incorporated the Law Society, the profession of attorneys was separated from that of barristers and put under the supervision of the courts. "Henceforth, though solicitors could and would be created by the courts, the importance and influence of the

Law Society and the popularity of its status of barristers relegated the profession of solicitor to secondary importance."[24] Because the same person could still become a barrister and attorney, agitation continued to sever the two professions even more completely. In 1830, the Benchers at Convocation resolved to separate the branches although that was not, according to one distinguished author,[25] the desire of the majority of the profession. However, a rule drafted to implement the resolution failed to meet the approval of the judges who, as visitors of the Law Society, had to approve all rules before they became operative.

Various attempts to legislate a separation of the professions were frustrated as well. An 1840 bill for separation was abandoned because it was the opinion of a special committee of the Law Society that the time was not right. The legislature let die a futher bill of separation in 1847. With the passage of the bill in 1857 which instituted the practice whereby, upon the certificate of the Law Society, any superior court could swear in and admit an attorney or solicitor, both branches of the profession came under the jurisdiction of the Law Society and have not been separated since.

There remained, however, distinctions. Although no attempt was made by statute or by regulation to set out the duties and obligations of a barrister or solicitor, they were in many housekeeping matters treated differently. Some examples of the difference pertained to exercise of disciplinary power, power to disbar or strike from the rolls, quantum of fees, levy for the Compensation Fund, and admission

from other jurisdictions. These distinctions have all disappeared and, to the extent that they are relevant, reference to them will be made under a more complete review of each topic.

The history of the Law Society after 1857 is continued in the sections on legislation,[26] legal education,[27] and legal aid,[28] where it acts as an introduction to those respective topics.

II. LEGISLATIVE HISTORY

Initially three statutes appear to be relevant to the regulation of the legal profession in Ontario, namely: The Law Society Act,[29] The Barristers Act,[30] and The Solicitors Act.[31] However, upon closer inspection, we see that The Barristers Act is only concerned with special appointments of government officials as barristers, appointments of Queen's Counsel, and order of precedence of members of the bar in the courts of Ontario, while The Solicitors Act covers primarily unauthorized practice, the determination and collection of lawyers' fees and the regulations relating to agreements between solicitors and clients respecting fees. Accordingly, this legislative history will concentrate on sections relating to The Law Society Act and refer only briefly, and perhaps incompletely, to the histories of the other acts mentioned. Two comments are necessary by way of explanation for this emphasis. First, the concentration of the study by the Professional Organizations Committee is on the professional organization governing the legal profession and, by specific reference, The Law Society Act. Secondly,

a complete legislative history of The Solicitors Act is provided in Report on The Solicitors Act[32] dealing with reform of that act.

Nevertheless, having stated that emphasis will be placed on the history relating to the provisions of The Law Society Act, it is necessary to consider older versions of acts relating to lawyers because, until the amendments in 1970, The Solicitors Act[33] contained provisions dealing with the admission of barristers and solicitors to practice, the regulation of students-at-law, the regulation of barristers and solicitors in practice and the jurisdiction of the court over solicitors as its officers, and The Barristers Act[34] contained provisions dealing with the right to practise as a barrister and the admission of barristers.

In 1797, An Act for the Better Regulating the Practice of the Law[35] was passed making it lawful "for the persons now admitted to Practice in the Law and practising at the Bar of any of His Majesty's Courts of this Province, to form themselves into a Society to be called the Law Society of Upper Canada." This first act with only eight sections provided not only for the appointment of the Treasurer and the Benchers with the power to make rules and regulations under the inspection of the Judges as Visitors, but also set out the requirements for becoming a barrister, solicitor or attorney.[36]

In 1822, the Law Society was incorporated by An Act to repeal part of and amend An Act passed in the thirty-seventh year of His Majesty's reign, intituled, "An Act for the better regulating the practice of

the Law", and to extend the provisions of the same.[37] This act also made the requirement for admission of attorneys actual service under articles for five years and placed the admission of attorneys in the hands of the courts.

In the same year, an act was passed to improve practice in the Court of King's Bench. That statute[38] prohibited an attorney from trading as a shopkeeper while practising as an attorney and marked the first efforts by the legislation to keep the legal profession separate from other commercial activities. This provision continued until it was dropped in the amendments to The Solicitors Act in 1970.

In 1837,[39] the Court of Chancery was established wherein barristers and attorneys were permitted to act as counsel and solicitors of the court respectively. In the same year, the value of university education was recognized by allowing persons with university degrees to be called as barristers by the Law Society and admitted as solicitors by the Court of King's Bench after only three years articles.[40]

The provisions of AN ACT for the better regulation of the Office of Reporter to the Court of Queen's Bench in this Province,[41] 1840, allowed the Law Society to appoint, supervise and discharge court reporters. In 1850, AN ACT to confirm and give effect to certain Rules and Regulations made by the Judges of Her Majesty's Court of Error and Appeal for Upper Canada, and for other purposes relating to the powers of the Judges of the Courts of Law and Equity in that part

of the Province, and the practice and decisions of certain of those Courts,[42] was passed. Section 2 of that act defined which judges were to hold supervisory powers as Visitors of the Law Society.

An Act to amend the Law for the admission of Attornies[43] in 1857 returned attorneys and solicitors to the control of the Law Society by requiring a certificate of fitness from the Law Society before attorneys and solicitors could be admitted by the courts. The courts also maintained final approval over the rules and regulations of admission of attorneys or solicitors.[44]

The Consolidated Statutes of Upper Canada, 1859, contained the three statutes concerning the legal profession, namely: An Act respecting the Law Society of Upper Canada, c. 33, An Act respecting Barristers at Law, c.34, and An Act respecting Attorneys at Law, c.35. The acts as they appeared in 1859 formed the foundation for the acts as they appeared prior to the 1970 amendments. With the passage of The Judicature Act, 1881,[45] all attorneys and solicitors became known as Solicitors of the High Court of Ontario. With the 1887 consolidation and following, the act governing solicitors became The Solicitors Act.

II.1 STATUTORY AMENDMENTS 1859-1970

(1) The Barristers Act

An Act respecting Barristers at Law, C.S.U.C., c.34, together with

An Act respecting the Study of the Law in this Province, C.S.C., c. 75, An Act respecting the Appointment of Queen's Counsel, S.O. 1873, c. 3, and An Act to Regulate the Precedence of the Bar of Ontario, S.O. 1873, c. 4, were consolidated as The Barristers Act, R.S.O. 1877, c. 139. In 1912 the act was re-acted under the title The Barristers Act, S.O. 1912, c. 27, and was only subject to minor revisions thereafter until 1970. By The Barristers Act, R.S.O. 1960, c. 30, the benchers of the Law Society had power to make rules as to the admission of barristers. The more detailed rules as they appeared in The Barristers Act, S.O. 1912, c. 27, were dropped in 1927[46] although the admission rules remained subject to approval of the Lieutenant Governor in Council until 1934.[47] The Barristers Act prior to the 1970 amendments also contained provisions recognizing the dual role of barristers and solicitors in Ontario by prescribing terms for call to the bar of solicitors.[48]

Section 6 of The Barristers Act, R.S.O. 1960, c. 307, providing for the appointment of Queen's Counsel, originated in 1873[49] and gives the Lieutenant Governor power to appoint from members of the Bar of Ontario provincial officers to assist in conduct of matters between Crown and subject, some of which matters were in Her Majesty's name and some in the name of the Attorney General. In 1897[50] legislation provided that a barrister could not be a Queen's Counsel unless he had been called to the bar for ten years. The legislation also limited the number of Queen's Counsel that could be appointed. Although section 6 no longer contains either limitation, in selection, limits are imposed. Provisions regulating the order of precedence of

appearance in court of members of the bar also originated in 1873.[51]

(2) The Solicitors Act

In 1859 An Act respecting Attorneys at Law, C.S.U.C., c. 35, was the consolidation of all previous acts respecting attorneys and solicitors. Notable amendments between 1859 and the re-enactment in 1912 included the grant of power in 1875-76[52] to the benchers of the Law Society to make rules with respect to the admission and internal discipline of attorneys or solicitors. Section 5 of that Act preserved the practice of the courts as to admission of attorneys or solicitors as well as court jurisdiction over them as officers of the court. The conflict created by the apparent concurrent roles of the courts and the benchers with respect to discipline was rectified in An Act to extend the powers of the Law Society of Upper Canada,[53] in 1881, wherein it was clarified that "any powers which the visitors of the said Law Society may have in the said matters of discipline, are hereby vested in the benchers," to be exercised by them without reference to the visitors. Nevertheless, the right of the courts with respect to admission was not removed until the re-enactment in 1912 and the jurisdiction over solicitors as officers of the court remained in The Solicitors Act until 1970.

With the passage of The Judicature Act, 1881,[54] the distinction between attorneys and solicitors was dropped, and attorneys and solicitors became solicitors of the Supreme Court of Ontario. This resulted in a few changes to the act governing attorneys and solicitors. The name thereafter was The Solicitors Act and sections referring to admissions

to the Courts of Chancery and Queen's Bench became unncessary because they were now all solicitors of the High Court.

The principles of remuneration and the regulation of agreements between solicitors and clients, introduced by The Conveyancing and Law of Property Act, 1886,[55] sections 49-52, were incorporated into The Solicitors Act in the 1887 consolidation. The powers of judges to make rules to carry out provisions of the act were clarified in The Law Courts Act, 1895[56] by stating that "sections 49-52 were intended to apply and do apply to all business by solicitors connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing." This rule-making power survived the 1970 amendments, although no such rules have been enacted.

The Solicitors Act was re-enacted in 1912 and again in 1970 when all provisions dealing with solicitors as members of the Law Society were transferred to The Law Society Act.

(3) The Law Society Act

In 1859, there was a consolidation of the various acts respecting the Law Society in An Act respecting the Law Society of Upper Canada.[57] Provisions of this Act continued the Law Society and the Corporation of the Treasurer and Benchers, provided for the appointment of benchers and their rule-making powers and named the Judges as Visitors of the Society. The act also contained provisions with respect to the grant for the buildings of the superior courts.

The 1870-71 Act provided for the Benchers to be elected by the membership at large.[58] It also provided for those whose popularity at the polls resulted in their being elected at four quinquennial elections, to be Benchers for life. It provided further for a number of Benchers ex officio including the Attorney General and all who had held that position as well as retired judges of the Superior Courts. These provisions have been subject to numerous amendments.

The conflict between the power of the Benchers relating to internal discipline legislated in 1875-76[59] and the power of the Judges as Visitors over discipline was clarified in 1881[60] when the power of the judges was vested in the Benchers.

The authority to admit women to practise law required a special enactment in 1892 entitled An Act to provide for the admission of women to the Study and Practice of Law.[61] The initial statute only provided for admission of women as solicitors and had to be amended in 1895 to permit women to be called as barristers.[62]

The disciplinary power of the Benchers was confined to disbarment of defaulting lawyers. By the Statute Revision Amendments of 1897[63] the power of suspension of members was added.

In 1912 The Law Society Act was re-enacted. A few noteworthy amendments between 1912 and 1970 include the removal of the supervisory power of the Judges as Visitors in 1934,[64] regulation

of clients' accounts in 1935,[65] provision for the legal aid plan in 1951,[66] and the establishment of the compensation fund in 1953.[67]

II.2 THE 1970 AMENDMENTS

Two factors in the late sixties prompted revision of the statutes governing the legal profession. Firstly, the acts had not been thoroughly reviewed for over fifty years and were anachronistic because they contained elaborate provisions to account for differences between barristers and solicitors when no separation of the professions actually existed. The statutes no longer reflected an accurate picture of the legal profession. Secondly, Report No. 1 of the Royal Commission Inquiry into Civil Rights (the "McRuer Report") of 1968 emphasized the deficiencies in The Law Society Act. Figures II.1 and II.2 are appendices from the McRuer Report summarizing the mode of operation of the Law Society's power in the areas of administration, policy and discipline as it existed in 1968.

The McRuer Report at page 1162 stressed the rationale behind self-governing 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."[68]

The main concern of the Commission was that self-governing professions act in the public interest.

> "The traditional justification for giving powers of

APPENDIX A * Composition of Governing Body

1. Wholly Elected	*2. Wholly Appointed*	*3. Other*
		2. LAW SOCIETIES (s. 5 *as am.*—elected benchers plus ex-treasurers, life-benchers *and Min. of Justice and Sol.-Gen.* (Dom.) and *Att-Gen. Ont.* ex officio.).

APPENDIX B * Rule-Making Power

	A. Power to make Regulations	*B. Approval Required*	*C. Permissible Subject Matter*	*D. Regulations Made*	*E. Special Provisions*
7. LAW SOCIETY	Yes—ss.24, 43, 50, 54(3).	No approval required.	Elections, admission of students, barristers, solicitors, conduct and discipline, investigation of breach of rules, promotion of county law libraries, publishing of law reports.	No statutory regs. Rules of Soc. deal with all matters mentioned in col. C. and other matters with respect to which benchers authorized to make rules.	

APPENDIX C * Admission Requirements: Ontario Applicants

1. EDUCATIONAL			2. NON-EDUCATIONAL				3. HEARING REQUIRED	4. APPEAL FROM REFUSAL TO ADMIT
a. Where set out	b. Requirements	c. Apprenticeship	a. Good Moral Character	b. Age	c. Citizenship	d. Other		
Rules	Grade 13; 2 yrs. college or university; graduation from approved law course at approved university in Canada; articled clerkship; Bar Admission Course	1 yr. articled clerkship	Required	No requirement	No requirement in Act or in Rules *BUT* see Barristers Act, R.S.O. 1960, c.30, s.2 (barrister must be Br. subj.), and Solicitors Act, R.S.O. 1960, c.378, s.13(1)—must take oath of allegiance		No provision	No provision

APPENDIX D * Grounds for Disciplinary Action

Act	*Grounds Set Out*	*Details*	*Details Circulated to Profession*	*Rulings Given on Professional Conduct*	*Rulings Circulated to Profession*
7. LAW SOCIETY	Act. s.44	*s.44:* Sanctions may be imposed where barrister, solicitor, or student-at-law found guilty of professional misconduct or of conduct unbecoming a barrister, solicitor or student-at-law. No further details in Act or Rules BUT compilation of rulings on professional conduct, ethics has been circulated to all members.	Yes, see previous column.	Rule 83—Professional Conduct Committee may, subject to the approval of Convocation, make rulings on matters of professional conduct. Three members of committee shall also be members of Discipline Committee.	No provision for circulation *BUT* rulings have been compiled and circulated and new rulings are published in Ont. Reports which are sent to all members.

* Source: McRUER REPORT, "INQUIRY INTO CIVIL RIGHTS", REPORT No. 1, VOLUME 3

APPENDIX E

Self-Governing Bodies: Comparative Analysis of Procedure in Disciplinary Matters

(Figure II.2)

7. Law Society

Procedure Set Out — Act & Rules

A. Time of Notice	Not less than 7 days before hearing—personal service *OR* registered mail *OR* ad in newspaper where accused resides or practices.	P. Standard of Proof	No provision.	Z. Immunity of Tribunal	No provision.
B. Contents of Notice	Notification of formal compiaint, time and place of hearing.	Q. Stenographic or Electronic Recording	Evidence to be reduced to writing, taken down in shorthand or mechanically recorded.	AA. Publication of Findings.	No provision.
C. Place of Hearing	No provision.	R. Record Compiled	No express provision *BUT* committee prepares report for Convocation.	BB. Other	1) If Treas., Sec., Deputy Sec., chairman or vice-chairman of discipline committee have reasonable cause to believe that member has been *or may be* guilty of misconduct re property in his possession, Judge of Supreme Court may order property not to be dealt without leave. 2) Convocation or Committee may appoint solicitor to investigate and conduct cases.
D. Public/Private Hearing	No provision.	S. Written decisions with reasons	No express provision *BUT* copy of committee's report sent to accused.		
E. Accused's Failure to Attend	Discipline Committee may proceed in accused's absence.	T. Sanctions Available	Reprimand (by Committee) suspension, disbarment, striking from rolls.		
F. Accused's Right to Counsel	Right provided.	U. Costs	May be awarded against accused found guilty.		
G. Adjournments	Committee may from time to time adjourn any investigation.	V. Right of Appeal	No provision.		
H. Subpoena	Committee or Treasurer may issue summons with force of subpoena.				
I. Accused's Right to call witnesses.	Has right to "adduce evidence".	W. Availability of Transcript	No provision.		
J. Evidence on Oath	Yes—Committee has power to examine witnesses under oath.	X. Suspension, Cancellation effective pending appeal	No provision.		
K. Right to cross-examine	No provision.				
L. Counsel for Witnesses	No provision.				
M. Privilege in Defamation	No provision.	Y. Reinstatement	No provision.		
N. Official Notice	No provision.				
O. Rules of Evidence	No provision.				

> self-regulation to any body is that the members of the body are best qualified to ensure that proper standards of competence and ethics are set and maintained. There is clear public interest in the creation and observance of such standards. This public interest may have been well served by the respective bodies which have brought to their task an awareness of their responsibility to the public they serve, but there is a real risk that the power may be exercised in the interests of the profession or occupation rather than in that of the public. This risk requires adequate safeguards to ensure that injury to the public interest does not arise."[69]

Efforts were made in revising The Law Society Act to observe the standards of self-government set out in the McRuer Report.

(1) The Law Society Act, 1970

The Law Society Act, 1970, and its subsequent revisions retained the traditions of the Law Society while attempting to make the Law Society more responsive to its members and the public. Various sections also reflect the philosophy of the McRuer recommendations with respect to self-governing bodies.[70]

While the aim of amendment was to modernize the statute, the traditions of the Law Society were preserved. The name "Law Society of Upper Canada", and the titles "Treasurer" and "Benchers" survived efforts to update them. Furthermore, the terms barristers and solicitors have been used throughout in spite of section 1(2) of the Regulation to the New Act which states: "No person shall be called to the bar as a barrister only or admitted as a solicitor only, but all applicants for admission to membership in the Society, ... shall qualify both

for call to the bar as a barrister and admission as a solicitor and be called to the bar as a barrister and admitted as a solicitor on the same day." Also, the traditional dual procedure of having the Treasurer call the member to the bar and having the Supreme Court cause the candidate to be admitted as a solicitor has been continued with the presiding judge administering the traditional oaths, namely, the oath of allegiance, the barristers oath and the solicitors oath.

(2) Protection of the Public Interest

The McRuer Report recommended the appointment of lay members to each of the governing bodies. This recommendation was not fully implemented until 1973[71] when provision was made for the appointment of four lay persons as benchers of the Law Society. Initially section 26 provided for the Law Society Council which had nine lay members. The Council proved unworkable[72] and was replaced in 1973 by the Advisory Council composed entirely of professionals.

A further means of protecting the public interest was established through the designation of the Attorney General as guardian of the public interest with power to require the production of documents pertaining to the affairs of the Law Society. Any danger of the Attorney General using his powers under The Law Society Act in performance of his duties as Attorney General was removed by section 13(2) which provides:

"(2) No admission of any person in any document, paper,

record or thing produced under subsection 1 is admissible in evidence against that person in any proceedings other than disciplinary proceedings under this Act."

(3) Client Protection

The 1970 Act protects clients from negligent or unlawful behaviour by lawyers by providing for stop-orders on member's bank accounts[73] and the appointment of trustees[74] to assume the legal practice. Section 53 also permits the Law Society to make arrangements for its members respecting indemnity for professional liability.

(4) The Corporation

Until the 1970 amendments to The Law Society Act, the corporation of the Law Society excluded the ordinary members of the Law Society from membership by naming the treasurer, benchers and their successors as its only members. However, The Law Society Act, 1970, introduced several corporate features to include the members in the Corporation and to allow the membership greater participation. The Law Society is continued as a corporation without share capital[75] and, as such, falls within the terms of The Corporations Act.[76] By section 6, the provisions with respect to proxies and the cancellation of a charter for cause contained in The Corporations Act are specifically omitted. Furthermore, section 6(12) resolves any conflict between the provisions of the two acts in favour of The Law Society Act. Other sections were introduced as sections typically found in corporate instruments, such as a provision for a quorum of

ten benchers for the transaction of business,[77] and fifteen benchers for disciplinary matters,[78] provision for suspension for failure to pay fees,[79] and a provision restricting the liability of benchers, officers and employees.[80]

Greater participation of members was introduced by providing for an annual meeting of members.[81] Greater representation of members was introduced by giving elected benchers more power through the removal of the vote from all ex officio benchers except the Attorney General and past Treasurers and by dividing the representation between the Municipality of Metropolitan Toronto and the rest of Ontario. Efforts to amend the draft bill to include complete geographical representation failed.[82]

The power of the membership to initiate action was further extended by rule 52 under The Law Society Act which enables one hundred members to initiate resolutions by forcing a mailed vote to members. If two-thirds of those voting support the resolution, Convocation must implement it to the extent that it is, by law, able to do so. The membership may also have greater powers by the application of The Corporations Act to the Law Society.[83] Section 130 of The Corporations Act provides that by-laws relating to admission of members, fees, elections, suspension and termination of memberships and "the conduct in all other particulars of the affairs of the corporation" require the confirmation of members at a general meeting and are only effective until the next meeting without confirmation. Furthermore, section 325 of The Corporations Act allows members to requisition a general meeting.

These sections do not appear to conflict with The Law Society Act and are more extensive than the provisions thereof.

(5) Admission of Members

The McRuer recommendations were concerned with the rights of applicants upon application for admission to the Law Society. Section 27 in the 1970 Act increased the applicant's right by requiring a hearing before refusal and written reasons to explain the refusal. However, the 1970 Act failed to provide a statutory appeal from a refusal as called for in McRuer recommendation 23.

The requirement of good character in section 27 of the 1970 Act was supported in the McRuer report:

> "Notwithstanding the difficulties of application, it is nevertheless necessary to have standards of good moral character where bodies are given the power of self-government. The determination of other standards is essentially a judicial decision and an applicant should only be refused admission on this ground after being afforded a hearing."[84]

The McRuer report also recommended that only British subjects hold office in the self-governing bodies on the grounds that persons exercising delegated legislative power should be qualified to vote or sit as members of the legislature which delegates the power. Accordingly, the draft bill contained a provision requiring all officers of the Law Society to be British subjects. This section was opposed on principle at second reading and was dropped from the Act before it reached committee.[85]

However, in spite of opposition in committee, section 28 was adopted requiring all members of the Law Society to be Canadian citizens or British subjects. In support of this section, the Hon. Arthur A. Wishart, Q.C., Attorney General, cited[86] the McRuer report which justified the restriction of membership to Canadian citizens and British subjects because lawyers are officers of the court. It has been considered important that officers of the courts and legal advisors to the public be citizens or British subjects who have been sworn to uphold the country's law and lawful institutions. The special treatment afforded British subjects has been based on their similar background in British common law as well as the reciprocal treatment given Ontario lawyers in other commonwealth jurisdictions.

(6) Ethics and Discipline

The ethics and discipline sections of the 1970 Act were extended as a result of the McRuer recommendations which included:

6. Members of a disciplinary body should be prohibited from sitting on an appeal from decisions in which they have participated.

8. The term "professional misconduct" should be the term used in all statutes to describe conduct of a nature to warrant disciplinary action.

9. Each self-governing body should prepare a code of ethics, laying down standards of conduct designed primarily for the protection of the public. This code should be available to the public and circulated to members of the body to which it applies.

10. Where disciplinary proceedings have been instituted against a member, he should have at least ten days notice of a hearing. The notice of the hearing should be served personally. If personal service cannot be effected, service by registered mail, addressed to the member at the last

address shown on the register should be permitted.

11. The disciplinary body should have power to proceed with the hearing where the member involved has been duly notified but has not attended.

12. Disciplinary hearings should not be held in public unless the member involved so requests.

13. The rules of evidence applicable to civil cases should apply to disciplinary hearings.

14. On a hearing concerning admission, the tribunal should have discretion to ascertain relevant facts by such standards of proof as are commonly relied on by reasonable and prudent men in the conduct of their own affairs. No defined standards of proof applicable to all cases should be laid down.

15. A member against whom disciplinary action has been taken should have a statutory right to be represented either by counsel or an agent.

16. Disciplinary bodies should have a right to impose a full range of sanctions, from reprimand to revocation of licence to practise.

17. No disciplinary body should have the right to impose fines.

18. In no case should the fines imposed by a court for breaches of the relevant statutes be payable to the self-governing bodies. All fines should be payable to the Province.

19. The disciplinary bodies should not have the power to award costs against a member of the body. In no case should a mandatory award by a disciplinary body be enforceable by an execution issued out of a court of the Province.

20. Self-governing bodies should have power to reimburse a member for costs incurred through unwarranted disciplinary action against him.

21. A member who has been the subject of disciplinary action should not be suspended from continuing to practise pending an appeal, unless the charge is for incompetence.

22. The self-governing bodies should be required to hold a formal hearing before an application for registration is rejected.

23. There should be a right of appeal from all disciplinary decisions, and decisions refusing admission. The appeal should be to the Appellate Division of the High Court of

Justice, in accordance with recommendations made in Chapter 44.

Recommendation 9 calls for the preparation of a code of ethics laying down standards of conduct designed primarily for the protection of the public.

Section 55 of the 1970 Act grants Convocation power to prepare, publish and distribute a code of professional conduct with the approval of the Lieutenant Governor in Council and the Law Society is now preparing a new code using the Code of Professional Conduct of the Canadian Bar Association as a model.

Section 34 of the 1970 Act does use the term "professional misconduct" to describe conduct warranting disciplinary action. However, the 1970 Act also uses another phrase "conduct unbecoming a barrister or solicitor."

Sections 33 to 49 now satisfy all the requirements of disciplinary procedure listed in the McRuer report. However, there are two instances where the spirit of the recommendations has not been observed. Firstly, in accordance with the McRuer recommendation 6, section 39 of the 1970 Act prevents a bencher of the Discipline Committee who ordered a reprimand in committee from taking part in the hearing of the appeal in Convocation. However, when Convocation hears matters on which the Discipline Committee has recommended further action by Convocation, the matter is not heard as an appeal and no provision has been made to

exclude Discipline Committee members from participating at Convocation. Secondly, the requirement that a member found guilty of misconduct pay investigation expenses is a form of costs awarded against a member and as such is contrary to McRuer recommendation 19.

The McRuer report recommends that a member not be suspended from continuing to practise pending an appeal unless the charge is for incompetence. However, section 45(2) of the 1970 Act clearly states that the effect of the disciplinary order is to remove the right to practise pending appeal unless the member successfully applies to a judge of the Court of Appeal for the right to practise in the interim.

(7) Other Changes

Changes in the New Act which affect the power of the benchers include dropping all references to the Judges as Visitors of the Law Society, making the regulations subject to the approval of the Lieutenant Governor in Council, requiring that a copy of the rules be filed in the office of the Attorney General and be made available for public inspection, and limiting the right to summons witnesses to disciplinary matters. With respect to this last change, it is noted that section 37 of The Law Society Act, 1960, was a much broader section giving any committee power to summons witnesses.

Other McRuer recommendations not mentioned in the above discussion are:

24. Uniform terminology should be adopted with respect to regulations, rules and by-laws.

25. All matters relating to admission and discipline should be dealt with by regulations made by the Lieutenant Governor in Council.

26. By-laws relating to administrative and domestic affairs of a self-governing body should be made by the body.

27. No self-governing body should have statutory control over others who are not members of the body. If employees of members of a self-governing body are required in the public interest to be controlled, this should be done by some form of licensing and not by the conferring of legislative and judicial powers exercisable over them.

28. A Model Act should be drawn which should form the basis of all self-governing Acts so that there might be some uniformity in the delegation of the relevant and judicial powers.

29. No limitation period [on actions against professionals] should be for less than twelve months.

30. The court should have power to grant leave in proper cases to bring an action, notwithstanding that the limitation period has expired.

31. Uniform language should be used in defining a limitation period.

Recommendations 24 to 26 were followed by re-organizing the rules and regulations.

III. ROLES, POWERS AND STRUCTURES OF THE LAW SOCIETY OF UPPER CANADA

The roles and powers of the Law Society are controlled by The Law Society Act, R.S.O. 1970, Chapter 238, (the "Act"), its regulations and rules.[87] The Law Society is a corporation with its permanent seat at Osgoode Hall in the City of Toronto (s.4). The Law Society has the statutory power to acquire and dispose of property, to borrow

money, and to exercise all powers of trustees under the laws of Ontario (s.5).

III.1 GOVERNMENT OF THE LAW SOCIETY

The affairs of the Law Society are governed by the benchers (s.10), who have a treasurer, elected annually by the benchers, as president and head (s.7), and a secretary, appointed by Convocation, as chief administrative officer (s.8). Benchers fall into four categories, namely: elected benchers, ex officio benchers, honorary benchers and lay benchers.

Section 15 provides that forty benchers will be elected every fourth year after 1971 by secret ballot in accordance with the Act and the rules. Benchers are elected by area, twenty of whom must be members whose addresses on the records of the Law Society are within the Municipality of Metropolitan Toronto and twenty of whom have addresses outside this area (s.15). This distribution of benchers corresponds to the distribution of lawyers in the province. (Eligibility as a bencher depends on qualifications to vote (s.18) which in turn requires membership in good standing without arrears in fees or levies (s.17)). Nominations for positions as benchers must be signed by the nominee indicating his consent to be a candidate and by at least ten persons entitled to vote at the election (Rule 10).

If the number of candidates nominated is greater than the number of candidates to be elected, the secretary, under the supervision of the treasurer, conducts a poll of members by mail. The ballot, in addition to stating the names of the candidates, indicates specifically the incumbent benchers.

In the case of a tie, the secretary draws lots to decide which of the benchers with an equal number of ballots will be designated an elected bencher.

The Law Society Act provides that any member qualified to vote in an election may petition Convocation against the election of a bencher (s.20). The petition must state the grounds of dispute and requires the deposit of $200 by the petitioner which may be awarded to the duly-elected bencher or the petitioner depending on the result of the petition. Convocation then appoints an ad hoc committee to inquire into matters raised in the election petition and conduct a hearing to determine if the bencher petitioned against was duly qualified and duly elected (Rule 17).

Once duly elected, a bencher may only be removed by fellow benchers for non-attendance at six consecutive regular convocations (s.23).

Section 13 of the Act describes the persons who, by statute, are to be ex officio benchers of the Law Society:

1. The Minister of Justice and Attorney General for Canada.
2. The Solicitor General for Canada.
3. The Attorney General for Ontario and every person who has held that office.
4. Every retired judge of the Supreme Court of Ontario or of the Exchequer Court of Canada who was at the time of his appointment a member of the bar of Ontario and who became an ex officio bencher under paragraph 5 of section 5 of The Law Society Act, R.S.O. 1960, c.207, as that paragraph was before it was repealed in 1964.
5. Every retired judge of the Supreme Court of Ontario who became an ex officio bencher under paragraph 6 of section 5 of The Law Society Act as that paragraph was before it was repealed in 1964.

6. Every person who was elected a bencher at four quinquennial elections and became an ex officio bencher under paragraph 4 of section 5 of The Law Society Act as that paragraph was before it was re-enacted in 1964.

7. Every person who was elected a bencher at three quinquennial elections and served as a bencher for fifteen years and became an ex officio bencher under paragraph 4 of section 5 of The Law Society Act as re-enacted in 1964.

8. Every person who is elected a bencher at three elections and serves as a bencher for fifteen years before the election in 1975.

9. Every person who is elected a bencher at four elections and who serves as a bencher for sixteen years. R.S.O. 1970, c.238, s.12(1); 1972, c.1, s.9(7).

Apart from the Attorney General, no ex officio bencher named in Section 12 has the right to vote in Convocation or in a committee. The treasurer and past-treasurers are also ex officio benchers but they have all the rights of an elected bencher which includes the right to vote in Convocation or a committee until age seventy-five, at which time they continue to be ex officio benchers without the right to vote (s.14). There is an option available to elected benchers who by definition in Section 2(1) become ex officio benchers to maintain their privileges as elected benchers. There is a further provision for the appointment of honorary benchers (s.11 and Rule 48).

Section 23 of the Act provides for the appointment by the Lieutenant Governor in Council of four persons who are not members of the Law Society, two of whom are resident in the Municipality of Metropolitan Toronto, and two of whom are persons resident outside that area. These lay benchers have all the rights and privileges of elected benchers which include the right to vote and participate on committees of the Law Society.

The business transacted by Convocation requires a quorum of ten benchers except in the case of disciplinary matters where the quorum must be fifteen. Table III.1 shows the organizational structure of the Law Society in graphic form.

In a response to demands that governments of self-governing bodies be more accountable to the public, The Law Society Act of 1970 included amendments relating directly to the composition of the benchers. Firstly, the Attorney General of Ontario, as an ex officio bencher, was designated specifically "the guardian of the public interest in all matters within the scope of this Act or having to do with the legal profession in any way", with power to require the production of any document relating to the affairs of the Law Society (s.13).

Secondly, the new statute provided for a Law Society Council (the "Council") with a statutory mandate "to consider the manner in which members of the Law Society are discharging their obligations to the public and generally matters affecting the legal profession as a whole".[88] The Council consisted of the treasurer, the chairman and vice-chairman of each standing committee, the vice-president for Ontario of the Canadian Bar Association, the presidents or nominees of the county and district law associations, a full time law teacher, two Bar Admission Course students, three members of at least ten years standing appointed by the annual meeting of the Ontario section of the Canadian Bar Association and nine members not being members of the Society appointed by the Lieutenant Governor in Council.

LAW SOCIETY OF UPPER CANADA

OSGOODE HALL TORONTO M5H 2N6
362-4741

TABLE III.1

ORGANIZATIONAL STRUCTURE

GOVERNING BODY	DESCRIPTION	ELECTION/APPOINTMENT	FUNCTION
Treasurer	W. Gibson Gray (current)	elected annually by Convocation (ex officio bencher with right to vote)	president and head
Secretary	Kenneth Jarvis (Current)	appointed by benchers	chief administrative officer
Benchers	elect 40 20 Toronto 20 outside Toronto appoint 4 laymen 2 Toronto 2 outside Toronto	elected every four years by letter ballot eligibility equivalent to right to vote as members removal by benchers for non-attendance	governing body of Law Society quorum of Convocation : 10 except Discipline 15 voting rights except honorary and ex officio benchers
	Attorney General (Ontario)	ex officio bencher with right to vote	guardian of public interest
Standing Committees	see Table III.2		
Special Committees	Errors and Omissions Insurance	appointed by Convocation	to consider nature and frequency of size of claims and reserves maintenance in respect of them;
	Mediation		to deal with complaints of one lawyer against another or by a client against a lawyer which are not disciplinary matters but require mediation to prevent problem from worsening;
	Prepaid Legal Costs Insurance		to continue consideration of matter and to maintain liasion with the proper government departments.

The success of the Council was in doubt from its inception due to its heavy weighting with the professional members and the statutorily-defined powers and procedures it was given. The latter included a provision to meet twice yearly and report after each meeting to the benchers and provincial cabinet. However, without provision for a permanent secretariat, the undertaking of research, or the compulsory production of documents by the Law Society, the Council was lacking in machinery to gather and analyze information to discharge its mandate effectively.[89]

The Council itself reported[90] in 1973 that it was ineffective due to its unwieldy size, in that the Council numbered ninety persons, and that it did not provide true public representation on the effective governing body of the profession. The Council went on to recommend the removal of lay members from the Council and the appointment of lay persons to be benchers. Some objection was raised as to the effectiveness or competence of lay persons to participate in the daily business of the Law Society.

For many years the Society had annually arranged a meeting of the Chairmen and Vice-Chairmen of its Standing Committees with the presidents or other representatives of the forty-seven County and District Law Associations. The agendas of these meetings contained matters on which the Society sought the views of the profession at large and also matters which the local representatives wished to discuss. The meetings provided a means of communication between the governors and members of the profession. The agendas having been drafted in consultation with the local representatives

were circulated far enough in advance of the meeting that the local Associations were able to hold their meeting first so that their representatives came to the meeting with the Society with the views of their own local members. The Law Society Council had been formed by the addition of laymen and others to the meeting with the County and District representatives. Since it was at those meetings that the matters of greatest importance and major concern to the profession were traditionally discussed, it was thought that the lay representatives would in this way be spared the routine matters which occupy many hours of Convocation's time and be placed in a position to observe and take part in discussion of the matters of most importance to the profession from time to time. The greatly increased size of the Council and the change in its composition destroyed its usefulness and when the Act was amended in 1973 to abolish the Council, it was also amended to give statutory recognition to the meetings of representatives of the County and District Law Associations with the Chairmen and Vice-Chairmen of the Standing Committees of the Society. The meetings became known as the Advisory Council and was enlarged by the addition of representatives of each of the approved law schools in the province. The purpose of the Advisory Council is to consider the "manner in which the members of the Law Soicety are discharging their obligations to the public and generally matters affecting the legal profession as a whole" (s.26).

With the amendment to the Advisory Council to remove lay representation, Section 23(a) was added to the Act to provide for the appointment of four persons, not members of the Law Society, two of whom are resident in the Municipality of Metropolitan Toronto and two of whom are resident outside

this area, as benchers with all the rights and privileges of an elected bencher.[91] Lay members are able to sit on any committee and they are all members of the Discipline Committee. Because practically speaking lay benchers do not have time to sit on all committees, there is no lay representation on the Libraries and Reporting Committee, Unauthorized Practice Committee, or Legislation and Rules Committee. There is lay representation on all other committees, especially the Legal Aid Committee whose composition is one-third lay persons.

The Rules provide for the establishment of the following standing committees of Convocation (see Table III.2 for composition and responsibilities):

1. Finance
2. Legal Education
3. Admissions
4. Discipline
5. Professional Conduct
6. Libraries and Reporting
7. Unauthorized Practice
8. Public Relations
9. Legislation and Rules
10. Legal Aid

L A W S O C I E T Y O F U P P E R C A N A D A

S T A N D I N G C O M M I T T E E S

TABLE III .2

General Composition : Treasurer ex officio member of all standing committees
8 benchers (except Admissions, Public Relations and Legislation and Rules)

Quorum : 3 benchers

According to Statute

COMMITTEE	SPECIAL COMPOSITION	RESPONSIBILITIES FOR ALL MATTERS RELATING TO:
Finance	-	1. The management of the Society's financial affairs including (a) the collection, management, investment and disbursement of the Society's funds; (b) the management of the lands and buildings of the Society or for which the Society is responsible; (c) recommendations with respect to staff appointments and salaries; (d) the enforcement of the rules relating to the payment of fees and levies to the Society. 2. Recommendations with respect to fees. 3. Consider budget estimates. 4. Consider and report upon applications for resignation.
Legal Education	-	Legal education and continuing education, including: (a) make recommendations to the Finance Committee with respect to appointments and salaries of members of the faculty and staff of the Bar Admission Course; (b) prescribe the duties of the members of the faculty and staff of the Bar Course; (c) prescribe the academic requirements and entrance examinations for admission to the Bar Admission Course of persons who have not been called to the bar or admitted as solicitors elsewhere; (d) approve courses and universities for the purpose of admission to the Bar Admission Course; (e) prescribe the curriculum of the Bar Admission Course; (f) recommend to the Finance Committee the fees payable by students in the Bar Admission Course; and (g) establish and hold in connection with continuing education programs or otherwise courses of lectures, seminars, conferences and panel discussions, and publish any parts thereof.

LAW SOCIETY OF UPPER CANADA
STANDING COMMITTEES (continued)

TABLE III.2
(continued)

	COMMITTEE	SPECIAL COMPOSITION	RESPONSIBILITIES FOR ALL MATTERS RELATING TO:
*	Admissions	Chairmen and Vice-Chairmen of both Legal Education and Finance Committees and at least one other bencher	Admission to the Society of all students of Law and Bar Admission Course and from other jurisdictions.
	Discipline		1. Conduct and discipline of members and student members. 2. Administration of the Compensation Fund.
*	Professional Conduct	Chairmen and Vice-Chairmen of both Legal Aid and Discipline Committees and at least four other members	Professional conduct and making reports and recommendations to Convocation with reference thereto - making the necessary rulings to members and student members
	Libraries and Reporting		1. General supervision and managment of the Great Library, the Bar Admission Course Library and other rooms used for library purposes. 2. County law libraries. 3. Provision of reports of significant reasons for judgment in Ontario courts.
	Unauthorized Practice		Unauthorized practice of law whether raised by complaint or otherwise.
	Public Relations		Public relations
	Legislation and Rules		The Law Society Act, the regulations and rules

LAW SOCIETY OF UPPER CANADA
STANDING COMMITTEES (continued)

TABLEIII.2
(continued)

	COMMITTEE	SPECIAL COMPOSITION	RESPONSIBILITIES FOR ALL MATTERS RELATING TO:
*	Legal Aid	12 members of whom at least 2/3 including chairman & vice-chairman are benchers and 1/3 members of the Society who are not benchers	Supervision of the Ontario Legal Aid Plan under The Legal Aid Act, 1966 Quorum - five members if a majority of those present are benchers.

* exceptions to general composition and quorum

Sections 54 and 55 of The Law Society Act define the power of Convocation to make rules and regulations.

54(1) Subject to section 55, Convocation may make rules relating to the affairs of the Society and, without limiting the generality of the foregoing,

1. providing procedures for the making, amendment and revocation of the rules;
2. prescribing the seal and the coat of arms of the Society;
3. providing for the execution of documents by the Society;
4. respecting the borrowing of money and the giving of security therefor;
5. fixing the financial year of the Society and providing for the audit of the accounts and transactions of the Society;
6. providing for the time and manner of and the methods and procedures for the election of benchers;
7. providing procedures for the election of the Treasurer, the filling of a vacancy in the office of Treasurer, the appointment of an acting Treasurer to act in the Treasurer's absence or inability to act, and prescribing the Treasurer's duties;
8. providing for the appointment of and prescribing the duties of the Secretary, one or more deputy secretaries and assistant secretaries and such other officers as are considered appropriate;
9. respecting Convocation;
10. providing for the establishment, composition, jurisdiction and operation of standing and other committees and delegating to any committee such of the powers and duties of Convocation as may be considered expedient;
11. governing honorary benchers, ex officio benchers and honorary members and prescribing their rights and privileges;
12. governing members, life members and student members, and prescribing their rights and privileges;
13. prescribing fees and levies for members and student members or any class of either of them, and providing for the payment and remission thereof and exempting any class of either of them from all or any part of such fees or levies;
14. respecting the Compensation Fund and prescribing the amount of the levy to be paid to the Society for the Fund and exempting any class of members from all or any part of such levy;
15. prescribing oaths for members and student members;
16. providing for the payment to the Society by any member of the cost of any investigation or audit of his books, records, accounts and transactions;
17. providing for and governing meetings of members or representatives of members;

18. prescribing procedures for the call to the bar of barristers and the admission and enrolment of solicitors;

19. defining and governing the employment of student members while under articles;

20. providing and governing bursaries, scholarships, medals and prizes;

21. providing for and governing extension courses, continuing legal education, and legal research;

22. governing degrees in law;

23. providing for and governing libraries;

24. providing for the occasional appearance as counsel in the courts of Ontario and before provincial judges, with the consent of the Treasurer and of the court or judge, of members of the legal profession from outside Ontario;

25. providing for the establishment, maintenance and administration of a benevolent fund for members and the dependants of deceased members;

26. prescribing forms and providing for their use, except the form of summons referred to in subsection 10 of section 33.

Prior to 1970, the Law Society had a free hand to make rules and regulations respecting its activities. As a result of the 1970 amendments to The Law Society Act, rules prescribed under section 54 can be made by Convocation alone. However, copies of the rules must be filed with the Attorney General and made available to the public for inspection. This power is in keeping with recommendation 26 of the McRuer Report which allows by-laws relating to administrative and domestic affairs to be made by a self-governing body itself. However, subsection 22 "governing degrees in law" and subsection 24 "providing for occasional court appearances...of members of the legal profession outside Ontario", which related to admissions, may be out of place according to recommendation 25 of the McRuer Report which requires that all matters relating to admission and discipline be dealt

with by regulations made by the Lieutenant Governor in Council.

The power of Convocation to govern its affairs was restricted by section 55 requiring the Lieutenant Governor in Council to approve regulations outside the scope of the rule-making powers. Section 55 lists specifically regulations:

> "1. respecting any matter ancillary to the provisions of this Act with regard to the admission, conduct and discipline of members and student members and the suspension and restoration of their rights and privileges, the cancellation of memberships and student memberships, the resignation of members, and the readmission of former members and student members;
>
> 2. requiring and prescribing the books, records and accounts to be kept by members and providing for the exemption from such requirements of any class of members;
>
> 3. requiring and providing for the examination or audit of members' books, records, accounts and transactions and the filing with the Society of reports with respect thereto;
>
> 4. authorizing and providing for the preparation, publication and distribution of a code of professional conduct and ethics;
>
> 5. respecting the reporting and publication of the decisions of the courts;
>
> 6. defining and governing the employment of barristers and solicitors clerks;
>
> 7. respecting legal education, including the Bar Admission Course;
>
> 8. providing for the establishment, operation and dissolution of county and district law associations and respecting grants and loans to such associations;
>
> 9. prescribing the form of the summons referred to in subsection 10 of section 33. R.S.O. 1970, c.238, s.55."

Accordingly, in areas where the consequences of actions by the Law Society would affect the public directly or indirectly, absolute control was removed from it into the hands of the Lieutenant Governor in Council.

III.3 UNAUTHORIZED PRACTICE

The Law Society Act, (the "Act"), section 50, gives the members of the Law Society a monopoly to render legal services. Section 50 reads as follows:

> "(1) Except where otherwise provided by law, 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.
>
> (2) Every person who contravenes any provisions of subsection 1 is guilty of an offence and on summary conviction is liable to a fine of not more than $1,000.
>
> (3) Where a conviction has been made under subsection 2, the Society may apply to a judge of the Supreme Court by originating motion for an order enjoining the person convicted from practising as a barrister or solicitor, and the judge may make the order and it may be enforced in the same manner as any other order or judgment of the Supreme Court.
>
> (4) Any person may apply to a judge of the Supreme Court for an order varying or discharging any order made under subsection 3."

Enforcement of section 50 normally will be initiated and conducted by the Law Society at its own expense. The Unauthorized Practice Committee is charged with the responsibility to consider and report on all matters relating to the unauthorized practice of law, whether raised by way of complaint or otherwise, and to make such arrangements and take such steps as it considers advisable for the protection of the public and the profession. The workings of that committee are described by its secretary as follows:

> "In order for you to have a better understanding of how the Unauthorized Practice Committee works, I might mention that there are nine meetings a year. At each of these meetings the letters of complaint by solicitors, members of the public, Star Probe, government offices and others about persons giving legal advice, who are not qualified as solicitors in the Province of Ontario, are considered and discussed by the benchers who are members of the Unauthorized Practice Committee. As Secretary I am instructed as to how to deal with

each complaint. As I stated to you on the telephone, most of the complaints are not resolved either because there is insufficient evidence to satisfy a Court of a breach of Section 50 of The Law Society Act or the evidence submitted is more than six months old and therefore statute barred.

In the cases which do not fall into the latter category I am instructed to investigate by employing counsel for the Law Society in the localities where the activity takes place. I correspond with our counsel and he reports through me to the Committee on his progress. The Committee then decides at a meeting whether or not to instruct counsel, based on the evidence before it in his opinion, to lay an information in the Provincial Courts for a contravention of Section 50 of The Law Society Act. Once an information is laid counsel then interviews the witnesses and acts as special counsel at the hearings (rather than the Crown Attorney). All of these prosecutions have been paid for out of the Unauthorized Practice Committee budget with the exception of two cases which were prosecutions by the local Crown Attorney in Ottawa. Both these cases involved counselling clients of a divorce kit agency to commit perjury in a petition for divorce. However these cases are rare and usually the Law Society must take the initiative and pursue the investigation and the expense of the prosecution."[92]

A person who engages in the unauthorized practice of law is also subject to section 1 of The Solicitors Act. This section provides:

> "1. If a person, unless himself a party to the proceeding, commences, prosecutes or defends in his own name, or that of any other person, any action or proceeding without having been admitted and enrolled as a solicitor, he is incapable of recovering any fee, reward or disbursements on account thereof, and is guilty of a contempt of the court in which such proceeding was commenced, carried on or defended, and is punishable accordingly."

However, this section has not been resorted to by the Law Society in its efforts to control unauthorized practice.

It is no defence to a charge under section 50 of The Law Society Act that the accused either did not claim to be a lawyer or specifically told his client he was not a lawyer. The court interprets section 50 broadly and examines the whole course of action of the defendant to determine if he "acted or practised as a solicitor". The principle behind section 50 is

that untrained persons may not perform those services "which imperatively require the exercise of the skill and training of a solicitor".[93] This principle was established in R. ex rel. Smith v. Mitchell,[94] where the accused was convicted of two charges of unauthorized practice by acting as a solicitor in real estate transactions. The court analyzed the offence under the predecessor to section 50. Because practising involves a course of conduct, an isolated incident will not ordinarily result in a conviction under section 50.[95]

In Regina v. D.A.S. Holdings Limited,[96] Judge Boland of the County Court defined the practice of law for the purposes of section 50 as follows:

> "I think it is generally agreed that the practice of law includes representing others before the Courts, preparing pleadings, advising clients as to their rights and obligations under the law and preparing documents pertaining to legal rights. The reason for confining the practice of law in Ontario to members of the Law Society of Upper Canada is to protect the public from unqualified persons." (emphasis added)

Areas of the law which have given rise to cases of prosecution for alleged unauthorized practice include conveyancing work, applications for incorporation, estates work, court representations and divorce counselling.

Section 50 does not provide an absolute bar against practice of law by non-members of the Law Society in that the opening clause of section 50 states "except where otherwise provided by law". Consequently, where a statute permits representation by counsel or an agent, non-lawyers are free to represent the party. For example, for summary conviction offences under Part XXIV of the Criminal Code,[97] the defendant may appear by counsel or an agent. However, if the court requires the defendant to appear personally, a non-lawyer may not represent him. An agent may also

represent the accused on a charge where the Crown chooses to proceed by way of summary conviction.

All federal statutes which invoke Part XXIV of the Criminal Code and all Ontario provincial statutes which invoke The Summary Convictions Act,[98] which incorporates by reference Part XXIV of the Criminal Code, also permit agents to appear. The Small Claims Courts Act,[99] permits any person not prohibited by the judge "to act on behalf of a party". The Statutory Powers Procedure Act[100] provides that a party to proceedings may be represented at the hearing by counsel or an agent. Consequently, for proceedings to which this Act applies, non-lawyers may represent parties.

III.4 MEMBERSHIP

The membership in the Law Society includes honorary members, life members, members and student members. The membership of those performing named judicial functions, such as judges and full-time masters, is held in abeyance during their term of office. By statute every member is made an officer of every court of record in Ontario and by such appointment obligations and duties arise which are discussed under section V, on Ethics.

The participation of the membership in the affairs of the Law Society has been limited in the past. The study of the history of legal education indicates occasions when the membership, although they disagreed with the actions of the benchers, were powerless to effect change directly in their policies. The benchers had developed various informal techniques for communicating to the membership, such as publication of minutes of

Convocation in the Ontario Reports, an annual luncheon address by the Treasurer to the profession and the publication of the Law Society Gazette. However, the members had no formal means of communicating with the benchers. Discussion in 1969 over the forthcoming amendments to The Law Society Act was the first occasion of a well-attended general meeting of members who demanded to be heard. Provision for an annual meeting was included in the 1970 Act at which one hundred members in good standing constitute a quorum. At this meeting the benchers shall present "a report on the work of the Law Society and the committees on matters of professional interest". Rule 52 under The Law Society Act further provides a procedure whereby members may force action by Convocation. Any resolution passed at the annual general meeting must be considered by Convocation within six months although it is not binding upon Convocation. If the resolution is not implemented by Convocation within six months, then, upon the petition of one hundred members in good standing, Convocation must cause a mail vote on the resolution to be taken. If at least two-thirds of those voting are in favour of the resolution, Convocation shall implement the resolution to the extent that it is able to do so. Accordingly, the membership now has a means of taking direct action.

III.5 SERVICES AND BENEFITS OF MEMBERSHIP

The Law Society offers educational, informational, business and social benefits to its members. The Law Society sponsors courses in continuing education to meet the needs of the profession. The Great Library and County law libraries are maintained as resource centres for members. The Ontario

Reports, published weekly and mailed to all members, include both recent cases and advertisements and announcements of interest to the members. The Minutes of Convocation are mailed to members who request them. They contain reports of all committees of the Law Society. The Law Society Gazette contains reports of the Treasurer from time to time on the activities of the Law Society as well as articles by members concerning current issues affecting the profession. After each Convocation the Society distributes to all members a brief informal report of the proceedings of the benchers in Convocation. This publication is called the "Communiqué" and sets out on a single page the matters of importance that have been decided and also matters which are under consideration upon which members are invited to express their views.

The Law Society administers a Compensation Fund[101] to assume responsibility for repaying in whole or in part the financial losses suffered by the clients of defaulting lawyers. Non-defaulting members benefit from the plan by the increased public confidence in the use of a lawyer. The Law Society also makes arrangements for group Errors and Omissions Insurance[102] to enable all practising members to insure themselves against financial disaster resulting from actions. The Plan came into effect in 1970 at a time when many members were finding it impossible to obtain such insurance. Under the Society's compulsory Insurance Plan members are covered from the moment they begin to practise whether or not they have given notice of the fact that their practice has commenced. This feature of the Plan is to ensure that the public is fully protected and cannot be deprived of protection by a lawyer's failure to apply for coverage.

Lastly, the Law Society, through the work of its Professional Conduct Committee and Discipline Committee, attempts to maintain a high standard of professional competence and conduct in an effort to protect the public interest as well as improve the public image of lawyers generally.

III.6 JOINT COMMITTEES

The Law Society, although it is a certifying body, has established relationships with voluntary associations of members to discuss matters affecting the profession. These include the provision in The Law Society Act for an annual meeting of the Advisory Council with the law school representatives and county and district law associations. Also, the Law Society has entered a permanent joint public relations programme with the Canadian Bar Association. As well, by resolution of the Canadian Bar Association of 1975, the Law Society was given representation on a joint committee with the Institute of Law Clerks, the Ministry of Colleges and Universities and other groups interested in paraprofessionals to discuss paraprofessional education. Lastly, subject to the approval of the Federation of Law Societies, the Committee of Law Deans has proposed a National Joint Committee to evaluate non-Canadian law degrees. This Committee would include Law Society representation.

III.7 MEMBERSHIP DATA

The Law Society has completed the process of computerizing its membership data to give a profile of members according to counties and districts, language capabilities, kind and size of practice and other similar categories.

A print-out of statistics of the computer prior to the March 1977 Call to the bar showed the following categories of membership:[103]

Practising			
A.	Sole practitioners	2,374	
B.	Partners in law firms	4,261	
C.	Employees in law firms	1,230	
D.	Associates in law firms	445	8,310
Employed (other than in Practising Law Firms)			
E.	Employed in Education	134	
F.	Employed in Government	823	
G.	Otherwise employed	707	1,664
Others			
H.	Fully retired	269	
I.	Not in Ontario	352	621
			10,595

As of March 1977, the Law Society reports that there are 11,501 members of the bar of Ontario with a present ratio of lawyers to population in the province of one to 707.[104]

IV. ENTRY INTO THE PROFESSION OF LAW

IV.1 HISTORY: ADMISSION TO THE LAW SOCIETY - CALL TO THE BAR

The system of training in the law through practical work done under the guidance of a qualified member of the bar followed the English emigrants to the Colonies. The statutory history of admission to the practice of law dates back to the ordinance of 1785 which prohibited anyone from practising as a barrister, advocate, solicitor, attorney or proctor-at-law who had not served the regular and continued clerkship for five years,

and been examined by the bar in the presence of the Chief Justice or two or more judges, and approved and certified by the judges to be of fit capacity and character.

The Act of 1797 authorizing the formation of the Law Society, although the provision was obscure, was interpreted to mean that barristers, attorneys and solicitors, in addition to qualifying by service under articles, must become members of the Law Society.

A person desiring to become a barrister had to be entered on the rolls of the Law Society as a "Student of the Laws" for five years, having conformed to the rules and regulations of the Law Society, and been duly admitted to the practice of the law as a barrister. Section VI of the Act further provided that if a person had regularly articled and had stood on the books of the Society for three years, he was not prevented from acting as an attorney or solicitor. A rule passed by the Law Society in 1799 provided that all students must become articled clerks.

A combination of Ordinance 85, the Act of 1797 and the rule of 1799 led to this conclusion as stated by J.D. Arnup (now Arnup, J.A.) in his speech on the "Fusion of the Professions".

> "To become a barrister, a student had to have been under articles and on the books of the Society for five years; whereas five years articles and three years on the books qualified one to become a solicitor."[105]

Since there was nothing to prevent a person practising both as a barrister and attorney or solicitor, most members of the Law Society qualified and practised in both capacities. This combination ran contrary to English tradition and was thus opposed by the English trained members. As a

result, when the Act of 1822 incorporating the Treasurer and Benchers was passed:

> "the Attorney General took advantage of the opportunity to make the Law Society resemble even closer an English Inn of Court, by separating the profession of 'attorneys', putting them back under the supervision of the courts where they remained until 1859. Notwithstanding this, the same person might be both barrister and attorney but he acquired the former function through call by the Law Society, the latter by admission by the court."[106]

In 1819 a rule was passed which required candidates for admission to the Society to establish fitness for enrolment and show proof of a liberal education by giving a written translation of one of Cicero's Orations and such other exercise as required by the Society. Prior to that time, a student could be called to the bar or be admitted as an attorney on completion of the prescribed term of articleship or clerkship. There were no examination requirements. Students had to rely entirely on their own study and on the practitioners to instruct them in law. The inadequacy of this education led to the formation of the Advocates Society in 1822. Barristers and students met to argue and pronounce judgment in the style of Moot Courts. Unfortunately for the students, the Advocates Society only lasted three years.

Convocation passed a rule in 1831 requiring students proceeding to the degree of Barrister-at-Law to be examined before admission to the Society and again before call to the bar. Later regulations also required two intermediate examinations in addition to the entrance examination and the examination for the call. Except for a series of lectures given in 1848 by Chancellor Blake at King's College, it was not until 1854 that any formal academic training in law was offered. The programme set up in that year jointly by Trinity College and the Law Society allowed students to sit

examinations and receive a degree of B.C.L.:

> "Throughout these years the distinction between solicitors and barristers retained some importance with regard to the educational standard required of applicants for the different sides of the bar. Neophyte solicitors were "articled clerks", while barristers-to-be were "students-at-law". The former were potential attorneys and had been governed since 1822 by the legislature of the province rather than by the Law Society (which since the same year had had sole governance of students-at-law). Generally there was no preliminary examination to be passed by the clerks nor were they faced with the rigours of examinations for a Call to the Bar at the end of their five years of study. The editor of the Upper Canada Law Journal noted the anomaly patent in the system:[107] "The barrister must have proved his fitness...the fitness of the attorney is presumed; an inconsistency too palpable to require much enlargement."[108]

Because of the higher standards required to be called to the bar, more and more students became attorneys simply on proof of service under articles and without applying for admission to the Society. A writer in the Canada Law Journal in 1855 expressed the general concern:

> "A young man whose only qualification for entering the study of the law is ability to read and write may be articled to an attorney; spend five years copying and serving papers or idly kicking his heels against the office desk or in doing the dirty work of a disreputable practitioner. At the end of that time, armed with a certificate of service, he claims to be sworn in as an attorney of Her Majesty's Courts, and is sworn in accordingly."[109]

The general dissatisfaction that arose because of this situation resulted in the passage of an Act to amend the Law for the admission of Attornies in 1857[110] which provided that no person might be admitted by any court as an attorney or solicitor unless he produced a certificate of fitness issued by the Law Society. Thus, the Law Society again had authority over both attorneys and solicitors as well as barristers.

The history of legal education in Ontario under the supervision of the Law Society developed in each case as a result of committee decisions to resolve existing conflicts. In 1855 there was a need to establish a set

of criteria for admission examinations and relate them more directly to legal knowledge than had been done in the past. In reporting on the state of legal education leading up to the need for change, the Toronto Daily Colonist made this comment:

> "Formerly there were no particular books prescribed as necessary to be read by a candidate before examination. He was examined in the different branches of the law, and his knowledge tasked, no matter from what source derived. Some examinations were comparatively simple; there was no true test of legal knowledge - many passed without more knowledge of law than absolutely necessary, and perhaps, fortuitously sufficient to pass them: thus many, though not sound lawyers, might succeed in attaining a call. To meet this evil, or with some such view, the new rules have been passed."[111]

The Report of Convocation in 1855 made certain books prescribed reading and made a series of lectures compulsory for the students articled in Ontario. This lecture series was the forerunner to the first law school in Osgoode Hall administered and regulated by the Law Society. In 1862 the Law School of Osgoode Hall was authorized to be established with lectures, readings and mootings under the tutelage of four lecturers. The number of compulsory lectures was increased from one to two each day. In 1868 the Law School closed, apparently on the grounds that it was uneconomical.

The second law school at Osgoode Hall was established in 1873 and lasted until 1878. The reasons for its failure were discussed by Gillis in his article "Legal Education in Ontario - An Historical Sketch":[112]

> "Its failure is ascribed to several causes, one being its excessive popularity with the students, for by attending lectures and passing examinations the term of service could be shortened by six to eighteen months. This privilege drew students from outside towns to Toronto and the school, under such conditions, was bitterly opposed by benchers and barristers not living in the city which probably was the real explanation of its early demise."

Gillis suggests that, as a result of the migration of students to the city, there were fewer students available to article in small towns. The profession

has been criticized for its attitude towards establishing a law school.

> "...The early attempts to formalize legal education were vulnerable to the hostility and "rampart parochialism" of the rural bar and to what must surely have been specious considerations of economy. At the heart of the matter lay the fact that the profession, having itself been trained in legal practice, found it difficult to appreciate the claims that Law had to being an academic discipline."[113]

One remnant of this early law school remained. The Legal and Literary Society founded in 1876, through the law school, continued to function after the close of the law school and sponsored series of lectures by prominent members of the profession, conducted examinations and awarded prizes. This ad hoc educational programme continued until the law school was again re-established.

During the three years that no law school was operated, the benchers were the subjects of severe criticism. They were accused of being short-sighted, selfish and ignoble mainly because they were receiving almost one-half the Society's revenue from students without providing any instruction in return. Due to pressure from the law students, the law school was re-established in 1881 by the benchers, initially for a two-year term and thereafter on a year-to-year basis until 1888.

In 1888 an offer by the University of Toronto[114] to collaborate with the Society in the operation of a faculty of law led a committee of Convocation to make another critical examination into the state of legal education in the province. Convocation approved a report that it was not at that time desirable to enter into this arrangement with any university nor to shorten the period of study or service of students. The resolution resulted in a re-organization of the Law School in 1889 with attendance by students being made obligatory, whereas formerly attendance had been optional.

This 1889 resolution of Convocation fixed the course of legal education in Ontario until 1957 as a blend of apprenticeship with concurrent academic work with apprenticeship the dominant element. The benchers firmly supported the articling system and, as a result, lectures had to be arranged early in the morning and late in the afternoon in order to permit the students to spend the bulk of their days in law offices.

While the benchers gave responsibility to the Principal for the administration of the school, the Legal Education Committee of the Law Society had final authority to the extent that it controlled appointments to the staff, approved the curriculum, lecture hours and schedules, and stipulated the text books to be studied.

A second overture by the University of Toronto in 1905 to develop a university faculty of law was dismissed by the benchers who continued to stress practical training and practice-oriented lectures over academic training.

The period of the twenties and thirties was one of crisis and conflict for the legal profession. The low admission standards and the concessions made to a great number of veterans returning after the 1918 armistice resulted in unhealthy overcrowding.[115] Much of the profession suffered from insufficient training, lack of work and low income.

The conflict within the legal profession centred around law school admission requirements and training. As early as 1919, the Legal Education Committee of the Canadian Bar Association recommended one year university

as minimum admissions requirement, a standard three-year law school curriculum and suspension of office attendance during part of the school year. Seeing a need for reform, the Special Committee on Legal Education appointed by the Law Society in 1923 went part way in recommending: lengthening the school year, expanding existing curriculum, adding new subjects of study, appointing a second full-time lecturer, encouraging new teaching methods, and naming the law school "Osgoode Hall Law School". In 1926, the Law Society responded to the pressure to establish a university degree as the basic admission standard by adopting a recommendation that two years university be a pre-requisite to legal studies. To increase academic emphasis still further, lectures were held in the morning when students were most alert.

The Depression created a critical problem of overcrowding.[116] With junior lawyers a glut on the market, the articling student had little hope of a meaningful articling position, even if he could find a practitioner to take him. The benchers reacted to the problems created by the Depression by returning to the old system. They reduced the admission standards to pass matriculation plus either Honour Matriculation or completion of first year of university and supported the change on the grounds that impecunious students were being unfairly discriminated against. The laudable conduct of the benchers was cast in doubt the following year when the admission and tuition fees were raised substantially. According to the Legal Education Committee, the fee increase served to "deter some people from entering the Society".[117]

In 1934 the legal profession was described as being "bordered with a vast

fringe of practitioners who simply cannot make an adequate living and who are prepared to give cut-throat competition of the worst kind".[118] One solution offered to the problem was to raise the law school admission standards and stiffen up law school courses, to raise the quality of those called to the bar and automatically cut down on the number of calls. Those opposing higher admission standards saw the poor rather than the unfit being barred by establishing a university qualification as a prerequisite. Furthermore, the fact that the most eminent members of the profession were trained by practical experience alone was advanced to refute the need for raising academic standards to improve quality.

The Legal Education Committee of the Canadian Bar Association also opposed the Law Society on the issue of concurrent law school and articling:

> "Experience has demonstrated completely and entirely that if you are content to acquiesce in that dual system, law school attendance and office attendance running concurrently, you will not get good results either out of the law school or out of the office. That I personally...look upon as absolutely fundamental."[119]

The proponents of the practical aspects of training did not concede without a fight. The 1934 Special Committee on legal education in support of emphasis on practice made the following recommendations:

(a) re-instate afternoon lectures to permit students to spend more time in their offices;

(b) not to prescribe a university degree as a minimum requirement, and;

(c) reduce the curriculum.

These recommendations were made in the face of briefs from students, practitioners, the York County Law Association and the Toronto Lawyers' Club containing views to the contrary. These recommendations were a severe

setback to what appeared to be a progressive trend in legal education. Efforts by the Legal Education Committee to make articling more meaningful, including a list of suggested matters to be covered during practical experience, oral examinations and tightening administrative requirements, were to no avail.

The Second World War relieved temporarily the problem of overcrowding in the profession. The Law Society, through its newsletter, made every effort to keep informed those lawyers and students serving in the armed forces. The Law Society provided refresher courses to members returning from the forces and helped them to find positions. The end of the war brought the legal profession back to its internal struggle between the academics and the practitioners over what role the articling system should play in the educational process.

The recommendation in 1947 that practice groups conducted by volunteer Toronto lawyers be made compulsory and be substituted for articling during the first year of the law school term, and the appointment in 1948 of Dr. Cecil A. Wright as Dean of the Osgoode Hall Law School led to the end of the traditional concurrent articling system.

Dean Wright advocated full time attendance at law school, followed by one year of apprenticeship training before call to the bar. When the Special Committee on Legal Education recommended in 1949 no change in any of the entrance requirements, the concurrent system of law office apprenticeship, law school attendance, nor the length of articling term, Dean Wright resigned and was soon thereafter appointed Dean of the Faculty

of Law at the University of Toronto.[120]

The clash between Dr. Wright and the benchers has been explained as "an immense personality clash"[121] - not so much over their opposing views on education but about the fact that their disagreements were viewed by the benchers as a private matter, while Dr. Wright made a public issue of them. The problem centred around who should control legal education as much as the form of legal education.

The benchers were convinced of the value of the articling system which had trained them. In 1947, Mr. R.M. Willes Chitty defined the benchers' position:

> "The real function of the Law Society is essentially [the] qualifying of men already reasonably educated to practice law, or rather... to exercise the privileges of the profession in the service of the public in the practice of law...We thoroughly sympathize with the educationalists. They know no other standard than the academic and by and large the world-beating student will probably be the quickest to learn to practice law, though the record of the gold medalist does not always prove this. But the run-of-the-mill students are neither world beaters nor do they know anything of the practice of law as they come from the law school and they, if ever, are qualified to practice law at the expense of the public whom they ought to be serving. Neither academic nor practical they are for a longer or shorter but always for too long period until they grasp the essence of the practice of the law, a living misrepresentation by the Law Society to the public that the men they graduate and call to the Bar are qualified to exercise the privileges of the profession in the practice of law...[In] fact the public are the guinea-pigs on which these men practice while they learn what the Law School ought to have taught them. The public are blameless - no wonder they dislike the lawyers - and so are the students. Need we go further."[122]

The benchers were much more remote from the members of the profession than they are today and much less subject to influence by them. When objecting members overcame their initial reticence and became involved in the dispute, their representations and submissions had no direct

influence over the benchers and their decisions, and they had to turn to articles and letters in newspapers and periodicals to air their views.

The controversy over Dean Wright's resignation led the Law Society to realize that it was out of touch with many of its practising members and to solicit the views of the county and district law associations on legal education. As a result of their submissions, the Law Society reconsidered the 1949 report and adopted a four-year law course which consisted of two years of full time legal studies at Osgoode Hall, followed by a third year of articles and a fourth year of concurrent practical and academic training in Toronto. A student was prepared for articling by experiencing, in the first two academic years, a series of seminars conducted by practising lawyers on procedural and practical instruction. The experience of students under articles was assessed by an oral examination conducted by a board of practising lawyers. Students with only senior matriculation had to spend three years under articles before beginning their academic studies. However, in 1953 a university degree became the basic admission requirement to law school. The Law Society by 1950 recognized the Faculty of Law at the University of Toronto to the extent that its three year graduates could enter third year of the Osgoode Hall law course. This meant an additional year for university trained students.

The projected increase in enrolment and the cost of maintaining a controlling hand in legal education persuaded Convocation to appoint a new special committee on legal education in 1955. The changes instituted with the report of the Committee as adopted by Convocation in 1957 resulted in the format of legal education as we know it today. The following requirements

for call to the bar were established:

(1) a candidate for admission to law school was required to have a minimum of two years university training after senior matriculation;

(2) upon completion of a three year LL.B. programme at an "approved" law school, the student was required to proceed to the Bar Admission Course comprised of a twelve month articling period followed by a six month clinical teaching programme.

The Law Society had to approve the law school and assumed the responsibility of approving the programmes at the common law schools in Ontario and elsewhere in Canada for the purpose of permitting the graduates of approved law schools to qualify for entrance to the Bar Admission Course given by the Law Society.

The Law Society, through its Legal Education Committee, continues to set requirements for the approval of law faculties for the purpose of the admission of their graduates to the Bar Admission Course. According to those requirements, the law school must set an admission requirement of a minimum of two years university training after senior matriculation, conduct a three-year course leading to a Bachelor of Laws (LL.B.) degree, offer instruction in a long list of courses, and hold classes for approximately thirty weeks each year during which a student must receive instruction or be supervised fifteen hours per week. Further requirements as to teaching hours, library facilities, sequence and combination of courses are prescribed. The list[123] of approved law schools includes all the Ontario law schools.

Due in large part to increased enrolment and economic pressure associated with maintaining its own law school, the Law Society and York University entered into an agreement whereby Osgoode Hall Law School became affiliated with York University in 1968.

IV.2 MacKINNON COMMITTEE

The latest special committee on legal education established in 1970 under the chairmanship of B.J. MacKinnon, Q.C., was a response to the needs for review of legal education necessitated by the many radical changes in the nature of the law, the profession itself, the law schools and the number of students requesting admission to the law schools. There was also a general feeling of dissatisfaction with the length of legal education and the value of bar admission course, both articling and instruction portions. The background papers and other material received and reviewed by the MacKinnon Committee are filed with the Secretary's Office of the Law Society.

The Committee recommended a Legal Education Council with representation from law schools, both faculty and students, the bar admission course, the profession and the public, to review admission policies and procedures of the law schools and to make annual recommendations to the Law Society and the law schools. The ultimate purpose of the Council is to undertake continuing review of legal education and make recommendations for its improvements. With respect to candidates for admission, the Committee singled out two groups, namely, mature students and native people. In the former case, the Committee advised that normal pre-law education

requirements should be waived when an individual deserved an opportunity to study law on the basis of experience, maturity and outstanding qualities. In the case of the latter, the Committee urged law schools to encourage native Canadians to pursue legal careers through a programme of relaxed admission requirements together with enriched legal training to help them to meet law school standards.

The length of time to qualify to practise law which in the case of an honours degree graduate would be nearly nine years, caused the Committee to consider possible means to reduce this term. They found that the factors relating to the pressing need to shorten the time were:

1. the increased social cost of encouraging pre-law students to complete undergraduate pass and honours degrees merely for the purpose of increasing their competitive chances of admission;
2. for the student marking time, the personal expense in terms of attitude and money, and
3. the restlessness of students at the total length of legal education.

It is not only the regulations themselves that have created the time problems. The situation has been worsened by the number of qualified applicants for each available law school position. In practice, the "qualifications" required exceed minimum academic requirements. With no better means of judging candidates, law schools have been accepting the highest grades, together with some experience factors, over those minimally qualified. Admissions Committees to some extent accept post-graduate degrees over four-year or three-year degrees. Thus, by pressure of numbers, the paper regulation of two years pre-law university training is applicable in only relatively few cases. To compete, the candidates must have higher degrees and higher marks.

The Committee expressed concern for this trend and advocated that law schools return to a two-year requirement for 50% of their enrolment subject to a transition period of five years to warn students and publicize the change.

The reports considered the arguments for and against a two year programme. Proponents in favour of a two year programme argued that:

1. the basic requirements could be completed in two years and there was no use subjecting students to optional subjects which might have no use in subsequent practice;

2. basic principles and techniques to approach the rapidly changing substance of the law can adequately be taught in two years;

3. due to the higher grade of education and students, students can now absorb as much in two years as is needed to enter practical training; and

4. students get a further year of legal education at the Bar Admission Course.

However, the Committee accepted the following arguments in favour of retaining the three-year law school programme:

1. students benefit from spending time going into one or two areas of law more deeply after conquering the basics;

2. optional subjects develop students who have been exposed to a variety of problems beyond the core subjects and this kind of graduate is needed to confront the variety of problems facing society;

3. shortening law school would make it impossible for a student to pursue any subject beyond the basic level;

4. legal research and learning could suffer if highly qualified lawyers were less attracted to teaching because they could only teach basic courses and could not pursue advanced work in their fields of interest with students; and

5. if pre-law training was reduced to two years and articling was dropped, the programme further shortened by a two-year law course would lead to a drop in the educational standard and quality of lawyers.

Nevertheless, the Committee suggested another way to limit the length of time to obtain an LL.B. degree to five years in its recommendation of the possibility of joint five-year programmes leading to an LL.B. with or without a second general arts, science or commerce degree at the end of three years. Two criticisms raised by the faculties of arts and sciences were the double counting of courses and the lack of control they would have over the content of law courses given at the law faculties. In spite of these criticisms, the obvious benefit of inter-disciplinary study in meeting the complex problems of today's society together with the benefit of a shortened programme moved the Committee to recommend such programmes be undertaken on an experimental basis.

The period of service under articles deserved and received the most attention by the Committee. The increased enrolment at Osgoode Hall as a result of affiliation with York University and the establishment of a law school at the University of Windsor resulted in a much higher number of graduates seeking articling positions. The resultant shortage of available articling positions was further aggravated by the increased use of law clerks whom some lawyers felt could do the work students had done at lower cost. An articling student may thus represent an additional expense to the principal who uses the student out of a sense of duty to the profession. At the same time, the lower income received during this articling year represents a cost to the student.

In addition to the problem of shortage of articling positions, a substantial proportion of students had serious criticisms of the quality of articling. No formal supervision of the standards of office training is undertaken by

the Law Society except the distribution of a 'Student's Pocket Handbook' which is merely a checklist and is ineffective to correct deficiencies and define standards.

Any means of enforcing universal standards of office training was rejected by the Committee for the following reasons:

1. such a system would be difficult to police or monitor;
2. any system of examination of principals would be costly and ineffective; and
3. determination and enforcement of standards would jeopardize the goodwill that existed between the Law Society and its members.

The report indicated that a lack of articling positions led an increased number of students to seek articling positions with lawyers in highly specialized practice, such as various government departments. Such training is less likely to allow students to obtain the general competence in practice that articling was designed to provide.

The Committee examined and rejected various proposals to increase substantially the number of articling positions, including the method used by the Treasurer in 1971. In that year, the Treasurer made an appeal to lawyers to take students under articles if they could possibly do so. The Committee felt that the lawyers who responded only out of a feeling of responsibility to the profession would be ineffective as principals compared with those firms who view students as part of their normal office complement and are experienced with them. The only proposal the Committee found feasible to increase the number of articling positions was to reduce the articling term to six months. Possible criticisms of such a reduction include: reduction in effective time to the principal due to the effort

required to introduce each student to elementary procedures and practices every six months; the lack of continuity with files the student is working on reduces his usefulness and minimizes the value of his experience; disruption of firm-originated training programmes; and the possibility that principals who lacked enthusiasm with the present system would drop out of a shortened system. The Committee further commented that the application of a shortened term would require some students to attend the teaching portion of the Bar Admission Course before articling. Such students would likely appear superior to students who articled directly after completing law school.

The concept of a 'conditional call' as considered by the Federation of Law Societies of Canada was also rejected by the Committee. By this system a student, after attending the instruction portion of the Bar Admission Course, would receive a qualified licence to practise and would only receive an unqualified licence upon completion of a period of experience under supervision. The pressure would then be on the final job market as no young lawyer could gain ultimate qualification without being employed as a junior lawyer in a firm. As well, a conditional call could do nothing to improve the unevenness of the articling experience.

Accordingly, the Committee, while endorsing the concept of legal education which includes a period of office training recommended removing the articling requirement because it felt that the period of articles of clerkship could not be conducted satisfactorily. The recommendation to eliminate articles was coupled with a proposal to improve the teaching portion of the Bar Admission Course to prepare students for the general

practice of law. The improved course would be a pragmatic functional course that would stress basic and practical familiarity with the main areas of practice. Transitional provisions were recommended to facilitate the influx of lawyers into the job market over the first year of implementation of the recommendations.

In its last recommendation, the Committee took the opportunity to emphasize the importance of the training of professional responsibility and ethics within the law schools and at the Bar Admission Course. It was the feeling of the Committee that the approach to these topics had been haphazard and a concerted effort was needed in this field in light of the role lawyers are expected to play in society.

IV.3 AFTER THE MacKINNON COMMITTEE REPORT

The Committee's Report attracted a great deal of attention both from within and without the profession. In March of 1973, the benchers met with representatives of the county and district law associations, the Lawyers' Club, the Advocates' Society, the Women's Law Association and the Ontario Branch of the Canadian Bar Association. At that meeting it was made clear "the profession as a whole was opposed to the abolition of the articling system because they felt that experience in a law office forms an indispensable part of a legal education".[124] At a Special Convocation called on 9 March 1973 to consider the Report, all recommendations were adopted with a few minor qualifications except the one with respect to articling which was reserved and finally rejected.

IV.4 ADMISSION TO THE LAW SOCIETY

Control of admission to the practice of law in Ontario lies with the benchers of the Law Society through section 10 of The Law Society Act (the "Act") which 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."

In addition to its power to regulate admissions, section 52 gives the Law Society power to maintain the Bar Admission Course and to grant degrees in law. Convocation has further power to make rules relating to procedures for the call to the bar of barristers and the admission and enrolment of solicitors, defining and governing the employment of student members while under articles, and governing degrees in law. Subject to the approval of the Lieutenant Governor in Council, Convocation may also make regulations respecting the admission, conduct and discipline of student members and, more generally, respecting legal education, including the Bar Admission Course. Accordingly, it is clear that, while it may appear the University Law Schools control legal education, the potential for reasserting direct control lies with the Law Society. By controlling admission to the Bar Admission Course, the Law Society also retains indirect control over the law school's curricula and the law student's programme at law school.

Membership in the Law Society is restricted to Canadian citizens or other British subjects. The historic reason for this requirement has been the fact that, as officers of the Queen's courts, lawyers are required to swear allegiance to the sovereign. Critics of this requirement challenge the relevance of the oath as well as the requirement of Canadian citizenship.

The 1970 Act for the first time incorporated a requirement that applicants for admission be "of good character". This section replaced the informal requirement that applicants file character references. The potential for abuse in the administration of this section is controlled to some extent by the remaining subsections of section 27 which state that "[n]o applicant for admission to the Society who has met all admission requirements shall be refused admission". In support of this statement, an applicant cannot be refused admission without an opportunity to be heard before a committee of benchers and a statement of the reasons of refusal. The written reasons of refusal provide a check where refusal is based on lack of good character. However, failure to provide an appeal from the refusal of admission makes it difficult for the applicant to challenge the refusal.[125]

The Regulation to The Law Society Act provides for three modes of admission, namely, admission through the Bar Admission Course, admission by transfer, and the special admission of law teachers.

IV.4(1) Admission through the Bar Admission Course

The academic qualification for the Bar Admission Course as a student-at-law is graduation from a law course in a university in Canada which is approved by Convocation. To gain approval by Convocation, the law school must have, in addition to the other requirements, the following rules as to admission and course structure. A candidate for admission to the first year of the course leading to the Bachelor of Laws must have a degree from a recognized university or at least two years academic work in a recognized university after completing Senior Matriculation or its equivalent. In

response to the MacKinnon Committee recommendations, most faculties encourage mature students to enter by recognizing experience or exceptional circumstances in lieu of fulfilling the strict academic requirements and encourage native Canadians to pursue legal education by relaxing admission requirements for them. The increase in the ratio of applications to available positions had led to a gradual increase in the academic requirements to gain admission. Universities have also turned to the Law School Admissions Test as a means of trying to distinguish between applicants.

The course leading to the Bachelor of Laws degree requires full time attendance for three years. An academic year is composed of thirty teaching weeks with fifteen hours of courses per week exclusive of examinations. Apart from a set of core subjects[126] that are prescribed by the Law Society, a student may complete his course with any subjects allowed by the law school. The core subjects are: civil procedure, constitutional law of Canada, contracts, criminal law and procedure, personal property, real property, and torts. Subject to modifications permitted by the Law Society in exceptional cases, every student-at-law must complete the Bar Admission Course within five years from graduation from law. The Bar Admission Course, as structured at present, consists of service under articles of clerkship for twelve consecutive months within the eighteen-month period preceding entry into the teaching part of the Course. Although the student must file an affidavit of service and his principal must file a certificate with the Registrar of the Bar Admission Course upon completion of service, the Law Society does not supervise or approve either the law firm or the articling student's performance. The teaching part consists of practical training, lectures and tutorial groups for a period up

to six months. One to three week courses are given over the six month period in real estate, tax, corporate and commercial law, civil and criminal procedure, creditor's rights, wills and the administration of estates, family law, legal aid, accounting and law office management. Until 1977, a student who had obtained a sixty per cent average and had passed at least eight examinations was entitled to be called to the bar. Students of the 1977-1978 Course must pass all their examinations.

In his address to the Conference on the Professions and Public Policy in October 1976, Mr. Justice Horace Krever of the Supreme Court of Ontario made the following assessment of the Bar Admission Course:

> "The unevenness of the articling experience is a matter that has been acknowledged publicly and that qualification to practise law does not, as the articling system assumes, necessarily qualify the practitioner to properly instruct or train students-at-law needs no proof. The articling experience is entirely unsupervised by the Society and is universally conceded to be much longer than necessary for proper instruction. The teaching portion of the Bar Admission Course - the six-month period of intensive classroom instruction by practising lawyers, intended to compensate for the unequal nature of the articling experience operates, even though now decentralized by the establishment of courses at Ottawa and London, under the handicap of large numbers of students, a curriculum which is essentially the same as that with which it began in 1957, course content which duplicates university law school courses and no expertise or effective mechanism for reviewing curriculum policy except for the full-time Director and his dedicated staff who are so fully occupied with day-to-day functioning of the course as to have no time to devote to policy development."

IV.4.(2) An Alternative Approach to Legal Education

The latest flurry of activity with respect to legal education was prompted by an expression of "personal views" by Kenneth Jarvis, Q.C., the Secretary of the Law Society.[127] He suggested that some of the problems with respect to legal education could be solved by adding the following four courses:

evidence, wills and trusts, agency, and company law to the core subjects required and allowing students who intend to practise to complete the core subjects in two years[128] or by designing a four-year course of combined Arts and core legal subjects leading to a single degree of honours B.A. in law. In either case, students would then be eligible to become student members of the Society and embark upon their articles. It would still be open to students to take complete law degrees or other higher education before articling. Mr. Jarvis suggested an articling period of at least twelve months and students at the outset would receive the written materials now available at the Bar Admission Course. Students, with the aid of tutors made available by the Law Society, would cover the materials in addition to their responsibilities to their principals. To be a principal, the practising lawyer would have to have a broad enough practice to ensure adequate training. At the end of the twelve months of articling, the students would sit examinations for call to the bar. Rewrites would be permitted as well as splitting the examinations between two sittings. Examinations would be held quarterly and the student would continue to serve under articles between quarters. Mr. Jarvis also suggested the use of similar examinations to earn accreditation as a specialist.

The Legal Education Committee of the Law Society continues to consider the problems of legal education in an effort to resolve them.

IV.5 ADMISSION REQUIREMENTS - POLICY OF ONTARIO LAW SCHOOLS

The Council of Ontario Universities (the "Council") undertook in 1974 a study of enrolment policies and practices in Ontario law schools.[129] The study arose initially out of concern over the selection procedures used when making offers of admission for those professional undergraduate programmes for which positions are seriously over-subscribed by qualified applicants. The proposed areas for study were the following:

1. review of public admissions policies of the Law Schools from calendars, widely distributed pamphlets, and official publications of the profession;

2. interviews of admissions officers to determine to what extent the published policies required interpretation in their application;

3. collection of statistics on raw numbers of applications, numbers of immediately qualifiable applications, numbers of applications for which qualification may be obtained in a reasonable time, numbers of unqualified applications, by source of application (university, mature students, etc.);

4. collection of statistics on raw numbers of acceptances, number of acceptances without qualification, with qualification, numbers of acceptances for which there was no registration;

5. various analyses of acceptance characteristics - test scores, grade point averages, degrees, etc., including tests of significance of the characteristics in determining acceptance;

6. interviews with admissions officers to determine criteria used in adjudication of borderline cases; and

7. comparison of admissions patterns to model patterns that might be inferred from the published policies and descriptions of types and degree of deviation from expected patterns.

From these data the Council hopes to establish a pattern of application to law school, the character of the applicant, the criteria of the law school to accept or reject the applicant, and a geographic distribution of the applicant and registrant categories. The statistical report is not yet available. The data were collected in 1974-75 based on 1973 and 1974

applications. The Council has decided to withhold any policy recommendations until they receive reactions from the universities to the data. Furthermore, because there have been policy changes since 1973-74, some of the proposed recommendations may no longer be relevant.

A subcommittee of the Legal Education Council, chaired by Professor Peter Maddaugh of Osgoode Hall Law School, is planning to review the present admissions policy of the six Ontario law schools based on the statistical data from the Council of Ontario Universities with a view to recommending an integrated admissions policy.

IV.6 ADMISSION OF LAW TEACHERS

A dean or full-time member of a faculty of an Ontario law school may be called to the bar or admitted as a solicitor in the discretion of Convocation pursuant to section 9 of the Regulation which reads as follows:

> "(1) The dean of a law school in Ontario that is approved by Convocation, upon application after he has entered upon the second consecutive year in that position, may, in the discretion of Convocation, be called to the bar and admitted as a solicitor without examination.
>
> (2) A full-time member of the faculty of a law school in Ontario that is approved by Convocation, upon application after he has entered upon the third consecutive year in that position, may, in the discretion of Convocation, be called to the bar and admitted as a solicitor without examination."

IV.7 ADMISSIONS BY TRANSFER

(1) Applications from other Canadian Provinces

Sections 3 and 4 of the Regulation to The Law Society Act provide for

admission to the Law Society by transfer of applicants who have been in the active practice of law in one or more common law provinces or territories of Canada for at least three out of the past five years. The applicant must file a certificate of good standing from the governing body of the legal profession in the province in which he is practising at the time of the application. In addition, he or she must pass the prescribed examinations on the statutes of Ontario and procedure in Ontario. Also, the applicant must provide evidence of the times and places where he or she has been engaged in active practice of law. Transferees from the Province of Quebec must pass an additional comprehensive examination on the common law of Ontario. Applicants from Quebec who have been in practice less than three years must complete the Bar Admission Course before being called to the Ontario bar and must complete a one-year conversion course in common law before being admitted to the Bar Admission Course. While the wording of sections 3 and 4 requires the recommendation of the Admissions Committee before the applicant can be called to the bar, section 27 of The Law Society Act which prohibits refusal of an applicant who has met all the admission requirements suggests that the recommendation cannot be refused arbitrarily. Upon payment of the prescribed fees, the transferees are called to the bar and enrolled as solicitors.

(2) Applications from Outside Canada

By sections 5, 6, 7 and 8 of the Regulation to The Law Society Act which prescribed conditions whereby applicants from the United Kingdom, other Commonwealth countries and the United States could be admitted to the Bar Admission, the Law Society controlled admissions of this category of

entrant. However, these sections were revoked in 1975. Applicants must now apply to join the stream leading to call to the bar by entering an approved law school either in the first year or with whatever advanced standing the law school is prepared to grant on the basis of the particular applicant's own academic and practical training and experience. Having obtained the approved LL.B. degree applicants then enter the Bar Admission Course with those whose whole training has been in this jurisdiction. A difficulty exists with respect to those whose qualifications are highest. Though they inevitably lack Canadian content if their academic studies have been pursued abroad, they may now be able to obtain an approved Canadian LL.B. degree because they do not require having further training to warrant a Canadian university granting its degree.

This had led to the formation of a joint committee of the Canada Law Deans and the Federation of Law Societies to study and recommend a strategy for the establishment of a single accrediting body to develop expertise in evaluating foreign qualifications. It has been suggested that this authority be located in Ottawa, available to both civil law and common law schools.

IV.8 ADMISSIONS FOR OCCASIONAL COURT APPEARANCES

In order to accommodate a member of the legal profession from outside Ontario who wishes to appear as counsel in a specific proceeding, section 10 of the Regulation provides that any such person may, in the discretion of Convocation, be admitted to membership in the Law Society and called to the bar and admitted as a solicitor upon giving an undertaking that he

will not otherwise engage in the practice of law in Ontario. Upon completion of such proceeding, he is deemed to have applied for permission to resign from the Law Society. Rule 56 permits such person, with the consent of the Treasurer and of the court or judge before whom he is to appear, to appear as counsel in a specific civil or criminal proceeding in a court of Ontario or before a provincial judge and in any matter incidental to that proceeding or matter.

IV.9 ADMISSION STATISTICS, FAILURE AND ATTRITION RATES

The six Ontario Law schools provided admissions information and failure and attrition rate statistics for the three years of law school. Table IV.1 indicates the admissions requirements for the law schools. Table IV.2 shows the failures and attrition rates and the class sizes for 1975/1976.

IV.10 THE COMBINES INVESTIGATION ACT[130]

Sections of the Regulation to The Law Society Act prescribe requirements for entry. These should be read subject to section 32(6) of The Combines Investigation Act which provides as follows:

> "In a prosecution under subsection (1), the court shall not convict the accused if it finds that the conspiracy, combination, agreement or arrangement relates only to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public,
>
> (a) in the practice of a trade or profession relating to such service; or
>
> (b) in the collection and dissemination of information relating to such service."

ONTARIO LAW SCHOOLS

ADMISSIONS

(Source: Correspondence with Law Schools)

CATEGORIES	QUEEN'S UNIVERSITY	UNIVERSITY OF OTTAWA	UNIVERSITY OF TORONTO	UNIVERSITY OF WESTERN ONTARIO	UNIVERSITY OF WINDSOR	YORK UNIVERSITY (OSGOODE)
REGULAR	75/76 ACADEMIC - 77% (LSAT) - 540	PRE-LAW - 5/6 LSAT - 1/6 WEIGHTED 75% AVERAGE 75/76	75/76 ACADEMIC - 79% LSAT 656	75/76 75% 1st 2 76/77 76% LSAT - 530	75/76 PRE-LAW 2/3 LSAT 1/3 WEIGHTED 75% AVERAGE	COMPUTERIZED RANKING OF AGGREGATE ACADEMIC AND LSAT SCORE
MATURE			75/76 27/162 STUDENTS 5 YEARS NON-ACADEMIC EXPERIENCE	28 YEARS OLD WORK HISTORY LSAT 2 YRS. UNI-VERSITY	ACADEMIC AND OCCUPATIONAL EXPERIENCE	PERSONAL INTERVIEWS 10% OF 1st YEAR CLASS
NATIVE			75/76 1st NATIVE STUDENT	AGE, MATURITY OUTSTANDING QUALIFICATIONS PERSONAL INTER-VIEW -ATTENDANCE AT PROGRAMS LEGAL STUDIES NATIVE PEOPLES COLLEGE OF LAW, UNIV.OF SASK.	2 YRS. COLLEGE LSAT 8 WKS. COURSE FOR NATIVE PEOPLES SASKATCHEWAN	ADVERTISE IN ETHNIC PRESS
OUT-OF-PROVINCE		EACH CASE ON ITS OWN MERITS	1 YR. ADVANCED STANDING			

TABLE IV.1.

TABLE IV.2.

O N T A R I O L A W S C H O O L S

FAILURES AND WITHDRAWALS (Source: Correspondence with Law Schools)

	QUEEN'S	UNIVERSITY OF OTTAWA			UNIVERSITY OF TORONTO			UNIVERSITY OF WESTERN ONTARIO			UNIVERSITY OF WINDSOR			YORK UNIVERSITY (OSGOODE)		
		1	2	3	1	2	3	1	2	3	1	2	3	1	2	3
FAILURES																
1975/76	"negligible"	13.3	2.3	1.5	3.1	0.7	1.3	1.3	0	0	10.4	3.6	0.6			
1974/75		2.2	3.6	0	1.3	2.0	0	5.1	1.4	0	6.3	2.9	0.8			
1973/74		13.8	0	0				4.0	0.7	0.8	12.5	3.7	0			
WITHDRAWALS																
1975/76					3.1	2.6	2.0	2.6	1.3	0						
1974/75					6.9	0.7	0	3.1	.7	0						
CLASS SIZES																
1975/76		180	173	138	162	154	152	156	157	141	192	166	166			

IV.11 CONTINUING EDUCATION

There is no obligation on lawyers to participate in continuing education beyond the call to the bar. However, both the Law Society and many of its members recognize the need for updating their knowledge in the areas in which they practise. Accordingly, the Law Society has attempted to offer many and various courses not only to bring new legal developments into focus but also to refresh practitioners on finer points of law and practice that may have been lost through time.

During 1976, in the field of continuing education, the Law Society presented thirty-four one-day programmes of which nine were offered in Ottawa, as well as twenty-seven seminars of which ten were offered in centres outside Toronto. In addition, there were three extended programmes at Osgoode Hall, namely, a two-day programme in New Developments in Communication Law in June attended by one hundred and eleven registrants, a five-day course in Family Law attended by one hundred and seventy-eight registrants and a five-day programme in Advocacy in Civil Litigation attended by three hundred and forty-nine registrants.[131]

The Law Society also lends its continuing education services to the Federation of Law Societies which held two courses during 1976 on criminal law which attracted in total three hundred and twenty-one lawyers from across Canada. The Law Society has also participated in the deliberations of a joint committee of the Federation and the Canadian Bar Association formed to consider the problems of continuing legal education on a national scale.

In addition to conducting courses, the Law Society also publishes and distributes continuing legal education materials.

Members of various voluntary associations such as Canadian Bar Association sections, County Law Associations and the Advocates Society help lawyers keep abreast of changes in more informal ways.

IV.12 SPECIALIZATION IN THE LEGAL PROFESSION

The real issue with specialization in the legal profession in Ontario is not whether there is to be specialization, for specialization is a fact of life, but rather whether there should be express recognition of specialists through official certification.

The omniscient, omnicompetent lawyer is a thing of the past, if he ever did exist. Accordingly, many lawyers have chosen fields of specialty. For others, areas of practice have been delineated by the interests of their clients. "The Specialist by experience acquires an expertise in his restricted area of law which enables him to produce the legal service required more or less as a routine without the investment in time and research that is necessary for the general practitioner."[132]

The data available on specialization in Ontario come from two studies not specifically directed at that issue. Arthurs, Willms & Taman,[133] in their random survey of 125 Toronto lawyers in 1971 found that 72% were restricting their practice to chosen fields. The study showed that 58% of the lawyers were spending more than 70% of their time in one field of law or their

full time in one or more fields. Province-wide statistics as gleaned from the MacKinnon Committee questionnaire answered by 4,411 Ontario lawyers in 1972 showed approximately 50% of lawyers specializing.[134] The results were as follows:

Categories	Percentage Responses
General Practice	49.9
Specializing in:	
Criminal Law	3.4
Civil Litigation	7.5
Corporate Law	5.5
Commercial Law	2.8
Real Estate	3.5
Taxation	1.2
Estates	.9
Family Law	.4
Administrative Practice	1.1
Labour Relations	1.0
Industrial and Intellectual Property	1.2
Admiralty Law	.0
Corporate and Commercial Law	1.9
Criminal Law and Civil Litigation	1.1
Other Specialties	13.8
Not Directly Connected with Law or Practice	3.7
No Response	1.1

Further specialization is indicated in the response to another question which showed approximately 1.4% of those who responded were law professors, 4.4% were employed in government services and 3.6% worked in corporate law departments.

The problem for the de facto legal specialist lies in receiving official certification and, more importantly, being able to advertise his specialty. At present, the rulings in the Professional Conduct Handbook of the Law Society prevent the specialist from using this designation. Rulings 1 and 3 contain general bans on solicitation of business or advertising. Ruling 1 adds that "[t]he best advertisement for a lawyer is the establishment

of a well merited reputation for personal capacity and fidelity to trust". There is a prescribed content for signs and letterheads, (Ruling 10), and directories, announcements and professional cards, (Ruling 16), and any reference to the term "specialist", except patent agent or attorney, is specifically excluded.

Restrictions in any reference to a lawyer as a specialist are also established with respect to the description of lawyers as authors in non-legal publications, (Ruling 23), and on the occasion of public appearances, (Ruling 30). Professional qualifications and biographical facts may be stated in legal periodicals which are likely to be read exclusively by lawyers. Ruling 24 deals specifically with specialization and reads as follows:

> "A solicitor may not, by published notice or otherwise, describe himself as a "specialist" in any branch of law or knowingly permit himself to be so described.
>
> A number of announcement cards that are objectionable on this basis have come to the attention of the Committee. They announce, for example, that "Mr. X will be associated with the firm 'specializing in industrial relations' or 'taxation matters'."
>
> On the other hand, if a solicitor has confined or restricted his practice to a certain branch of law, there is no objection to his announcing this in such terms or to his permitting himself, if the occasion requires it, to be described as having done so." (emphasis added)

The last paragraph of the ruling is ambiguous in the use of the words "if the occasion requires it". Without further clarification on this section, it is difficult to determine exactly how a lawyer can identify at present his specialty.

The Law Society had recognized the educational needs of specialists and attempted to respond to the needs for identifying specialists. Through

its continuing education programmes, the Law Society attempts to update and reinforce the knowledge of specialists within particular areas of the law. Since 1970 the Law Society has been operating a Lawyer Referral Service (see section IV.11 for more complete description). Lawyers may select three of eight specialties as areas in which they are capable of providing legal advice. Since the initial experience requirement has been dropped, the Service allows a lawyer to designate himself or herself a specialist. To some extent the Legal Aid Plan also categorizes lawyers on the Legal Aid Panel according to specialties.

While the issue of specialization has been a concern in the United States since 1953, it was not until 1972 that the issue of certification was discussed in Canada. Prompted by a series of editorials calling for some system whereby lawyers could identify better the legal services they provide, the Law Society appointed the Special Committee on Specialization in the Practice of Law (the "Committee") under the chairmanship of W.Z. Estey. There appeared to be a public demand for accessibility to experts who would provide high quality service. It was suggested that specialization would result in higher educational standards of the profession and increased efficiency of lawyers.

The Committee analyzed the problems involved in the plans in effect in California and New Jersey. They also received submissions from governing bodies in other Canadian provinces. The Committee recognized that "[i]n most, if not all [identifiable branches of the law], formidable bodies of technical information have been developed which demand considerable expertise on the part of the practitioner."[135] They reviewed the public

demand for specialization and debated the methods of achieving this status, including allowing members to designate themselves as specialists.[136] In rejecting the system of self-designation by specialists, the Committee acknowledged that "the public must have the assurance that those who are held out to be specialists have undergone suitable training and testing and that their claims to expertise are subject to appropriate controls on a continuing basis". The report of the Committee, dated 9 November 1972, containing a programme for specialization on the California model to be administered by a special committee was adopted in principle by Convocation.

The Committee suggested that specialization should follow a period of practical experience and concentration in the areas selected. Accordingly, to obtain a specialist's certificate, an applicant would have to prove five years of substantial devotion to a specialty and then pass approved courses given at law schools and the Bar Admission Course facilities. To maintain the title, specialists would be required to attend and pass examinations in prescribed courses. However, the Committee rejected compulsory periodic re-examination or recertification. In the first two years of the programme, the Law Society was prepared to recognize "grandfather" certification without formal examination of those who had been in practice ten years and had substantially devoted themselves to practice in the field of specialty. Multiple specialties, to a maximum of three areas, would have been permitted. Certified specialists would then have been allowed to identify their specialty on professional cards, letterheads, professional signs, telephone directories and other approved publications.

Throughout the report, the Committee emphasized the "crucial importance that the general practitioner remain both numerically and influentially the dominant factor in the profession". Several steps were taken to avoid endangering the future of the generalist. The training of the specialist must be additional to general training. General practitioners could practise in all fields including those in which specialist qualifications exist. Likewise, specialists could continue in general practice outside their specialty. Lastly, the Committee anticipated changes to the rules of professional conduct to prevent a specialist from expanding his relationship with a client beyond the scope of his specialty when the client had been referred to him by a generalist. Whatever impact specialization would have on raising the standard of care expected from experts practising their specialties would be left to evolve through the Courts.

The Committee suggested criminal law, bankruptcy, admiralty and labour law as the first areas of specialization. Developing specialization at the federal level would not only promote mobility of specialists but also would allow governing bodies to share the high cost of implementing the plan. Concurrent interest was shown in the topic by Alberta,[137] British Columbia,[138] the Federation of Law Societies of Canada,[139] and the Canadian Bar Association.[140] All bodies recommended a trial run in a few areas within the competence of federal legislation.

The Committee on Specialization of the Canadian Bar Association (Ontario Branch) (the "Bar Committee") formed to consider the Estey Committee report requested that the Law Society give their committee an opportunity to consider the matter. The Bar Committee was "not convinced that there

either exist[ed] a public demand for the accreditation of specialists in the legal profession or that the public would be better served by such accreditation".

In the background paper[141] to its report, the Bar Committee saw difficulty in determining the amount of concentration to be expected by a lawyer in an area before he could prove substantial devotion. Further difficulty was noted with respect to determining the standard of competence to be expected from a specialist. The Bar Committee criticized the "grandfather" clause, not only because it would create a large number of potential grandfathers, but also because experience is not necessarily synonymous with competence. The Bar Committee, while agreeing with the use of areas within federal competence for the pilot project, disliked the choice of subjects, commenting that client demand should be the main criterion for establishing specialties. The Bar Committee was critical of the Law Society's failure to establish safeguards to protect the general practitioner from loss of clients which constitutes the real threat to the existence of the generalist. The Committee saw as a distinct disadvantage of accreditation the real possibility that fees would increase by specialists trying to recoup the cost of extra training. The real concern was whether the service of the specialist would be proportionately superior. The Bar Committee recommended that the Law Society not proceed with the specialization plan until an in-depth study had been done to determine the public need for specialist certification and to determine whether there were other alternatives to meet that need.

No immediate action was taken by the Law Society to implement the

recommendations. While the problems in relation to identifying specialties to the public still exist, some leeway has been given by the Law Society in the area of advertising. In its Communiqué[142] of 25 June 1976, the Law Society notified its members that lawyers and law firms who restrict their practice to particular areas of law may apply to the Professional Conduct Committee to use the words "practice limited...." on their letterhead. Lawyers may now also indicate a practice-limitation reference on their business cards without application. This recent move by the Law Society was discussed by Mr. V.P. Alboini in "A Lawyer's Limited Practice in Ontario - The Time for More Appropriate Recognition".[143] Mr. Alboini recommended a programme of recognizing persons who do, by the devotion of their practice to limited areas, specialize, and allowing such persons to advertise in a restricted way. Such a programme, based on experience alone, avoids the problem of requiring a governing body to certify a lawyer as competent before his specialty can be recognized.

Renewed interest in specialization led to a revival of the Law Society's Special Committee on Specialization. In its report of 20 January 1977, the Committee stated that there was a negative reaction by the profession to its 1972 recommendation of a plan to certify true specialists and that this attitude had not changed. However, in recognizing the demand "to provide a way for members of the public to be able to select a lawyer who is ready and able to handle their particular problems", the Committee recommended a scheme for "accrediting" lawyers in various fields and permitting them to inform the public through the yellow pages of the telephone book, their professional cards and letterheads, of the areas in which they practice. The Committee tried to emphasize the distinction between

accreditation and true specialization in that the latter represents an exceptionally high standard of legal expertness through a combination of intensive experience and outstanding ability in a narrow field of law, whereas the former signifies competence only in broader areas of law. The Committee emphasized the importance of keeping the distinction clear in the minds of the public. In summary, the scheme as approved by Convocation in principle and circulated to the profession for comment is the following:

1. applicants for accreditation would file a statement showing that at least fifty per cent of their time over a three or five year period had been spent in a particular area of law. The Law Society does not propose at this time to examine or investigate these qualifications;

2. maintenance of accreditation would require attendance at a refresher course at least once in each successive two year period following accreditation. Initially shorter courses of one or two days duration would be offered every six months;

3. no examinations would be required initially; however, the possibility of examinations was suggested as the plan matures;

4. the Committee looked to the profession for help in establishing the categories of accreditation;

5. the Committee recommended wide publication of the purpose of the plan to allow lawyers to inform the public of areas of practice where they have at least minimum competence and experience and to improve standards of practice emphasizing that the Law Society was not accrediting experts;

6. each category of accreditation should be under the supervision of a committee of knowledgeable practitioners who would be responsible to the Legal Education Committee for exercising general surveillance over the qualifications of the accredited group and aiding in the content and delivery of the refresher courses;

7. the costs of the accreditation programme would be covered in fees for prescribed courses;

8. continuing Education Courses could be enlarged to provide more intensive instruction than provided in the refresher courses; and

9. the Committee did not fully explore the need for changes in the governing legislation.

V. ETHICS AND DISCIPLINE AND CIVIL LIABILITY

The right to self-government by the professions carries with it a responsibility to establish and maintain ethical standards to protect the public interest. This responsibility is spelled out in section 55(4) of The Law Society Act which requires Convocation, with the approval of the Lieutenant Governor in Council, to make regulations "authorizing and providing for the preparation, publication and distribution of a code of professional conduct and ethics". The requirement of Cabinet approval for the code of ethics is new to The Law Society Act, 1970. The Professional Conduct Handbook* was issued by the Professional Conduct Committee with approval of Convocation in 1964 prior to this requirement.

Apart from Ruling 1 which adopted important canons of ethics from the Canadian Bar Association Code of Ethics passed in 1920, the Professional Conduct Handbook is composed of rulings made by the Professional Conduct Committee on questions of ethics addressed to them. The Handbook is not intended to be exhaustive. Its contents provide indicative guidelines rather than definitive standards of conduct. As such, the rulings present an incomplete picture of the ethical requirements of lawyers because not all the rulings of the Professional Conduct Committee are published. However, the rulings, by representing ongoing decisions of the Professional Conduct Committee, can reflect changes in standards of ethical and professional conduct. The Professional Conduct Committee is working to integrate the Canadian Bar Association's Code of Professional Conduct (the "Code"), which has been approved in principle by Convocation, with the Law Society's existing handbook. To some extent, the adoption of the more extensive canons of ethics of the Canadian Bar Association Code will

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* See now the Law Society of Upper Canada's Revised Professional Conduct Handbook, 1978.

give a lawyer a clearer indication of suggested ethical standards. However, the profession and the public should have complete access to the Professional Conduct Committee Rulings which represent interpretation of these canons. Until the new code is completed, the Professional Conduct Handbook continues in force.

Because the code of ethics is germane to many issues in this paper, the relevant rulings are discussed more fully under other headings. However, an overall view of the rulings, as well as a brief discussion of the contents of the Professional Conduct Handbook, helps to set the stage for a close look at discipline in the legal profession.

Ruling 1 spells out generally the responsibility of a lawyer to the state, to the court, to the client, to fellow lawyers and to himself or herself. Several rulings are directed at preventing potential conflicts of interest. Ruling 2 prohibits a lawyer from representing two clients whose interests conflict, leaving open the possibility of acting in a situation of potential conflict with the full knowledge and consent of the clients. A rider to that rule is that it is professional misconduct to use or disclose confidential information. Ruling 13 covers conflict of interest with regard to public and other offices. Ruling 35 attempts to avoid any potential conflict that might be created when a judge returns to practice. Other rulings adopted with a view to the public interest are Rulings 14 and 15 which deal with rules with respect to borrowing from clients, and mortgages and other financial transactions involving clients. The rules recognize that the lawyer is in a fiduciary position in relation to his client and he must exercise special care not to abuse that position.

Ruling 15 with respect to lawyers acting as mortgage brokers emphasizes that the lawyer who enters into this form of commercial sideline must not infringe advertising Rulings by his commercial activities.

Further attempts have been made in the rulings to avoid any commercial connotations. For example, use of a firm name containing "and Company" is improper on the ground of the commercial connotation it carries (Ruling 29). Ruling 25 relating to providing legal representation through insurance policies, and Ruling 27 relating to the practice by collection agencies of using the term legal department to add force to their collection letters, are rulings designed to control the use of inferences of legal association by these commercial enterprises.

Two further rulings which clarify a solicitor's duty with respect to personal undertakings (Ruling 7) and financial obligations (Ruling 32) are important to both the public and the profession. The honour of the profession is maintained through the honour of its individual lawyers.

The remaining rulings are largely concerned with restraining entrepreneurial behaviour. Rulings relating to behaviour of lawyers including Ruling 3 on touting, advertising and solicitation; Ruling 10 on signs and letterheads; Ruling 16 on directories, announcements and professional cards; Ruling 23 on legal writing; Ruling 24 on specialization; and Ruling 30 on public appearances. Ruling 8 which prevents a lawyer from inserting a clause in a will requiring him to be the solicitor for the estate is also directed at a lawyer gaining unfair advantage in handling an estate through preparation of the will. In this latter Ruling, the public is also protected by

preserving the right of the executor to select a lawyer of his own choice. Rulings 28, 34 and 31 are directed at division of fees and tariff.

Rulings by the Law Society aimed at preventing unauthorized practice include rulings related to division of fees with non-practitioners mentioned above as well as to the ban on working with disbarred persons without the consent of Convocation.

Rulings of an administrative nature include the duty to notify the Law Society about any instance of professional misconduct by a barrister when such instance involves shortage of trust funds (Ruling 33) and the duty of a member to respond to letters from the Law Society (Ruling 20).

The draft report of the Professional Conduct Subcommittee of July 1976 reviewed section by section the Canadian Bar Association Code. The report recommended repeal of the rulings of the Law Society's Professional Conduct Handbook and, with few exceptions, approved the canons of ethics plus the commentary in the Code as the new rules of ethics for the Law Society. The subcommittee sought to clarify and extend the rules relating to impartiality and conflict of interest, not only between clients, but with respect to the lawyers' own financial and other interests. The changes to the Code suggested by the subcommittee prohibited contingent fees and restricted the broader approach taken by the Code to increasing the availability of legal services through more liberal rules with respect to advertising.

Although the Professional Conduct Handbook contains some important rulings

by the Professional Conduct Committee, case law both in Canada and in England provides some examples of conduct which have been regarded as professional misconduct or conduct unbecoming a barrister and solicitor:

"(a) borrowing funds and giving security and subsequently persuading the creditor to release the security which the solicitor liquidated and used the money for his own purpose;[144]

(b) dating back a quit claim deed to avoid the effect of filing executions under a judgment;[145]

(c) aiding and abetting a director of a company to carry out a scheme to defraud creditors;[146]

(d) writing letters threatening criminal proceedings unless costs and charges are paid;[147]

(e) deliberately allowing a client to file a false affidavit on production;[148]

(f) carrying on negotiations resulting in a breach of trust;[149]

(g) after receiving an agreed fee, making a further exorbitant charge before proceeding with trial or the charging of excessive fees against a client;[150]

(h) operating a debt collecting agency with a view to getting the solicitor's work therefrom;[151]

(i) paying a public officer with a view to being introduced to clients;[152]

(j) writing an insulting letter to the Chief Justice and failing to apologize therefor;[153]

(k) failing to discharge after payment a mortgage held by himself;[154]

(l) procuring money to influence a jury;[155]

(m) being rapacious and dishonest;[156]

(n) preparing for a suitor in person a pleading which he must know is vexatious and shows no cause of action."[157]

It is interesting to note that negligence, even gross negligence, is not in itself a form of professional misconduct.[158]

V.1 DISCIPLINARY POWERS

The Law Society Act, section 55(1), gives Convocation, with the approval of the Lieutenant Governor in Council, power to make regulations respecting conduct and discipline of members and student members. Section 34 provides penalties for a lawyer who has been found guilty of "professional misconduct or conduct unbecoming a barrister and solicitor". At present, the rulings of the Professional Conduct Handbook label actions as being "improper", "objectionable", "professional misconduct", "unprofessional conduct" and "conduct unbecoming a member". Presumably these rulings are intended to tie into section 34, but it is not entirely clear whether or not actions which are merely "improper" or "objectionable" could give rise to discipline. The phrase "professional misconduct" refers to misconduct in the course of a member's professional activity such as in the handling of trust funds. The phrase "conduct unbecoming a barrister and solicitor" refers to private misbehaviour which reflects upon the honour of the bar. Evidence in discipline matters where conduct unbecoming is charged is normally a Certificate of Conviction by a competent authority.

In addition to the penalties for breaches of the Professional Conduct Handbook rulings, lawyers may be disciplined for failure to keep their books, records and accounts pursuant to sections 18 to 22 of the Regulation. These sections set out detailed requirements for the establishment and use of a trust account, and for the maintenance of books, records and accounts in connection with the practice to record all money and other negotiable property received and disbursed. To ensure compliance with these sections, the chairman or a vice-chairman of the Discipline Committee can at any

time require an investigation of the books and accounts of any member by the Law Society's audit staff. Pursuant to section 22 of the Regulation, the solicitor is under a compulsion to produce to the audit staff all evidence, including books, records, paid cheques and vouchers. This investigation may be initiated by the Discipline Committee or by a third party; however, in the latter case, the chairman or vice-chairman of the Discipline Committee may require prima facie evidence that a ground of complaint exists. The Law Society's audit staff conducts unannounced random audits in an effort to locate defaulting members and either improve their methods or initiate discipline proceedings. Special attention is paid to the practices of sole practitioners which have caused proportionately more work for the Discipline Committee. From time to time the Society engages large numbers of outside auditors and conducts a so-called "blitz" examination of the records of all of the members within one large geographical area visiting every office at the same time. In this way, the whole of the City of Ottawa was covered in one day and the City of Toronto in several separate divisions.

Two further sections of The Law Society Act under the heading "Discipline" appear to be misplaced. While section 36 permits the Law Society to suspend the rights and privileges of a member for non-payment of fees, this suspension is an administrative penalty and in no way indicates any culpability on the part of the member. Likewise section 35 is a preventive device which permits Convocation to suspend a member for incompetency due to some mental or physical condition and can be invoked without any breach of rules or the Regulation by the member. Therefore, action taken under section 35 need not be handled as a discipline case apart from

guaranteeing the member his procedural rights. The difficulty with respect to section 35 resulted in consideration of the section by a Special Committee which, in its report of 8 January 1976, recommended the following:

1. inquiries under section 35 be handled by a Committee of Convocation as a whole, rather than the Discipline Committee, preserving, however, the practices and procedures of that committee;
2. The Law Society Act be amended to allow Convocation to require a member under investigation pursuant to section 35 to submit to a physical and/or mental examination with the power of suspension for failure to comply;
3. the word "disciplinary" be deleted from section 33 in recognition of the fact that action taken under section 35 is not disciplinary action.

To date, this report has not been implemented.

The Society has recently disciplined members for incompetence though no specific rule or regulation was breached. The whole question of the maintenance of competence is being considered by the Society. It is clear that members who do not practise in a particular field of law gradually lose their competence in that area and should not advise clients with respect to such matters without first having regained competence. A method is being sought whereby members of the profession will be able to identify to the public the areas of law in which they practised and have maintained their competence. Broader and better programmes of continuing education generally are also being considered.

V.1(1) Disciplinary Proceedings

The Rules of Professional Conduct and the Regulation under The Law Society Act are enforced by the Discipline Committee under the power delegated to it by Convocation in Rule 37. Sections 37 - 49 of The Law Society Act describe the procedure to discipline a member and sections 12 - 15 of the Regulation describe the procedure for investigation and hearing of complaints. The source of complaints dealt with by the Discipline Committee fall into three main categories. The majority of complaints are for breaches of the Regulation as to the keeping of books and records, and the handling of trust funds, and trust property. Complaints may also originate from clients or other lawyers with respect to breaches of ethical standards. The last main source results from conviction of a criminal offence or misconduct disclosed in the course of a Royal Commission investigation.

> "Conviction for a criminal offence prima facie makes a solicitor unfit to continue in his profession, but Convocation generally through its committee should enquire into the nature of the crime and determine whether or not the solicitor's conduct tends to bring the profession as a whole into disrepute."[159]

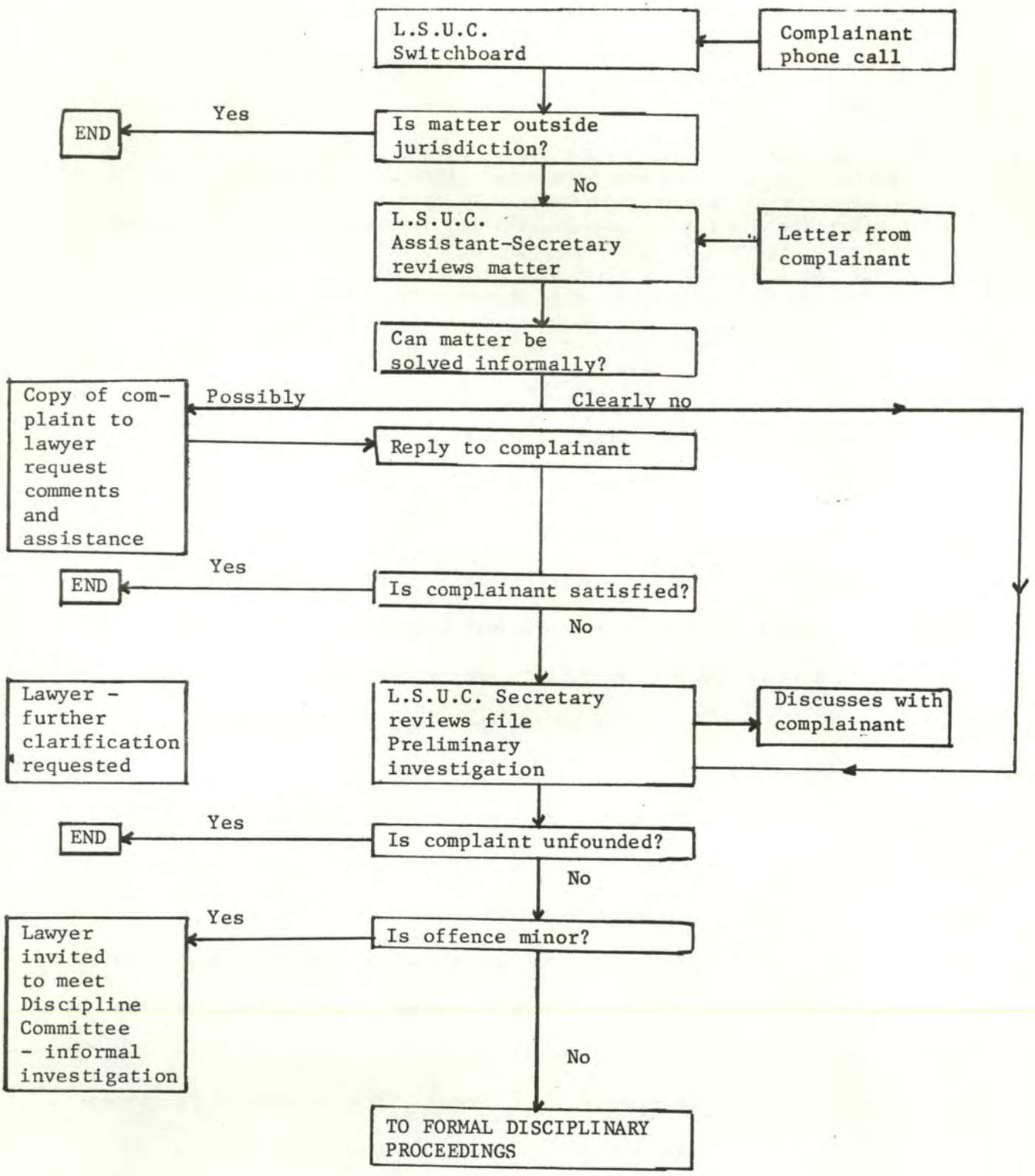
V.1(2) Complaint and Investigation Procedure[160]

When a client calls the Law Society to complain, initially the switchboard screens the call and reviews the matter with the caller to determine if the complaint falls within the jurisdiction of the Law Society. Matters which deserve further attention are transferred to one of four staff lawyers who, as assistant secretaries, discuss the issue with the complainant. The Law Society keeps records of the telephone calls and follow-up procedures. The complainant is urged to reduce his complaint to writing.

THE LAW SOCIETY OF UPPER CANADA

INFORMAL COMPLAINT PROCEDURE

FIGURE V .1



When information of possible misconduct by a member comes to the notice of the Law Society, the Secretary is required by section 13 of the Regulation to investigate. Section 13(1) reads as follows:

> "Where information comes to the notice of the Society that indicates that a member may have been guilty of professional misconduct or of conduct unbecoming a barrister and solicitor, the Secretary shall make such preliminary investigation of the matter as he considers proper, and where in his opinion there are reasonable grounds for so doing, he shall refer the matter promptly to the Committee or the chairman or vice-chairman for further direction."

The usual practice is to send a copy of the letter of complaint to the solicitor concerned. The nature of the complaint determines the kind of reply requested. The lawyer will be invited to give his comments. For lesser complaints, the lawyer may be invited to assist the Law Society in replying to the complainant. In the case of more serious complaints, the lawyer may be asked to furnish a written explanation. A refusal by the solicitor to answer such a letter of request from the Law Society could itself amount to professional misconduct (Ruling 20) and may result in proceedings against the solicitor before the Discipline Committee.

The letter of explanation furnished by the lawyer is sent to the complainant. If the complainant is not satisfied with the explanation, the Secretary will then review the file and the disposition of the complaint by the Assistant Secretary. The Secretary may ask the lawyer for further clarification or speak personally with the client. If the Secretary concludes that the complaint is unfounded, but his disposition is not accepted by the complainant, the matter is referred to a member of the Discipline Committee and if necessary to a meeting of the Policy Section of the Committee for consideration. The Secretary may consult with a member of the Discipline Committee, but because such consultation could disqualify the member of the

Discipline Committee from sitting when the matter is heard formally, the Secretary exercises discretion in seeking advice from members of the Discipline Committee.

Where, as a result of the Secretary's preliminary investigation or otherwise, there is evidence of a minor breach of discipline or evidence that the conduct of the member might result in a breach of discipline, the member may be invited to appear informally before the Discipline Committee at which time the Discipline Committee may conduct an informal investigation and advise the member with respect to the matter (Regulation 14).

However, in the case of more serious charges, section 13 of the Regulation provides a formal procedure for investigating and hearing complaints. If the Secretary is directed by the Discipline Committee to proceed with a hearing before the Discipline Committee, pursuant to section 13, he causes a complaint to be prepared under oath and files it in the office of the Secretary. The member is served with a copy of the sworn complaint, a notice of the time and place of the hearing and a summons to appear thereat (Regulation 13(2)). The Law Society appoints counsel to represent its interests at the hearing.

Sections 33(10) and (11) of The Law Society Act describe the procedure for summoning witnesses and punishing witnesses who fail to appear. If a witness fails to appear or fails to answer questions addressed to him after the offence has been certified by the chairman of the Discipline Committee, proceedings may be taken before the courts for the punishment of the witness to the same extent as if he had been guilty of contempt of court.

The hearing is conducted by a minimum of three benchers excluding ex officio benchers. The conduct of the proceedings is similar to an ordinary trial and by section 33(9) of The Law Society Act, "[t]he rules of evidence applicable in civil proceedings are applicable at a hearing, except that an affidavit or statutory declaration of any person is admissible in evidence as prima facie proof of the statement made therein". The hearing is held in camera except if the member in question formally requests a hearing in public (s.33(4)). If the member fails to appear, the hearing may be conducted in his absence (s.33(3)). If present at the hearing, the person whose conduct is being investigated has the right to be represented by counsel, to adduce evidence and make submissions. Subject to his right to object to answer any question under section 9 of The Evidence Act[161] and section 3 of The Canada Evidence Act,[162] the "accused" member may be compelled to testify. Both the complainant and the lawyer whose conduct is being investigated have the right to examine witnesses and cross-examine opposing witnesses (s.33(7)). Oral evidence submitted at the hearing must be taken down in writing (s.33(8)). Because of the consequences of a guilty finding, the complaint against the solicitor should be proven beyond reasonable doubt.[163] According to section 33(12), the decision of the Discipline Committee must be in writing and accompanied by reasons setting out the findings of fact and the conclusions of law. Within thirty days after the date of the Discipline Committee's decision, the solicitor in question must be served with a copy of the decision and the reasons together with a notice of his right to appeal. In accordance with the McRuer recommendations, section 33(13) requires that any documents to be served must be served personally or by mailing a copy thereof by registered mail to the last known address by the records of the Law Society

not less than ten days before the date of the hearing or event.

> "The Committee's report is carefully prepared and is a review of the whole of the proceedings before it, which generally synopsizes the evidence adduced before the Committee, and sets out the conclusions of the Committee predicated upon such evidence. In the concluding paragraphs of this document, the Committee usually makes a recommendation both as to the verdict and the sanction which Convocation should impose."[164]

If the Discipline Committee finds that a member has been guilty of professional misconduct or conduct unbecoming a barrister and solicitor which, in its opinion, does not warrant more severe punishment, the Discipline Committee may by order reprimand him (s.37). The solicitor may appeal the reprimand to Convocation pursuant to section 40.

Where the Discipline Committee recommends a sanction be imposed by Convocation, the solicitor may by memorandum dispute the finding of fact by the Discipline Committee report. While the solicitor and his counsel are permitted to address Convocation regarding the facts or the suggested sanction to be imposed, it is not the practice of Convocation to hear evidence, however, the matter is referred by Convocation to the Discipline Committee if there is a need for further evidence.

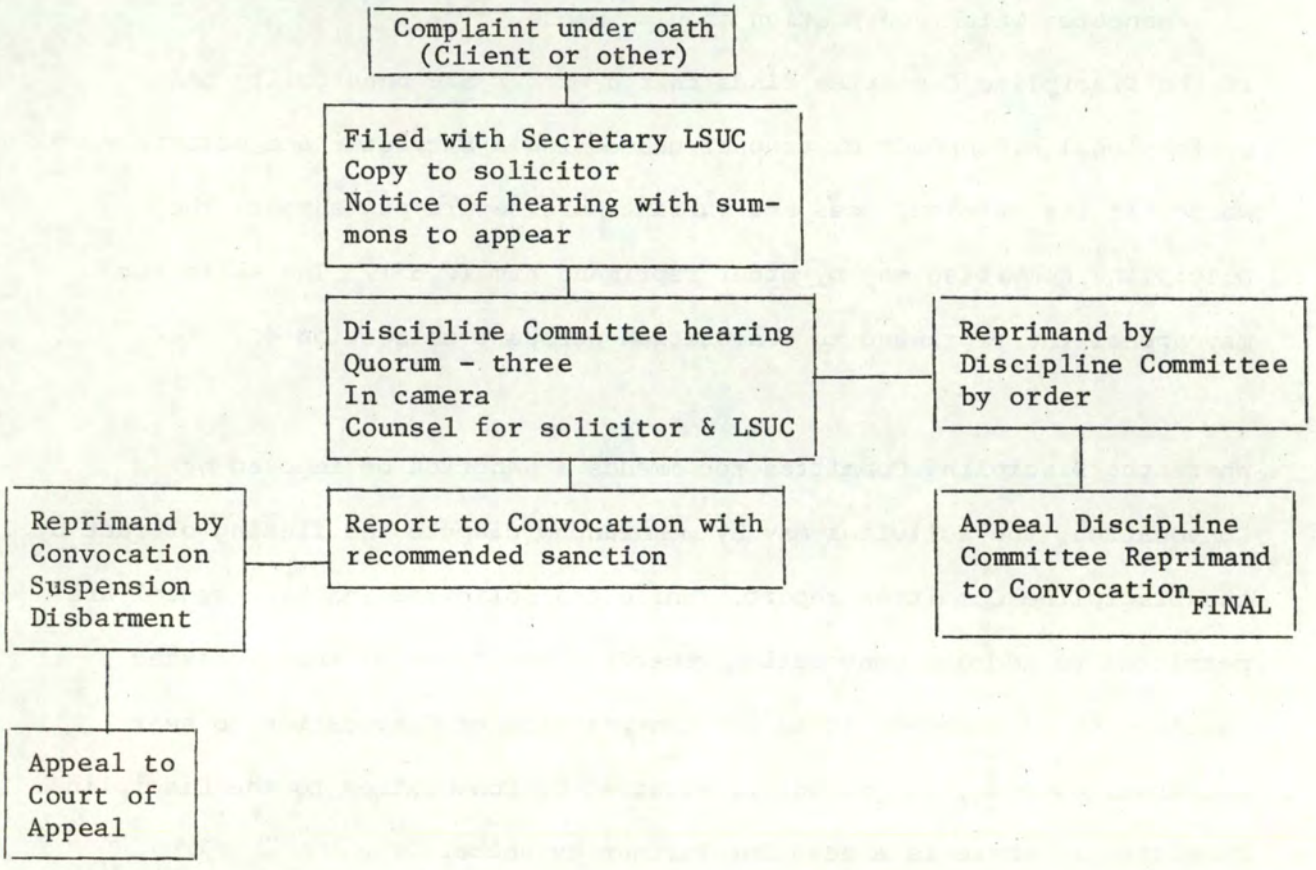
V.1(3) Sanctions and Appeals

The purpose of the Law Society's disciplinary procedure is not to punish a guilty lawyer but control the conduct of members of the profession or to expel from the profession those members whose conduct does not meet the established standard. Nevertheless, whatever the purpose of imposing sanctions, because membership in the Law Society is a prerequisite to practising law in Ontario, any sanction which affects this membership is

FIGURE V .2

LAW SOCIETY OF UPPER CANADA

FORMAL COMPLAINT PROCEDURE



clearly a further punishment for the lawyer.

Sanctions imposed upon a guilty solicitor include cancellation of his Law Society membership by disbarment as a barrister and striking his name off the roll of solicitors, suspension of the rights and privileges of membership, a reprimand of Convocation by order or by order such other disposition as the Law Society considers proper (s.34). Because the offences do not describe the sanction to be imposed for any particular offence, the sanction will vary with the seriousness of the offence and often reflects the entire record of the solicitor with the Law Society. Section 34 has given the Law Society power to innovate with respect to dispositions. To some extent the Law Society has done so by permitting publication, not only in the Ontario Reports but also in newspapers and other media, of those solicitors who are reprimanded, suspended or disbarred. In rare cases, the Law Society may permit the defaulting member to resign on condition that he not seek reinstatement at a later time. A guilty lawyer may be further punished in the form of costs for part or the whole of the expense the Law Society incurred in investigating the complaint (s.40). On the other hand, where it appears that disciplinary proceedings against a member were unwarranted, Convocation may order that such costs as it considers just be paid by the Law Society to the member (s.41).

Other side-effects of disbarment include prohibition against a disbarred lawyer being employed in any capacity by another lawyer or sharing space with another lawyer. Consequently, a disbarred lawyer is cut off entirely from traditional legal practice. Furthermore, in some cases, the findings of Convocation are given to the Crown Attorney for the purpose of considering

a criminal charge and may result in criminal proceedings. Lastly, in some cases, the lawyer could be subject to a civil action at the instance of his client. This will be discussed more fully later in the text.

All disciplinary orders by Convocation may be appealed to the Court of Appeal within fifteen days from the day upon which the member is served with the order. To avoid his appeal being abandoned, the member must pay the cost of furnishing the necessary certified copies of all proceedings, evidence, reports, orders and papers received as evidence by either Convocation or the Discipline Committee. The order of Convocation operates pending appeal unless a judge of the Court of Appeal, upon application for stay of the order, stays the order with or without terms and conditions.

Sections 46 and 47 provide for readmission or restoration of rights and privileges by Convocation "after due inquiry". Because there are no rules or sections in the Regulation as to what constitutes "due inquiry", Convocation is not bound by any defined procedure. However, section 44 provides for an appeal to the Court of Appeal from a decision by Convocation under section 46 not to re-admit.

The disciplinary and appeal procedures apply mutatis mutandis to a student member.

V.2 INCIDENCE AND DISPOSITION OF COMPLAINTS

The information as to the incidence and disposition of discipline-related

complaints contained herein is based upon a study by Sheila Arthurs[165] on statistics made available by the Law Society and on the annual report of the Law Society.

The Arthurs study was based on data from the Law Society's files of eighty lawyers disbarred between 1945 and 1965. The author noted that the values of the Law Society are reflected in the differential enforcement of rules with emphasis on those values basic to the survival of the group.

> "The greatest penalty, disbarment, appears to be reserved for those offences which likely threaten the group's existence as an independent entity. For those infractions which offend only the legal community, and likely only a small portion of it, lesser sanctions are imposed."[166]

The article looks at the rules of the Law Society, the objectionable behaviour, the circumstances surrounding it and the background of the guilty lawyers.

Looking at the ninety-three lawyers disbarred between 1945 and 1965, Arthurs observed an increase over time in that 13% of the total ninety-three were disbarred in the 1945-1949 period whereas 51% of the total ninety-three were disbarred in the time period 1960-1965. She questioned whether the increase reflected in part intensified surveillance and a changed attitude by the profession toward defaulting lawyers. In considering the behaviour leading to disbarment, she observed that 83% of the lawyers were disbarred for misappropriation of clients' funds and related activities. Analysis of the reasons for behaviour leading to disbarment led Arthurs to the conclusion that for the most part disbarred lawyers were in solo practice of a general or real estate nature and were involved in "extra-legal" business. There was also a history among this group of previous

encounters with the Law Society. In discussing the three main factors leading to disbarment, Arthurs emphasized that "extra-legal" business led to a need for greater financial resources and solo practice provided the opportunity for turning to client funds without the controlling effect of answering to a partner. Arthurs compared the disbarments to data on the disbarred lawyers relating to academic career, age, and number of years in practice. She attempted to compare pre-war and post-war graduates who were disbarred by examining their father's occupation, their age, their type of practice and their involvement in extra-legal business.

Information as to the disposition of discipline cases from 1970 to 1975 is summarized in Table V.1.

V.3 REMEDIES BY THE LAW SOCIETY

To protect the property of clients from defaulting lawyers, the Law Society may apply ex parte for an order to freeze the client's property and remove it from the control of the lawyer. Section 42(1) states:

> "If the Treasurer or the Secretary or the chairman or the vice-chairman of any committee of Convocation dealing with disciplinary matters has reasonable cause to believe that a member has been or may be guilty of misconduct in connection with any property in his possession or under his control, a judge of the Supreme Court may, upon an ex parte application by the Society, order that the property described in the order shall not be paid out or dealt with by the person or persons named in the order without the leave of a judge of the Supreme Court."

This power to have a stop-order issued on property in control of the lawyer may be coupled with the power under section 43 to apply ex parte to a judge of the Supreme Court for an order to appoint a trustee "to take possession of any property in the possession of or under the control of

TABLE V .1

THE LAW SOCIETY OF UPPER CANADA
DISPOSITION OF DISCIPLINE CASES 1970 - 1976

	1970	1971	1972	1973	1974	1975	1976
REPRIMAND IN COMMITTEE	20	10	12	19	8	12	5
REPRIMAND IN CONVOCATION	9	1	4	3	4	3	2
SUSPENSION	2	0	2	0	4	0	0
DISBARMENT	13	3	1	4	5	2	7
PERMITTED TO RESIGN	2	0	0	0	2	0	0
SUSPENSION - NON-PAYMENT OF FEES	7	38	27	20	36	17	29

such member...for the purpose of preserving, carrying on or winding up the practice of such member...". The power to appoint a trustee is not limited to the member involved in a disciplinary matter but is extended to include the practice of a member or former member who dies, disappears or leaves Ontario resulting in neglect of his practice or lack of provision for a client's interests.

V.4 COMPENSATION FUND

In recognition of its inability to curb and control fraud and defalcations completely, and the responsibility of the profession as a whole to victims of defaulting lawyers, the Law Society established the Compensation Fund in 1953.

Pursuant to section 51 of The Law Society Act, the Compensation Fund is made up of:

1. the Compensation Fund levy paid by members;
2. all moneys earned from the investment of moneys in the Fund;
3. all moneys received by subrogation of the Law Society's grant from the fund to the rights of the recipient of the grant; and
4. all moneys contributed by any person.

Grants from the Compensation Fund are authorized by section 51(5) which reads as follows:

> "Convocation in its absolute discretion may make grants from the Compensation Fund in order to relieve or mitigate loss sustained by any person in consequence of dishonesty on the part of any member in connection with such member's law practice or in connection with any trust of which he was or is a trustee, notwithstanding that after the commission of the act of dishonesty he may have died or ceased to administer his affairs or to be a member."
>
> (emphasis added)

Because Convocation has absolute discretion whether or not to make a grant from the Compensation Fund, it has established conditions and restrictions on the claims by clients.[167]

Although section 51(6) states that no grant shall be made out of the Compensation Fund unless notice in writing of the loss is received by the Secretary within six months after the loss came to the knowledge of the person suffering the loss or within such further time not exceeding eighteen months, as in any case may be allowed by Convocation, there is no time limit for actually making a formal application for payment out of the Fund. The monetary limits imposed on grants from the fund are as follows:

1. no award may be made in favour of a single applicant in excess of $25,000;

2. the total awards in respect of conduct of any particular member may not exceed $150,000;

although the Committee hearing the application has the discretion to exceed these limits. Revised guidelines for the determination of grants from the Compensation Fund on substantive issues were approved by Convocation as of July 1976.

Pursuant to the guidelines, it must be shown that:

1. a solicitor and client relationship existed;

2. the loss arose in connection with the solicitor's law practice or in connection with any trust of which he is or was a trustee; and

3. money or money's worth was received by the lawyer and has not been returned.

The greatest difficulties arise in cases where funds are paid over to the solicitor on trust for investment. In such circumstances, the transaction is tested to determine if the loss occurred on account of the solicitor

and client relationship or on account of the solicitor's capacity as a borrower which was known to the client.

Because the Compensation Fund is not a guarantee of all losses, reductions in grants are made where the client expected the funds to be invested in a "risky" venture. Whether or not the claimant has claimed a loss in computing his income tax is considered in determining the amount of the grant. A claimant who has been afforded an opportunity to review the proposed transaction and has carelessly failed to do so may also receive a reduced grant.

The claimant is required to take all necessary steps to pursue any causes of action he may have against other parties as a prerequisite to recovery from the Fund. Where the defaulting solicitor has partners, this requirement may mean that the claimant needs to pursue costly litigation prior to becoming eligible for a grant. A valid claim may be reduced by fees and disbursements owing to the solicitor. Where circumstances of the claim afford *prima facie* evidence of criminal conduct, the claimant must report the facts to the Crown Attorney before his claim will be entertained.

Between 1953 and 31 March 1975, there were 909 applications with respect to ninety-two former lawyers for a total amount of compensation granted of $3,308,777.44.[168] The contribution the Compensation Fund has made on behalf of the profession to the injured sector of the public has been overshadowed to some extent by deficiencies that remain. Monetary restrictions on the grants require the *bona fide* claimant to share the

damages. Furthermore, injury that resulted from the dishonesty of a lawyer acting outside the solicitor and client relationship is not compensable and often the defaulter is without funds when the loser is alerted to his misfortune. Lastly, the Compensation Fund provides total or partial indemnity only against the consequences of dishonesty, not a solicitor's negligence. Although the claimant must personally pursue causes of action in negligence, the requirement of mandatory malpractice insurance ensures that some funds will be available to meet these claims.

V.5 COMPENSATION FUND PROCEDURE

Pursuant to provisions of section 51(10), Convocation may delegate any of the powers conferred to a committee of Convocation or, in addition to or in substitution for the committee, may appoint a referee and delegate the said powers to him. The Law Society has appointed a referee to hear applications for payment out of the Fund who makes recommendations to the Discipline Committee. The decision of the Discipline Committee is final, although where the limit per defaulting solicitor is to be exceeded substantially, the practice is to do so only with the approval of Convocation.

V.6 CIVIL LIABILITY

As noted earlier, negligence, even gross negligence, does not amount to professional misconduct, Therefore, the client cannot look to the Law Society but must enforce his own rights. Consequently, it is the courts, not the Law Society, who have established the minimum standards of competence for the profession. In the case of Brenner v. Gregory,[169] Mr. Justice Grant

confirmed that a solicitor is judged by the knowledge, care and skill of an ordinarily competent solicitor with the same qualifications practising in his jurisdiction.

> "In an action against the solicitor for negligence it is not enough to say that he has made an error of judgment or shown ignorance of some particular part of the law, but he will be liable in damages if his error or ignorance was such that an ordinarily competent solicitor would not have made or shown it;"
> Aaroe and Aaroe vs. Seymour et al., [1956], O.R.736.[170]

Evidence of the practice of solicitors in the locality may be called to support the procedure taken by the defendant solicitor. It is important to note that, as a result of this rule, a different standard of care may be expected of solicitors practising in rural communities as opposed to large cities. Furthermore, a lawyer qualified and acknowledged as a specialist may well be subject to a higher standard of care than an ordinary lawyer. On the other hand, a barrister or a solicitor doing barrister's work such as preparation of pleadings is subject to the lowest standard of care as a result of the case Rondel v. Worsley,[171] [1969], 1 A.C.191, which was confirmed in Banks v. Reid,[172] [1975], 6 O.R.(2d) 404 (H.Ct.). Presumably, counsel would only be liable for an act of gross negligence by some acute elementary blunder. The rationale behind these cases is the public policy argument against the proliferation of law suits that would result if an unsuccessful litigant could easily turn around and sue his lawyer.

The basis of an action against a lawyer has traditionally been viewed as a contract action[173] with a limitation period of six years commencing from the date of the breach of contract. However, recent cases[174] have been founded in negligence wherein the limitation period runs from the date of the discovery of the breach. The obvious problem for a lawyer in the

light of this recent trend is the fact that due to the nature of the work, his errors are likely to be discovered later rather than sooner and consequently the lawyer remains vulnerable for a much longer period of time. Accordingly, a prudent lawyer may have to keep up errors and omissions insurance indefinitely after discontinuing practice.

V.7 ERRORS AND OMISSIONS INSURANCE

Initially, lawyers arranged their insurance privately. As a result of an increase in the number of actions taken against lawyers in the sixties, by 1968 some practitioners were paying as much as $800 to $1,000 in annual premiums. In order to provide greater uniformity at less expense, the Law Society implemented a compulsory insurance scheme in 1970.[175] The Law Society was initially insured through Guardian Insurance Company at an annual premium of $110 per member. The deterioration of the loss record resulted in a change of insurance firms at continually increased premiums until 1977 when the policy involves joint coverage by the Law Society and a group of insurers at an annual premium of $375 per lawyer. The lawyer remains liable for the first $5,000 as a deductible. The Law Society assumes responsibility for the next $30,000 of a claim and the insurance companies are liable for the remaining $65,000. Coverage of any occurance is limited to $100,000; however, the lawyer may privately arrange for excess insurance to cover greater losses. Such insurance must specifically state that it is excess over the coverage provided in the group policy. The policy specifically excludes coverage for any dishonest, fraudulent, criminal or malicious act or omission or for acts or omissions of the insured in a fiduciary capacity which are outside the

solicitor-client relationship. A suit cannot be compromised without written consent of the insured lawyer but failure to settle limits liability under the policy to the amount offered as settlement.

The Law Society uses a single adjuster, F.C. Maltman & Co. Ltd., to obtain more uniformity of settlement of similar claims. In addition, a single adjuster has greater ability to determine the nature of an average claim and should be able to achieve more effective loss control. On the topic of loss prevention, the adjusters are preparing a loss prevention manual for distribution to the profession. Due to the fact that approximately one-third of the claims arise from missed limitation periods due to sloppy office management procedures and one-third of the claims arise in real estate from poor title searches, the adjusters feel that education in these areas could improve the loss experience.

V.8 OTHER MODES OF DISCIPLINE IN THE LEGAL PROFESSION

Although the Law Society takes the primary role in disciplining its members, there are other methods by which a lawyer can be taken to task for his conduct.

(1) Inherent jurisdiction of the courts

Because every member of the Law Society is an officer of every court of record in Ontario (s.29), the court asserts a summary jurisdiction over its officers in matters affecting their professional character. Although The Law Society Act confers disciplinary jurisdiction on the Law Society,

the general and inherent power of the court over solicitors is preserved by section 29. The jurisdiction of the court in disciplinary matters is exercised either upon an application for a rule calling upon the solicitor to show cause why he should not be struck off the rolls, or for a rule calling upon him to answer what was alleged in the affidavit supporting the application. Upon this summary application, the court may investigate a complaint by a client or injured party against a solicitor. However "[the court] will not ordinarily intervene when the client has chosen his remedy by action or where the conduct complained of amounts to an indictable offence".[176] Normally, the jurisdiction of the court is reserved for actions taken in a professional capacity rather than in his purely personal or non-professional capacity.

> "Upon summary application the Court may order a solicitor
> (a) to pay over his client's money and deliver up his documents;
> (b) to fulfil his undertakings;
> (c) to answer for loss or pay damages occasioned by his improper conduct; and
> (d) to pay costs because of his negligence or default."[177]

The action taken by the court is in all cases based upon ensuring honourable conduct on the part of its officers rather than for the purpose of enforcing legal rights. In addition to the above orders, the court may order that the solicitor be struck off the roll for the more serious examples of misconduct.

(2) The Legal Aid Act

The Director of Legal Aid is given power by section 29(2) of Regulation 557 to The Legal Aid Act to remove for cause the name of any solicitor from any panel upon notice to the solicitor and with the approval of the Legal

Aid Committee. Apart from requiring notice, no formal procedure is provided for by the Act or the Regulation. However, before striking the lawyer's name, the Director holds an informal hearing at which the lawyer may appear in person or with counsel and explain his conduct. Where a notice of complaint is served upon a solicitor by the Law Society or a criminal charge is laid against a solicitor for a complaint or offence relating to the operation of the Legal Aid Plan, the name of the lawyer is removed from the panels forthwith, without any hearing (The Legal Aid Act, Regulation 29(3)).

Investigation Statistics provided by the Legal Aid Committee for the period 1971 to 1976 show the following:

1.	Complaints against solicitor (improper claims, fraud, retainer in addition, non-performance of services)	232
2.	Miscellaneous reports and enquiries	62
3.	Referrals to Law Society	77
4.	Referrals to Attorney General or Crown	9
5.	Assistance to Law Society (complaints received)	67
6.	Assistance to Area Directors (financial eligibility, conspiracy inquiries) (does not include verbal reports re financial eligibility on conspiracy charges - 48)	88
7.	Discipline Committee hearings	14
8.	Section 29(2) hearings	11
9.	Attendance before Discipline Officer	13
10.	Account surveys (resulting from complaints) (does not include accounts under survey by Legal Accounts - currently 29 - top earners)	23
11.	Extension of certificates (some solicitors allowed up to 200)	28

12. Removal from Panels
    (a) Notice of complaint 7
    (b) Provincial Director (L.A.C.) 7
    (in addition one resigned, three on own undertaking)

13. Reinstated to Panels
    (includes one who resigned and three from own undertaking) 15

    REMARKS: There was an increase of 40% in 1974 of complaints against solicitors as compared to 1973 and a 45% increase in 1975 over 1974. So far in 1976, should the number of complaints continue, there will be an even greater increase over 1975.

The Office of the Director co-operates with the Law Society and the Attorney General by referring relevant cases. For a lawyer who depends on legal aid for his main source of livelihood, removal from the legal aid panels can be as severe as any discipline imposed by the Law Society.

(3) Criminal Liability

Apart from any action taken by the Law Society, or the Director of Legal Aid, the lawyer whose conduct points to a criminal offence may be charged and prosecuted under the Criminal Code. The Law Society and the Director of Legal Aid assist the office of the Attorney General by making available the information gathered in their respective investigations.

(4) County and District Law Associations

Discipline initiated by the Law Associations with respect to enforcement of tariffs is unlikely as a result of the amendments to The Combines Investigations Act as discussed under the topic of Fees.[178]

VI. PRACTICE OF THE PROFESSION AND RELATIONSHIP TO THE REGULATORY STRUCTURE

VI.1 STRUCTURE AND FORM OF FIRMS

At present the practice of law is carried on exclusively through firms consisting of sole practitioners or partners with or without employees, all the members of which practise law. Historically, professional firms in all common law jurisdictions were denied the right to incorporate their professional practices. While there is no express prohibition against incorporation in The Law Society Act, from a combined reading of section 50 which restricts the practice of law to members of the Law Society, and section 28 which sets out the qualifications of members, it is clear that membership is at present limited to natural persons and not incorporated bodies. Ruling 29 of the Professional Conduct Handbook specifically prohibits use of "and Company" in a firm name on the grounds that such use has a "commercial connotation not in keeping with the nature of the profession". The combination of legal practice with any other profession or business is impossible under the present rulings against advertising, solicitation and fee splitting.

(1) Incorporation of Law Practices

Following the report of the Select Committee on Company Law (the "Lawrence Committee") wherein it was recommended that professionals be permitted to incorporate, The Business Corporations Act, S.O. 1970, c.25, section 3(3), was passed which states:

> "Where the practice of a profession is governed by an Act, a corporation may be incorporated to practise the profession only if such Act expressly permits the practise of such profession by a corporation and subject to the provisions of such Act."

As a result of the Lawrence Committee recommendations and before this section was enacted, the Law Society appointed a Special Committee on the Incorporation of Law Practices (the "Incorporation Committee") on 16 June 1967 to consider the following matters:

> "1. The feasibility of a "service" corporation as an adjunct to a law practice, the purpose of the corporation being to acquire and hold the premises and the facilities required for the conduct of the practice, to engage and manage the secretarial and other staff and to keep books and records relating to the practice. Questions that may be asked in this regard include the following:
>
> (a) on what basis would the lawyer or partnership of lawyers be charged by the corporation for services rendered;
>
> (b) what practical tax advantages, if any, would be gained by taking advantage of the low corporate tax rate on the first $35,000 of the corporation's income;
>
> (c) what limits would have to be set on the function and activities of the corporation;
>
> (d) what should be the qualifications of the shareholders and directors of the corporation;
>
> (e) what should be the limitations on the sale or other disposition of the shares of the corporation?
>
> 2. Amending The Law Society Act to permit the practice of law by a corporation. Matters that present themselves for discussion with regard to this proposal include the following:
>
> (a) the social and professional desirability and acceptability of the proposal, and how the solicitor-client relationship can be maintained;
>
> (b) the continuation of unlimited personal liability for professional negligence on the part of the lawyers who carry on the practice of the corporation.
>
> 3. Amending applicable general and taxing statutes to permit partnerships (including a single practitioner?) to be taxed as a corporation. Alternatively, recognizing unincorporated professional associations under the general law and the taxing acts to be taxable

> as a corporation when they have the characteristics of a corporation such as limited liability of the members, centralized management, continuity of life and free transferability of interests.

Both the Lawrence Committee and the Incorporation Committee reviewed the effect of normal corporate characteristics and benefits on the practice of law. The Incorporation Committee noted that the tax benefits of incorporation were the biggest impetus to incorporation by lawyers. Under the present taxation legislation, tax benefits of incorporation include a lower rate of tax on corporation income while it remains in the corporation. This enables the lawyer to accumulate income within the corporation at a lower rate to finance growth, pay retirement benefits and hedge against fluctuating revenues. A further benefit of the corporate business structure is the availability of pension and profit sharing schemes. If the corporation is permitted to have non-professional shareholders and directors, it is a means of splitting the income of a professional, for example, among members of his or her family who actually perform non-professional services for the corporation. There would be no additional business expenses permitted to a corporation. On the contrary, it is possible that some deductions now allowed to partners at a personal level would not be permitted either to the corporation or to the lawyer as an employee. The possibility of persuading the tax department to tax partnerships, sole practitioners or unincorporated professional associations as corporations is seen by the Incorporation Committee as futile. Accordingly, incorporation itself is the only way to obtain the full tax advantages now enjoyed by corporations. Because tax policy is in a state of flux, if incorporation of law firms did bestow windfall gains on lawyers, there is a possibility that the government would counter this effect by amending the legislation.

Some firms, especially smaller ones, use management corporations to gain some of the tax benefits of incorporation. These management corporations hold property, buy the equipment and hire secretaries and other non-professional personnel. The management company then leases its services to the lawyer or partnership. Additional benefits are gained by the management corporation employing members of the lawyers' families or buying cars and leasing them to the lawyers. While such plans have not been declared improper by the Law Society, there is always a question of whether or not the tax department will continue to allow them.

It is important therefore to justify incorporation on other grounds as well. Other characteristics of corporations have mixed effects on a traditional practice.

(2) Corporate Considerations

The articles of incorporation of an Ontario corporation require the statement of the objects of the corporation. Such an objects clause would virtually require a satisfactory definition of legal practice. This definition in itself presents a thorny problem. The Lawrence Committee suggested that the name of a professional corporation contain some words of notice to the public that they are dealing with a corporate entity.

The transferability of shares and the qualifications of shareholders and directors raise important issues. Unless shareholders and directors must all be licensed practitioners, management of the corporation could fall outside the profession. While outsiders might improve management by their involvement, they would also be called upon to make some professional

decisions for the corporation. The Incorporation Committee also noted that one danger of 'centralized management' of law firms, if branch offices were permitted, was that large chains could develop and they questioned the desirability of such a development.

A decided benefit of the corporate form is continuity of ownership which eases periods of change, including admission, withdrawal, retirement or death of shareholders. The possibility of the corporation itself buying back shares relieves the financial burden associated with these changes.

(3) Relationships with Clients

It was clearly important to both the Lawrence Committee and the Incorporation Committee that the personal relationships with clients not be impaired by incorporation. The Incorporation Committee emphasized the obligation to maintain ethical and professional standards no matter what form of business organization was chosen. Concern was expressed for the solicitor-client privilege which is based on a personal relationship with the client. The question is not only whether the lawyer will continue to respect the confidentiality of his client but equally important is whether the court will continue to recognize privileged communications with a "corporation".

The most controversial issue of how incorporation will affect solicitor-client relations is the concept of limited liability. The Incorporation Committee recommended seeking legislation to permit law practices to incorporate while maintaining unlimited liability to the client. On the other hand, although the Lawrence Committee advocated continuing unlimited

liability for tortious acts of the lawyer, they conceded that limited liability for debts and other liabilities might be possible.

(4) Relationship with the Law Society

The Incorporation Committee noted that the effect of incorporation on the authority of the Law Society, as the governing body of the legal profession, could create problems with respect to payment of annual dues, disbarment, suspension and death. From the point of view of controlling the behaviour of lawyers, it is necessary for the Law Society to maintain its ability to impose standards on, and discipline, members who fail to meet these standards. Whether or not the corporation, as well as its individual lawyers, should be licensed and what effect defalcations by the corporation might have on the rights of the individual lawyers, whether or not they are directors, raise some interesting problems.

In its report of June 1969, the Incorporation Committee recommended that legislation be sought to permit the practice of law by a professional corporation. As a result of the White Paper on Taxation, the Incorporation Committee was revived and in 1972 they reconfirmed the recommendation of the 1969 report without stating when or in what manner legislation be sought. To date no amendment has been made to The Law Society Act expressly to permit incorporation.

VI.2 MIXED FIRMS

Although there is no specific prohibition against a lawyer participating

in a firm consisting of a mix of professionals, it is obvious that participation in such a firm would create problems with respect to rulings in the Professional Conduct Handbook. For example, restrictions on advertising in Ruling 3 would prevent the firm from advertising its endeavour. There exists also restrictions imposed by Ruling 16 on directories, announcements and professional cards. Additional problems are created with respect to prohibitions against fee splitting and assisting non-members of the Law Society in the unauthorized practice of law. There would also be a conflict between members of different professional associations with respect to the regulations of the associations concerning liability insurance, codes of ethics, discipline, accounting methods and relationship with clients.

In the research to this profile, no record of studies by the Law Society or other legal associations with respect to this issue were apparent.

VI.3 STATISTICAL INFORMATION ON LAWYERS

The available statistics on lawyers include the following:

1. a 1950 national survey of lawyers;[179]
2. a 1974 Ontario study based on the 1961 census;[180]
3. a 1971 random survey of 125 Toronto lawyers;[181] and
4. a 1972 survey of 152 women lawyers in Metropolitan Toronto.[182]

The following is a brief review of the contents of these reports.

In "Lawyers in Canada: A Half Century Count", Nelligan includes many charts and comparative statistics on lawyers by provinces. The charts

include the number of persons per lawyer 1950, number of persons per lawyer for eastern and western Canada 1900-1950, distribution of urban population 1940-1941, distribution of lawyers by size of municipality 1900-1950, experience of lawyers 1950, type of practice by size of city 1950, showing proportion of lawyers in various size firms, distribution of lawyers by various types of firm 1900-1950, population shift 1900-1940, and distribution of lawyers by size of municipality according to experience. Charts which compare by province include lawyers in Canada 1950, number of persons per lawyer in Canada 1900-1950, relation of distribution of lawyers to general population and provincial wealth 1949, and lawyers practising in towns of less than 1,000 population, 1950. Although the data from these records are outdated, the charts show an interesting organization of information as well as a comparative point for growth of the profession. In the same year, Nelligan wrote an article[183] based on statistics gleaned from a questionnaire distributed by the Dominion Bureau of Statistics to every member of the legal profession in Canada.

The review of the projections of the Ontario Labour Force of lawyers by Meltz contains a discussion of the definition of the term lawyer in the decennial population census and other sources of statistics and additional concepts relevant to legal professionals. The study also examines the changes in the numbers of lawyers, discussed the pattern of distribution of these law professionals by profession and by class as salaried or self-employed, presents data on the earnings of lawyers as an indication of the impact of changes in supply and demand in the profession, and discusses changes in the supply of lawyers since 1930. Finally, Meltz reviews and compares the projections of the future number of lawyers in

Ontario as contained in:

1. the MacKinnon Committee Working Paper No. 1, Relevant Considerations in the Projection of the Number of Ontario Lawyers;

2. 1968 Study by Cicely Watson and Joseph Butorac, Qualified Manpower in Ontario 1961-1986, Volume 1, Determination and Projection of Basic Stocks, Toronto: The Ontario Institute for Studies in Education; and

3. 1969 projection by B. Ahamad, A Projection of Manpower Requirements by Occupation in 1975, Canada and its Regions, Department of Manpower and Immigration, Ottawa: Information Canada, 1969.

The tables prepared by Meltz in his study are:

LIST OF TABLES

Table 5-2 Changes in the Number of Law Professionals and the Number Called to the Bar in Ontario and the United States

Table 5-3 Ontario Law Professionals (Lawyers and Judges) by Age Group, 1931 to 1961

Table 6-1 Projections of the Number of Lawyers and Judges in Ontario

To some extent, the statistics contained in the tables by Meltz have been updated by the 1971 decennial census.

The study of the Toronto legal profession by Arthurs, Willms and Taman was made to underline the need for more demographic data on lawyers. The tables of data include: age, place of birth, father's national origin, religion, father's education, father's occupation at the time of entrance to law school, other professional relatives, pre-law university, degrees obtained, law school, class standing at law school and the bar admission course, legal reports or periodicals regularly read, position in the firm, size of firm, location of office, inter-firm mobility and organizations and activities. With respect to patterns of practice, the study produced several graphs and tables indicating the degree of specialization and a comparison of firm size to type of practice. The survey examined the relationship between background and patterns of practice, the sole practitioner and the availability of legal services.

In her study of fifty women lawyers in Toronto, Dranoff examined the attitude of the legal profession to women in law through a review of hiring practices, choice of firm, choice of specialty, and income. She also looked at women as professionals by considering education patterns, marriage, motherhood and lawyering, and dedication.

(1) Size of Firms and Regional Distribution

As tedious as it may be, the best gauge of the size and regional distribution of law firms can be determined from a study of the current Canadian Law List. Unfortunately, the information contained in the above studies is not a useful indication of either firm size or distribution of the legal profession in Ontario, not only because of the date of the information or nature and size of the sample chosen but because none of the studies was directed at these issues.

VI.4 REMUNERATION

This section relating to the remuneration of lawyers practising in Ontario contains a discussion of the calculation and collection of fees, client's rights to initial fee information and to challenge the bill for services rendered, effects of federal legislation on lawyers' fees and the controversy with respect to contingent fees.

VI.5 CALCULATION OF PROFESSIONAL FEES

The process of determining a fee for services should begin with the first interview between the lawyer and the client. There are as yet no formal rules by the Law Society with respect to advising clients in advance as to the amount of the fee. The problem in forecasting fees is one of unforeseen difficulties. What appears to be a simple real estate sale is snagged with a serious title defect. A complex litigation case is settled after initial negotiations. What the final fee in such cases should be cannot

be accurately predicted. However, the Canadian Bar Association in Rule X(3) of the Code of Professional Conduct requires the lawyer to give a "fair estimate of fees and disbursements, pointing out any uncertainties involved". The rule continues to say that the lawyers should explain to the client "[w]hen something unusual or unforeseen occurs which may substantially affect the amount of the fee". The Law Society's Subcommittee on Professional Conduct has approved Rule X(3) for inclusion in their new code of ethics.

Where the lawyer is not familiar with a client, he or she may request a monetary advance at the initial interview to cover fees and disbursements. (Section 34 of The Solicitors Act permits acceptance of security for the amount to become due for services.) Regulation 18(3) under The Law Society Act requires the lawyer to include the advance as trust money and account for this money pursuant to the Regulation.

Sections 17 to 35 of The Solicitors Act provide for agreements between solicitors and clients. Section 18 reads as follows:

> "Subject to sections 19 to 35 a solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or a part of any past or future services in respect of business done or to be done by the solicitor, either by a gross sum or by commission or percentage, or by salary or otherwise, and either at the same rate or at a greater of less (sic) rate than that at which he would otherwise be entitled to be remunerated."

The advantage of such agreements in non-contentious matters with clients not acting in a fiduciary capacity is that the agreement is not subject to taxation, which is discussed fully later. However, such agreements are subject to judicial review and unless the agreement is fair and reasonable between the parties it can be declared void by the court. The advisability

of permitting a solicitor to contract out of the client's safeguard of taxation in limited circumstances has been questioned.

The only formal rules covering calculation of fees are found in Ruling 1.3(9) which states as follows:

> "He (the lawyer) is entitled to reasonable compensation for his services, but he should avoid charges which either over-estimate or under-value the service rendered. When possible he should adhere to established tariffs."

The Code of Professional Conduct of the Canadian Bar Association Rule X states: "The lawyer should not (a) stipulate for, charge or accept any fee which is not fully disclosed, fair and reasonable". Commentary attached to this section in the Code reviewed the eight factors to be considered in arriving at a reasonable fee as set down by Master McBride in Re Solicitors.[184]

> "1. A fair and reasonable fee will depend upon and reflect such factors as
> (a) the time and effort required and spent;
> (b) the difficulty and importance of the matter;
> (c) whether special skill or service has been required and provided;
> (d) the customary charges of other lawyers of equal standing in the locality in like matters and circumstances;
> (e) the amount involved or the value of the subject matter;
> (f) the results obtained;
> (g) tariffs or scales authorized by local law;
> (h) such special circumstances as loss of other employment, uncertainty of reward, and urgency."

The Subcommittee of the Law Society's Professional Conduct Committee has recommended that these factors become part of its new conduct ruling.

In spite of efforts by the Law Society, through management courses, to improve the business methods of its lawyers, there is no uniform practice in calculation of fees. Where a barrister or solicitor keeps accurate time dockets, he will be able to arrive at a fee based on time and tariff

and the other factors mentioned by Master McBride. However, where a practitioner fails to keep an accurate account of his time, a "reasonable fee" must be arrived at by other means.

VI.6 COUNTY LAW ASSOCIATIONS FEE SCHEDULES OR TARIFFS

The present code of ethics of the Law Society, the Professional Conduct Handbook, includes the following ruling on tariff of fees.

> Ruling 31: The following statement of policy was proposed by the Discipline Committee and was adopted by Convocation in October 1957:
>
> 1. That it is ethical for County Law Associations to establish a tariff of fees;
>
> 2. That an inflexible tariff which does not in itself allow for deviation in proper cases, should be discouraged;
>
> 3. That the Discipline Committee is not prepared to recommend enactment of any rule providing that a mere breach of a tariff is in itself a disciplinary offence;
>
> 4. That holding himself out or allowing himself to be held out as prepared to do professional business at fees less than the appropriate scale prevailing in the area in which he practises, is unprofessional conduct on the part of a solicitor;
>
> 5. That it is not practicable for the Discipline Committee in the first instance to investigate alleged breaches of the principle set out in paragraph 4, but that such breaches should first be investigated by the local association, which in its discretion could make a report to the Discipline Committee setting out the facts ascertained by the Association.
>
> (emphasis added)

The kinds of transactions included in county and district law association tariffs are:

1. sale and purchase of other than commercial properties;
2. sale and purchase of residential condominium units;
3. sale and purchase of commercial properties;

4. sale and purchase of land generally;
5. mortagage of land;
6. mortgage sales;
7. personal property security loans;
8. mechanics' lien;
9. wills, trusts and estate planning;
10. leases;
11. general commercial documents;
12. bulk sales;
13. partnership matters;
14. corporation matters;
15. collection of income and capital;
16. general collection charges;
17. miscellaneous services.

It is important to note that establishment of tariffs of fees by county was designed to reflect variations in costs and clients in different localities. While the ruling suggests that a "mere breach of a tariff" is not in itself a disciplinary offence, if a lawyer holds himself out as prepared to do professional business at fees less than the appropriate scale on a continuing basis, he can be disciplined for unprofessional conduct. The local association is given power to investigate such breaches and report to the Discipline Committee. Accordingly, there is the possibility that the whole discipline machinery may be employed to enforce fee schedules.

A variety of fee schedules have been established by county law associations. Table VI.1 indicates the categories of tariffs. As a result of the passage of The Combines Investigation Act amendments, the counties of Waterloo,

TARIFFS OF COUNTY LAW ASSOCIATIONS

Repealed or suspended	Suggested for matters of average complexity	Minimum charge	Expected compliance	Undertaking compliance	No preamble
Brant Essex Frontenac Lennox & Addington Waterloo	Dufferin Hastings Ottawa-Carleton Peel Victoria & Haliburton Welland York	Barrie Elgin Haldimand Kenora Lanark Leeds & Grenville Lincoln Northumber-land Ontario Parry Sound Simcoe Stormont, Dundas & Glengarry Sudbury	Middlesex Peter-borough	Norfolk Renfrew	Algoma Huron Kenora Perth

TABLE VI .1

Frontenac, Lennox and Addington, Essex and Brant have repealed or suspended operation of their fee schedules. Other counties, including York County, have, with the advice of counsel, amended their schedule to indicate that the tariff is a suggested schedule only for matters of average complexity. The remaining fee schedules made available range from those intended to set a minimum charge for services on the tariff to those which include an undertaking of compliance by solicitors in the county. The undertaking signed in Renfrew County states: "We the undersigned solicitors hereby agree to abide with the above tariff". The Norfolk County undertaking is much more elaborate and states as follows:

> "We the undersigned solicitors of the County of Norfolk, hereby subscribe to adhere to the within tariff. We severally pledge that we will not, directly or indirectly, or as members of a firm, enter into any arrangement, with any person, firm or corporation, whereby services will be rendered at less than tariff charges. We will not permit our names or the names of our firms to be used on any papers not prepared by us in our own offices nor will we rebate or divide any proportion of our fees for any work done with any person other than a law partner or solicitor principal. The scale of fees referred to in the tariff is to be applied in matters of average complexity, subject to increase or decrease when warranted and is subject to review by the Taxing Officer pursuant to the provisions of The Solicitors Act. If any breach of this pledge is brought to our attention, we undertake to assist by every means in our power in having the offending practice discontinued."

Compliance is urged in some cases, for example Peterborough or Middlesex Counties, by referring to the rulings of the Law Society and the canons of ethics of the Canadian Bar Association. Some tariffs, for example Elgin County tariff, while suggesting minimum amounts to be charged also indicate that bills are subject to review by the Taxing Officer pursuant to the provisions of The Solicitors Act.

Tariffs are reviewed and updated from time to time by county law associations. The most recent revision by the York County Law Association was an item

by item review in 1975. Most items were simply increased. However, the basis of calculation of the tariff on residential real estate was amended and suggested maxima and minima were introduced to replace the tariff based on a percentage of the selling price. This amendment could result in lower fees being charged on residential real estate matters. York County also revised the preamble to its tariff to reflect the amendments to competition legislation.

VI.7 TARIFFS UNDER PROVINCIAL LEGISLATION

Some tariffs have been established pursuant to provincial legislation. These include the following:

1. Solicitors' Tariff - The Surrogate Courts Act, R.S.O. 1970, c. 45, s. 79(c), authorizes the Rules Committee to establish a tariff of fees to be applied in estates of average complexity, subject to increase or decrease when warranted, and subject to review by the Surrogate Court judge on a passing of accounts and by the Taxing Officer pursuant to the provisions of The Solicitors Act.

2. Legal Aid tariff - The Legal Aid Act, R.S.O. 1970, c.239, s. 26(k), enables the Law Society with the approval of the Lieutenant Governor in Council to make regulations respecting fees to be paid to barristers and solicitors for professional services under this Act.

3. Supreme and county court tariffs - The Judicature Act, R.S.O. 1970, c. 228, s. 114(10)(g), authorizes the Rules Committee to enact the Supreme and county court tariffs found in the Consolidated Rules of Practice for Ontario.

VI.8 COMBINES INVESTIGATION ACT

As a result of amendments to The Combines Investigation Act, S.C.1974-75-76, c. 76, which came into force 1 July 1976, the use of fee schedules was questioned.[185]

By amending the definition of "product" to include "article and service" which is further defined as a "service of any description whether industrial, trade, professional or otherwise", section 32 of the Act, which prohibits agreements to lessen competition, became applicable to professional services. The implementation of this section was delayed to 1 July 1976 to allow organizations six months to amend their legislation and activities to comply with the Act. Section 32 reads as follows:

> (1) Every one who conspires, combines, agrees or arranges with another person
>
> (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,
>
> (b) to prevent, limit or lessen, unduly, the manufacture or production of a product, or to enhance unreasonably the price thereof,
>
> (c) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance upon persons or property, or
>
> (d) to otherwise restrain or injure competition unduly,
>
> is guilty of an indictable offence and is liable to imprisonment for five years or a fine of one million dollars or to both.

What is the effect of the Act on county law association tariffs? While it has been argued that tariffs which do not carry sanctions do not unduly affect competition in the way prohibited by the Act, nevertheless, in both the opinion to the Federation of Law Societies[186] and the opinion to the Law Society Special Committee on tariffs,[187] counsel stated that there was some risk in even a suggested tariff such as that used by York County. Such a flexible tariff drafted as a guide to matters of average complexity with no agreement amongst lawyers to make the tariff binding or impose a sanction might escape the Act. However, the danger in a suggested tariff lies in evidence from which an agreement could be inferred. The

fact that the tariff must be approved by the association of lawyers plus the existence of Law Society Rulings of conduct which emphasize adherence to fee schedules as proper professional conduct, indicate that there is at least indirect pressure to adhere to the tariff.

One method to avoid the Act that was suggested by both opinions is to have a suggested fee schedule promulgated under the specific authority of provincial legislation similar to the solicitors' tariff, the legal aid tariff or the Supreme and county court tariffs. In Regina v. Canadian Breweries Limited,[188] it was held by Chief Justice McRuer of the Supreme Court of Ontario that commercial activities that are effectively regulated by a public authority are not subject to the provisions of The Combines Investigation Act. The explanation is that the public authority fixing prices pursuant to its authority must be assumed to be exercising the power in the public interest. Accordingly, it is argued that, if a tariff of non-contentious legal services not already covered by tariffs prescribed under existing statutes could be promulgated under a provincial act, such a tariff would not then be contrary to the Act.

Sections 14 and 15 of The Solicitors Act, 1970 R.S.O., c. 441, permit the Rules Committee[189] to make rules respecting conveyancing including the mode and amount of remuneration for conveyancing matters. There is no other specific statutory authority for the Rules Committee to enact a tariff covering non-conveyancing matters. The Special Committee on Tariffs noted that there would likely be some resistance by the Rules Committee to any approach to them to establish a tariff. The report also suggested that the membership was divided on the advisability of looking to the Rules

Committee to deal adequately with non-litigious matters. Accordingly, the Special Committee on Tariffs recommended that no action be taken towards seeking a tariff established by the Rules Committee.

The Committee recommended that minimum tariffs be withdrawn. The status of the York County tariff was not decided upon by the Law Society. The County of York Law Association had also obtained an opinion of counsel to arrive at a preamble for their suggested fee schedule. This opinion was not made available to us but comments on the opinion were contained in the Report by the Special Committee on Tariffs at page 2. The opinion points out, firstly, that it is arguable that such a schedule of fees as published by the County of York Law Association does not "enhance" fees, and secondly, that if it does, it does not do so unreasonably. The opinion concedes that it is also arguable that the mere existence of a schedule of fees is evidence of an arrangement and that the inevitable effect of such an arrangement might be to lessen competition because of the natural tendency to adhere to the schedule or tariff. It concludes however, that the answer to this argument must be that the lessening is not "undue" and a prosecution must fail.

On the strength of counsel's opinion and in spite of risks expressed in the Report of the Special Committee on Tariffs, York County Law Association adopted a suggested fee schedule which includes reference to The Solicitors Act and the requirement of review of solicitors' accounts by the Taxing Officer as well as factors to be considered in arriving at a professional fee.

> "In all cases his professional fee should be based not only on the actual time spent on the matter, but should reflect the experience and competence of the solicitor, the responsibility and professional skill required, the amount, value or complexity of the particular matter, as well as the importance of the matter and the result attained to the client."

A few counties shown on Table A followed the model adopted by York County. Some counties have abandoned fee schedules entirely in light of the legislation but the majority have not as yet made any change to their tariff as a result of the Act.

VI.9 FEE SPLITTING AND REFERRALS

Ruling 34 of the Law Society's Professional Conduct Handbook specifically prohibits the division of fees except with another lawyer based upon a division of service or responsibility. Ruling 28 elaborates on fee splitting and states:

> "[a]ny arrangement whereby solicitors directly or indirectly share, split or divide fees with conveyancers, notaries public, students, clerks or other persons who bring or refer business to the solicitor's office is improper and constitutes professional misconduct."

The Ruling also clearly prohibits the lawyer from rewarding persons who make referrals to him. Although the Law Society's rulings do not prohibit fee-splitting among lawyers on the basis of labour and responsibility, Rule X(b) of the Canadian Bar Association's Code of Professional Conduct deems the fee to be unfair unless the client consents, either expressly or impliedly, to the employment of the other lawyer.

VI.10 REVIEW OR COLLECTION OF FEES

Because in England barristers historically were prohibited from suing for their fees, the provisions with respect to review and collection of fees are found in The Solicitors Act, R.S.O. 1970, c. 441(3), which prescribes a procedure, described below, whereby a solicitor may recover his or her fee or a client may demand or challenge the solicitor's bill. There is no doubt that barristers today may sue for their fees; however, Ruling 1.3(10) of the Professional Conduct Handbook requires the lawyer to "avoid controversies with clients regarding compensation so far as is compatible with self-respect and with the right to receive reasonable recompense for services." He should always bear in mind that "the profession is a branch of the administration of justice and not a mere money getting trade." As a result of this ruling and the possible damage to public relations, some firms as a policy do not pursue defaulting clients.

(1) Client's Rights

Where the retainer of the solicitor is not in dispute but the fee has not been fixed by agreement, the client may obtain an order on praecipe to the local taxing officer for delivery and taxation of a solicitor's bill or for the taxation of a bill already delivered (s.3).[190] Although there is a limitation period of one year within which the client must dispute the quantum of the solicitor's bill, special circumstances permit the court to allow the application beyond that time. Proper procedure on a taxation is set out in section 6, including delivery and contents of a bill, costs of the reference and contents of the order for costs.

(2) Lawyer's Rights

The solicitor who wishes to recover his fees, charges or disbursements is prevented by section 2 from bringing any action for recovery until one month after the bill has been delivered to the client. The solicitor may then obtain an order for taxation by the local taxing officer. Section 2(3) states that a solicitor's bill of fees is sufficient if it contains "a reasonable statement or description of the services rendered with a lump sum charge therefor together with a detailed statement of disbursements". However, in litigious matters the lawyer must, where possible, tie the item on the bill to an item in the Supreme or county court tariff.

Case law has established the principles to be looked at in a taxation including time spent, complexity, responsibility, monetary value, importance, skill, results and ability to pay, although it is clearly emphasized that the last item only operates to reduce the account.[191] The usefulness of county law association tariffs is discussed in Re Solicitors, [1970] 1 O.R. 407. That case decided that such tariffs are not a conclusive guide to the taxing officer because they are expressed to be minimum tariffs and give no recognition to varying degrees of complexity, responsibility and time involved in a particular matter. The taxing officers likewise feel no compulsion to be bound by minima stated and will allow less than the law association provides.[192]

VI.11 AGREEMENTS BETWEEN SOLICITORS AND CLIENTS

The possibility of excluding taxation exists in sections 17 to 35 of The Solicitors Act. Section 18 makes provision for a lawyer and client to enter into an agreement respecting the amount and manner of payment for the services of the lawyer. The section allows for either a gross sum, a salary or a percentage to be paid. However, for business to be done in any court except the small claims court, review by the taxing officer, (s.19), who may refer the matter to court, is necessary before the amount is payable under the agreement. If the amount is not fair and reasonable, the agreement may be amended or cancelled. The lawyer, however, is bound by the agreement and prevented from claiming additional remuneration (s.23). Any agreement which contains a waiver of the lawyer's liability for negligence is void (s.24). Although section 33 provides that, except as otherwise provided in named sections, a solicitor's bill under such agreement is not subject to taxation or any provision respecting the signing and delivery of a bill, the section is restricted to non-contentious business and conveyancing, and the number of such agreements used in practice is small.

At the taxation, the taxing officer may tax the bill ex parte if either party fails to show up. The taxing officer, after hearing evidence, makes a decision. The decision on a taxation is subject to appeal.

Although a procedure has been prescribed to control fees through the assistance of a taxing officer, the aggrieved client must initiate the procedure himself, usually, although not necessarily, with the aid of

another solicitor. It is questionable whether the general public is adequately aware of its rights in this area. Furthermore, it is possible that the procedure and principles are sufficiently complex to discourage a would-be protester from proceeding alone and turning to another lawyer may not appeal to a client who feels he has suffered an injustice at the hands of his first lawyer.

VI.12 SPECIAL MEANS OF COLLECTION

Although a lawyer has a right to sue a client for outstanding fees and disbursements, he is discouraged from so doing by rules of professional ethics which require a lawyer to avoid controversies with clients. In addition to his right to sue, a lawyer has a common law right of lien on documents belonging to the client for unpaid fees and disbursements. The right of lien is recognized in The Solicitors Act, section 6(6), which requires a solicitor to deliver to the client all deeds, books, papers and writings upon payment. A problem arises upon discharge or withdrawal of a lawyer. His obligation to deliver the papers of the client to the succeeding lawyer is subject to the lawyer's right of lien; however, the lawyer must have "due regard to the effect of its enforcement upon the client's position". Rule XI(10) of the Canadian Bar Association's Code of Professional Conduct, as approved by the Law Society's Professional Conduct Committee, states that "[g]enerally speaking, the lawyer should not enforce his lien if the result would be to materially prejudice the client's position in any uncompleted matter".[193] By Rule XI(11), it is proper for the successor lawyer to urge his client to settle outstanding accounts of his predecessor.

Regulations 140 and 141 under The Legal Aid Act also recognize the solicitor's lien by restricting the lien to property and papers in the lawyer's possession for fees and disbursements the lawyer provided prior to issuance of the certificate and not covered therein.

VI.13 CONTINGENCY FEES

A contingency fee is a fee which depends on the outcome of the contentious matter. It may be a percentage of a recovery or settlement or a lump sum but the important fact is that nothing is payable if the litigation is unsuccessful.

At present contingency fees are prohibited by Ruling 1(3)(7) of the Professional Conduct Handbook which states: "(the lawyer) should not, except as by law expressly sanctioned, acquire by purchase or otherwise any interest in the subject matter of the litigation being conducted by him." Contingency fee contracts are further prohibited by section 30 of The Solicitors Act which, when referring to agreements between solicitors and clients, states as follows:

> "Nothing in sections 18 and 35 gives validity to a purchase by a solicitor of the interest or any part of the interest of his client in any action or other contentious proceeding to be brought or maintained, or gives validity to an agreement by which a solicitor retained or employed to prosecute an action or proceeding stipulates for payment only in the event of success in the action or proceeding, or where the amount to be paid to him is a percentage of the amount or value of the property recovered or preserved or otherwise determinable by such amount or value or dependent upon the result of the action or proceeding."

The Code of Professional Conduct of the Canadian Bar Association has left the issue open by declaring that, where a jurisdiction so permits, it is not improper for a lawyer to enter an arrangement with his client for

a contingent fee provided such fee will be fair and reasonable (Rule X(8)).[194] The Subcommittee of the Professional Conduct Committee of the Law Society in its suggested code of ethics altered this section to prohibit arrangements for contingent fees.

A Special Committee on Contingency Fees (the "Committee") was appointed by Convocation on 20 June 1975 under the chairmanship of S.E. Fennell and reported on contingent fees on 23 April 1975. The report recorded the surprise of the Committee that, after being asked by the office of the Attorney General to give the Law Society's views of the use of contingency fees in Ontario, and the Law Society's appointing its committee partly in response to that request, the Attorney General went on record stating that he was opposed to letting Ontario lawyers share in awards their clients won in court actions. In reviewing submissions, the Committee noted that the preponderance of briefs opposed any change in legislation. Medical source briefs stated that there is a correlation between inflated awards in medical malpractice lawsuits and high medical malpractice insurance premiums. Those in favour of contingency fees argue that an impoverished litigant can initiate and pursue a case he might otherwise have to drop because he cannot afford the legal services. Because the lawyer shares the risk of failure, they argue, he is more inclined to screen out frivolous cases. The answer offered to this argument is the legal assistance provided by The Legal Aid Act. The question remains whether there is ground not being covered by Legal Aid which can be covered by permitting contingent fees.

In light of the position taken by the office of the Attorney General and

the opposition of the briefs, the Committee recommended that consideration of the question of contingency fees, which would require an extensive study, should not be proceeded with at this time.

VI.14 THE ANTI-INFLATION ACT, S.C. 1974, c.75

The freedom that lawyers had to set their professional fees was restricted on 14 October 1975 by the passage of The Anti-Inflation Act (the "Act"). The Act includes complicated provisions for compliance which are discussed in a paper by J.D. Ground, Q.C., entitled "The Anti-Inflation Program and the Legal Profession". The Act establishes so-called "safe haven" rules which permit a firm to be deemed to comply where it rolls back not less than one percent of the 13 October 1975 fee rate for every three-month period during the compliance period. The extent to which firms choose to roll back fee schedules rather than account for increases can directly benefit clients whose matters are subject to an "established" tariff.

VI.15 DATA ON INCOME DISTRIBUTION

Data on income from the professional practice of lawyers is available from the Highly Qualified Manpower Survey which can be linked directly to data collected in the 1971 census.

The accounting firm of Price Waterhouse & Co. has for at least three years conducted a survey of lawyers' incomes in Canada. Participating members receive the survey on a confidential basis. The survey breaks down

salaries by years in practice as partners and non-partners and by location.

The Young Lawyers Section of the Canadian Bar Association is at present embarking on a project to study imbalances in the supply and demand of lawyers. Stage one, now in progress, is ascertaining what information is available through the law association, the Law Society, law schools, etc. Stage two will involve collecting information to fill the gaps. Stage three will involve analysing the information.

INFORMATION SERVICES

VI.16 ADVERTISING

"There are rules of conduct which all professional men must observe. Refraining from advertising would, I think, clearly be one."[195]

In accordance with the traditional ban against professional advertising, the Law Society adopted as Ruling 1 the Canons of Legal Ethics of the Canadian Bar Association 1920. Subsection 5(3) of Ruling 1 reads as follows:

> "The publication or circulation of ordinary simple business cards is not per se improper, but solicitation of business by circulars or advertisements or by personal communications or interviews not warranted by personal relations, is unprofessional. It is equally unprofessional to seek retainers through agents of any kind. Indirect advertisement for business by furnishing or inspiring newspaper comment concerning causes in which the lawyer has been or is connected, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's position, and like self-laudations defy the traditions and lower the tone of the lawyer's high calling, should not be tolerated. The best advertisement for a lawyer is the establishment of a well merited reputation for personal capacity and fidelity to trust."

Although the Canadian Bar Association adopted a new Code of Professional Conduct in 1974 replacing this Ruling, the Law Society is governed by Ruling 1 until their new code has been adopted. In addition to this general prohibition on advertising, the Law Society adopted Ruling 3(1) in the Professional Conduct Handbook* which states:

> "A member shall not directly or indirectly do or permit any act or thing to be done which can reasonably be regarded as professional touting, advertising or as designed primarily to attract professional work."

The Ruling then elaborates on specific actions which are improper for a member, namely:

> "(a) to hold himself out or permit himself to be held out as being prepared to provide professional services at fees that are less than reasonable and appropriate in the circumstances in order to obtain professional work;
>
> (b) to permit his name to appear as solicitor, counsel or Queen's Counsel on any advertising material offering goods (other than securities of legal publications) or services to the public;
>
> (c) while in private practice, to permit his name to appear on the letterhead of a company as being its solicitor or counsel of a business, firm or corporation, other than the designation of honorary counsel or honorary solicitor on the letterhead of a non-profit or philanthropic organization which has been approved for such purpose by the Professional Conduct Committee;
>
> (d) to act for a vendor of property who to the knowledge of the solicitor advertises or makes any representation through salesmen or otherwise, as an inducement to a purchaser, that a registered deed is included in the purchase price, or leads purchasers to believe that it is unnecessary for them to be represented in the transaction;
>
> (e) to hold out or permit himself to be held out to any prospective purchaser as being specially fit to act for such purchaser because of his special knowledge as solicitor of the vendor;
>
> (f) to permit a vendor or his agent to hold out to a prospective purchaser that he, as solicitor for the vendor, will act for such purchaser and that the vendor will pay, in whole or in part, his fees as solicitor for such purchaser;

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* See now Law Society of Upper Canada Revised Professional Conduct Handbook, 1978 and further amendments of December 13, 1978.

(g) to arrange for or to encourage any other person (e.g. real estate agent) to make a practice of recommending to any party that the member's services be retained;

(h) to act for or accept a brief from or on behalf of a member of a club or organizations as for example an automobile club which makes a practice of "steering" its members, provided that a solicitor shall be entitled to assist a community social agency by providing legal advice or service on a gratuitous basis for persons falling within the scope of the agency's activities.

An exception to the rule against advertising is made in Ruling 3(3) with respect to services provided to a non-profit organization providing a community service. Subject to the lawyer obtaining a certificate of exemption from a subcommittee of the Professional Conduct Committee, submitting all advertising for approval and supplying the Law Society with information concerning its financial operations, financial procedures and other functions, the organization may advertise the legal services it provides so long as there is no association in the advertisement with a firm or a particular lawyer and the lawyer's income is not regulated by reference to any income for legal services earned by that organization. Consequently, community legal service organizations may advertise if they obtain an exemption.

Advertising has not been absolutely prohibited by the Law Society. The Professional Conduct Handbook outlines the circumstances in which limited informational material may be supplied. Ruling 10 covers the permissible content of signs and letterheads and reads as follows:

"1. Members should not use on their letterhead or on signs identifying their office the names of persons who

(a) if living are not qualified to practise in Ontario, or

(b) if dead never were qualified to practise in Ontario.

2. Members who practise in the industrial property field may show the names of patent and trade-mark agents registered in Canada who are identified as such but who are not solicitors.

3. Firm names used in letterheads or signs should comply with paragraph 1 of this Ruling.

4. A member's letterhead and the signs identifying his office should be restricted to the name of the lawyer or firm, a list of the members of any firm including counsel practising with the firm and the words "barrister-at-law", "barrister and solicitor", "lawyer", "law office", or the plural where applicable, the words "notary" or "commissioner for oaths" or both and their plural where applicable may be added. A statement of office hours or alternative addresses may appear, and the words "patent and trade mark agent" in proper cases.

5. Such words as "money to loan", "insurance office", "proctors", "attorneys", "mortgages", "solicitor to the township", or any other client, and the like if now in use will be removed.

6. Lettering and signs will be of modest size and in good taste. As a general guide no sign need have the letters larger than six inches in height.

7. The Professional Conduct Committee may in special circumstances authorize exceptions to this Ruling."

The exception made for members practising in the industrial property field is common to all the rulings on advertising and is a recognition of the fact that lawyers in this field would be at a decided disadvantage compared to patent agents if they could not indicate the nature of their practice. Ruling 16 sets out the requirement for directories, announcements and professional cards as follows:

"1. No member shall authorize or permit any notice or announcement or card to be circulated or to be published in any newspaper, periodical, programme or other publication except in accordance with the provisions of this Ruling.

2. No member shall authorize or permit the insertion in the yellow pages of any telephone directory of more than one standard listing in regular type under the heading "Lawyers" for the firm and for each lawyer thereof in the section for each area where the firm maintains an office or branch office. Provided that, where there are more

than one yellow-page directory for different areas of the same urban municipality members may have an insertion for each of those areas as such office or branch office may reasonably be considered serving in a substantial manner. Members who are Patent Agents or Attorneys may have a similar listing under the heading "Patent Attorneys & Agents".

3. No member shall authorize or permit the insertion in the white pages of a general telephone directory of more than one listing for the firm including the names of its members and associates and for each lawyer thereof in the section for each area where the firm maintains an office or branch office.

4. A member or firm may circulate among the profession or among his or its clients or public in any newspaper in Ontario, announcements in good taste, without photographs, (other than at the time of call to the Bar), containing only information pertaining to his or its practice such as to change of office hours, change of address or of personnel.

5. A member may insert a card, notice or announcement in good taste in any law list, legal directory, legal periodical or similar publication, when such publication has been approved by Convocation and on such terms as Convocation may from time to time approve. Such approval may be withdrawn at any time.

6. A member's personal professional card shall contain no more than the information permitted on his, or his firm's, letterhead pursuant to the provisions of Rulings 10 and 24 of the Rules of Professional Conduct. For those members who are not in private practice, the card may include the name of his employer.

With the approval of Convocation, a lawyer is permitted a limited form of promotional advertising by section 5 of Ruling 16 which permits insertion of a card, notice or announcement "in good taste" in specific legal publications where the reader is likely to be another lawyer rather than a member of the general public.

Ruling 24 further limits a lawyer from in any way describing himself as a specialist. Ruling 24 states:

> "A solicitor may not, by published notice or otherwise, describe himself as a "specialist" in any branch of law or knowingly permit himself to be so described.
>
> A number of announcement cards that are objectionable on this basis have come to the attention of the Committee. They announce, for example, that "Mr. X will be associated with the firm 'specializing in industrial relations' or 'taxation matters'".
>
> On the other hand, if a solicitor has confined or restricted his practice to a certain branch of law, there is no objection to his announcing this in such terms or to his permitting himself, if the occasion requires it, to be described as having done so."

The last paragraph of the Ruling permits reference to a restricted practice "if the occasion requires it". In its communiqué of 25 June 1976, the Law Society notified its members that lawyers and law firms who restrict their practice to particular areas of law may apply to the Professional Conduct Committee to use the words "practice limited to..." on their letterhead. A further extension of this informational form of advertising is contemplated by the Special Committee on Specialization (the "Specialization Committee") which was reactivated recently to reconsider specialization and the ban on advertising.

In its report to Convocation of 20 January 1977, the Specialization Committee recommended that a lawyer who became accredited by the Law Society as described in section IV on Specialization be permitted to use the words "Practising in _____Law" or "General Practice" after his name in the yellow pages, on professional cards, letterhead and "in other approved ways". Presumably "other approved ways" would be those ways presently permitted in Rulings 10 and 16 discussed above.

The Rulings in the Professional Conduct Handbook also attempt to limit the promotional advantage of legal writing and public appearances.

Ruling 23 permits the author to sign his name and indicate professional qualifications, firm name and biographical facts for articles published in "legal" publications, that is, publications intended to be read normally only by members of the legal profession. When writing for "non-legal" publications of general readership, the lawyer may only indicate his title as barrister and solicitor or Queen's Counsel. He is specifically prohibited from indicating specialties, professional qualifications, experience, or firm name.

Public appearances by solicitors are governed by Ruling 30 which reads as follows:

1. "Appearance" herein means appearance on radio, television or other public forum.

2. No solicitor should:
   (a) solicit appearances in his professional capacity as a solicitor;
   (b) attempt to use appearances as a means of professional advertisement;
   (c) engage in his capacity as a solicitor in any appearance that might reflect ill on the profession.

3. A solicitor may appear in his private or personal capacity as a speaker, actor or otherwise on a non-legal programme where his professional capacity as a solicitor is not the reason for his appearance in which circumstances he should not be described as a barrister, solicitor or Queen's Counsel or otherwise described as a lawyer.

4. Where the reason for a solicitor's appearance is his professional capacity he may be described by name and by his professional designation as a Professor of law, Barrister and Solicitor or Queen's Counsel as the case may be and a reasonable amount of biographical material may be given but, except in the case of a full-time academic, no reference may be made by him or any other to indicate that he is a specialist in any branch of law.

5. The overriding principle is that all public appearances by solicitors should be governed by considerations of good taste.

6. A solicitor should not, by direct statement, inference or otherwise, make it appear that he speaks on behalf of the Law

Society, the Canadian Bar Association or a County law association or any other group or association of lawyers unless he has their specific authority to do so.

7. Compliance with this ruling, by the solicitor appearing, or by any other person associated with the appearance shall prima facie be the responsibility of the solicitor.

Ruling 30 clearly attempts to control the use of public appearances for professional publicity. In addition to observing the overriding principle of good taste, a lawyer appearing in public as indicated in pragraphs 3, 4, 5 and 7 of the Ruling, must watch not only what he says but what is said about him.

VI.17 THE COMBINES INVESTIGATION ACT

The legality of the foregoing rules restricting advertising in the Professional Conduct Handbook is now under question as a result of amendments to The Combines Investigation Act (the "Act") in 1976 where such rules have the effect of restricting the availability of legal services. In his opinion as counsel to the Federation of Law Societies,[196] Mr. Gordon F. Henderson concluded that if the rules of the Law Society restricting advertising limits unduly the ability of the lawyer to advertise, then such a rule offends section 32(1)(a) of the Act and possibly section 32(1)(d) as well which penalizes, broadly, an arrangement to "restrain or injure competition unduly".

Counsel quickly responded to any discussion of the term "unduly" by pointing out that section 32(1.1) makes clear that unduly does not necessarily mean completely. Without commenting on any constitutional problems inherent in his suggestion, Counsel recommended that Provincial legislation authorizing Law Societies to impose advertising restrictions

is the "safest and most appropriate way of taking out this matter from the ambit of The Combines Investigation Act". The Law Society has chosen not to pursue this possible route.

In his address to the Special Lecture Series of the Law Society, Advertising and Professional Fees under The Combines Investigation Act, Mr. Henderson stated that the nature of professional business may make some provisions of the Act inapplicable. For example, section 32(2)(f) exempts from prosecution an agreement or arrangement which relates to the restriction of advertising or promotion, other than a discriminatory restriction directed against a member of the mass media. Mr. Henderson noted that the "new reasons" advanced in favour of the no advertising rule include the need to maintain the relationship of trust between the patient or client and the practitioner, and the increase in cost of professional services as a result of the cost to the professional of advertising his services.[197] In support of these arguments, Mr. Henderson quoted the Bar Council in England as follows:

> "If barristers were permitted to advertise, the advantages would go, not to the best qualified, but to the barrister who had the longest purse and the least scruples. If the choice of barristers came to be made by the general public on the strength of advertisement, the choice would tend to be more ill-informed and the public not so well served as at present. If it became common for barristers to advertise, and all were compelled to fall in with the practice, the cost of a barrister's services would inevitably go up."[198]

Mr. Henderson recognized that the dangers of "tasteless and undignified" advertising that existed when the ban on advertising was introduced are no longer a serious problem due to the laws regulating misleading advertising, deception and fraud. Mr. Henderson emphasized the need to reconcile the legitimate needs of the public for information to make an enlightened decision and the objective of the professional organizations

in maintaining the integrity of the profession.

> "It is therefore apparent that advertising respecting fees, expertise and competence, free from commercialism, is considered to be competitively useful. In these cases, the legitimate powers of the professional organizations to regulate advertising as an aspect of ethical practice must be reconciled with the objectives of The Combines Investigation Act. The difficulty of course is to draw a line of distinction between information that is competitively desirable and undignified or unethical promotional advertising, which borders on unfair competition that the professions may regulate.[199]
>
> .....
>
> The regulatory power may have to yield to the need of the public for relevant information especially in the areas of expertise, qualifications, and perhaps the cost and other charges that are recognized and protected by The Combines Investigation Act. Any regulation on the basis of the Code of Ethics that would unduly limit the distribution of such information to permit the customers to make decisions may offend The Combines Investigation Act. Such a rule may be argued to have the effect of restricting the availability of professional services to the public."[200]

VI.18 CANADIAN BAR ASSOCIATION'S CODE OF PROFESSIONAL CONDUCT

The need for informational advertising which could be of value to the public in assisting it to find a lawyer was recognized by the Canadian Bar Association in Rule XIII of its new Code of Professional Conduct (the "Code") which reads as follows:

> "Lawyers should make legal services available to the public in an efficient and convenient manner which will command respect and confidence and by means which are compatible with the integrity, independence and effectiveness of the profession."

Commentary to the rules makes it clear that it is essential that a person requiring legal services be able to find, with a minimum of difficulty and delay, a lawyer who is qualified to provide such services. Emphasis is placed on finding a lawyer who has the special skill required for the particular task. The Code recognizes that reliance on reputations of

lawyers is insufficient given the size of modern cities and the complexity of practice and that "[t]elephone directories, legal directories and referral services will help him find a lawyer, but not necessarily the right one for the work involved."[201] The suggestions for making legal services more readily available include the responsibility of individual lawyers to assist the public not only by participating in legal aid plans, referral services, public information programmes and education but also on a personal level by assisting prospective clients to find another lawyer when the initial lawyer is unable to act.

The Code clearly distinguishes between informational, as opposed to promotional advertising, encouraging the former and prohibiting the latter. For example, section 4 of the commentary to the Rule XIII reads as follows:

> "The means by which it is sought to make legal services more readily available to the public must be consistent with the public interest and must not be such as would primarily advance the economic interests of any individual lawyer or law firm, or detract from the integrity, independence or effectiveness of the legal profession. Unregulated advertising is not in the interest of the public or the profession. Such advertising has for good reason been prohibited by all professions. It would be apt to encourage self-aggrandizement at the expense of truth and could mislead the uninformed and arouse unattainable hopes and expectations resulting in the distrust of legal institutions and lawyers. Moreover, there are sound economic reasons for not allowing unregulated advertising, quite apart from the traditional reasons for which the professions have rejected it. There is the risk that such advertising would tend to increase the cost of legal services and in the course of time would tend to bring about a concentration of legal services in large firms that could afford to advertise freely to the detriment of the medium size and small firm, thereby unduly limiting the choice of persons seeking independent legal representation."

Section 5 to Rule XIII proposed the use of limited advertising (as opposed to unregulated advertising) by permitting

> "(a) advertising on behalf of the profession by Governing Bodies and by groups authorized by them;

(b) publication of names on legal aid panels and referral services sponsored or approved by Governing Bodies;

(c) the use of nameplates on law offices and the publication of professional cards and announcements, including where permissible a reference to the fact that a lawyer is an accredited specialist or that his practice is restricted to a particular field."

The Code suggests considering the clientele as a gauge of the need for limited advertising.

The Code restricts any promotional advertising by restricting any conduct designed primarily to attract legal business including offering services at reduced rates solely to attract clients or soliciting public appearances as a means of professional advertisement.

VI.19 THE LAW SOCIETY'S NEW CODE OF ETHICS

The Sub-committee of the Professional Conduct Committee approved substantially the rule and commentary in the Code for inclusion in the new Law Society Code of Ethics with the addition of restrictions on insertions in the yellow pages and rules with respect to the circulation and publication of announcements of changes in a lawyer's practice as well as announcements in legal publications.

These additions reflect the present rulings of the Professional Conduct Handbook. In fact, Ruling 3(3) relating to certifications of exemption with respect to non-profit organizations is included in its entirety. However, whether the final version of the Law Society's Code of Ethics includes these additions depends on the interpretation of the rulings on which they were based with respect to the amendments to The Combines

Investigations Act discussed above.[202]

VI.20 PUBLIC RELATIONS

The public image of the legal profession has been important to the Law Society for several reasons. Firstly, a poor public image could result in a reduced reliance on lawyers and would be "bad for business" generally. Secondly, an important concomitant to being a lawyer is the traditional respect arising from the position; the greater the public image of the profession as a whole, the greater the pride an individual feels in being a part of that whole. Lastly, and most important as far as the Law Society itself is concerned, a poor public image threatens the independence of the Law Society as the governing body of the legal profession. Actions, like establishing legal aid, establishing the compensation fund[203] and establishing the lawyer referral service, were also reactions to concerns over public image with respect to the issues of availability of legal services, the integrity of the legal profession and the accessibility of legal services respectively.

Concern for the public image of the legal profession in the 1960's led the National Executive of the Canadian Bar Association to retain a firm of professional consultants to conduct a survey among its membership[204] and the public with a view to ascertaining the attitude of the public to the legal profession. One conclusion of the survey, submitted in a report in November 1968, states:

> "Lawyers are better regarded by the public than by lawyers themselves. Lawyers generally felt that the public would be critical of the profession. They used words like tricky, shyster or argumentative. The public, on the other hand, frequently used words like educated, honest, clever (with a favorable connotation)."[205]

The National Executive concluded that internal rather than external communications needed improvements.

While public image has been a constant concern for the Law Society, traditions of the legal profession have made it reluctant to enter any active campaign to win public favour. However, in 1974 the Law Society established a joint public relations council with the Canadian Bar Association. The Council has retained the firm of Tisdall Clark Lesley & Partners Limited as public relations consultants to act as liaison between the Canadian Bar Association executive and the profession as well as between the profession and the public. The consultants attend all council and executive meetings, report on these meetings to the National, and issue press releases if requested to do so by the Canadian Bar Association. Financial contribution to the council is shared equally between the Law Society, the Canadian Bar Association (national branch) and the Canadian Bar Association (Ontario branch).

VI.21 LAWYER REFERRAL SERVICE

While supporting the ban on advertising with the view that "[t]he best advertisement for a lawyer is the establishment of a well merited reputation for personal capacity and fidelity to trust,"[206] the Law Society has recognized the validity of the criticism that modern urban life has made this adage out-dated. As an alternative to permitting advertising, the Law Society developed the Lawyer Referral Service in 1970 "to enable members of the public who find it difficult to choose a lawyer to find one in their locality who is ready to help them in the area of law where their

problem lies."[207] The Referral Service is the responsibility of the Public Relations Committee. The Referral Service originated in Toronto and has been extended to Ottawa and London. The Law Society plans to extend the service to the rest of the province through the use of toll-free calls to the Referral Service in Toronto with reference to a member of the bar in the geographical area of the caller. A lawyer applies to participate and undertakes to abide by the conditions of the Referral Service. The lawyer may select three of eight named areas of law which are civil litigation, commercial law, criminal law, family law, labour law and master and servant relationships, patents, trademarks and copyright, taxation, wills, estates and trusts. The initial experience requirement of three years was dropped permitting members newly-called to the bar to participate. Referrals are made geographically on a strict alphabetical rotation within each area of law. Legal aid recipients are directed to the next lawyer who is a member of the legal aid panel. Both the applicant and the lawyer are informed by mail of the names and terms of the referral. Those persons referred under the Referral Service are, upon presentation of a referral slip supplied by the Referral Service, entitled to a half-hour consultation with the referred lawyer at a cost of $10 with the understanding that further services needed are charged at normal rates. The lawyer benefits from receiving clients who might otherwise seek counsel elsewhere and the client risks only $10 to have his problem reviewed by a lawyer. The usefulness of the Referral Service depends on the referred lawyer not only assessing the legal rights of the potential client but in advising him or her as to the cost of pursuing those rights so that the client can decide whether or not to proceed with the matter.

It is interesting to note that the Public Relations Committee is planning to revive the custom of issuing pamphlets suitable for lawyers' waiting rooms containing information "on the services the profession has to offer".[208] There is no elaboration on the content of the suggested pamphlet.

VII. COUNTY AND DISTRICT LAW ASSOCIATIONS

The Law Society, pursuant to Section 55(8) of The Law Society Act has power, subject to the approval of the Lieutenant Governor in Council, to provide for "the establishment, operation and dissolution of county and district law associations". County and district law associations (the "Associations") have been established in forty-six areas. In spite of the power resting in the hands of Convocation, pursuant to section 55(8), to dissolve these associations, they view themselves as autonomous bodies which pursue the interest of their members independent of any Law Society control although relying on Law Society assistance in the form of grants. Naturally, any voluntary association whose members are compulsory members of the Law Society must respect the governing body. One of the main reasons for establishing the Associations is maintenance of the county law library although the Associations have grown to represent more broadly the views of member lawyers.

Although perhaps atypical due to its size, it is useful to consider in detail the government and activities of the York County Law Association (the "York Association") because its membership in December 1975 numbered 3,615 and, as a result, it represents nearly a third of the lawyers in Ontario.

VII.1 HISTORY OF THE YORK COUNTY LAW ASSOCIATION

The County of York Law Association was incorporated under the provisions of An Act Respecting Library Associations and Mechanics' Institutes, R.S.O. 1877, c.168, by Declaration filed in the Office of the Registrar of Deeds for the County of York on 30 December 1885. Objects of incorporation included the following:

> "Its purpose shall be the formation and support of a Law Library for the use of its members, to be kept and maintained in the Court House in the said City of Toronto, and to promote the general interests of the profession, and good feeling and harmony among its members."

By letters patent issued under The Corporations Act,[209] the Association was continued as if it had been incorporated under Part III of that Act. A committee chaired by Philip W. Benson, Q.C., and John D. Honsberger, Q.C., is preparing a complete history of the York Association based on the collection of minutes of meetings of the association.

VII.2 GOVERNMENT OF THE YORK ASSOCIATION

The affairs of the York Association are managed by a board of nineteen trustees elected in rotation, six being elected at an annual meeting of members each year to hold office for a three year term. Any ordinary member of the York Association is eligible to be elected trustee. A trustee is automatically removed if he is found to be a mentally incompetent person or becomes of unsound mind; if he resigns, if he ceases to be a member of the Law Society or an ordinary member of the Association; or if he has any of the financial difficulties outlined in section 6(a) of Bylaw 4 of the York Association. Furthermore, a trustee may be removed

by resolution passed by at least two-thirds of the votes cast at a general meeting of members called for that purpose. The board meets monthly or more often as circumstances require.

Bylaw 4 makes provision for election from among the board of a president, vice-president, secretary, treasurer, assistant secretary and assistant treasurer whose duties are defined therein. There is also provision for the election of an executive committee of at least three trustees to whom is delegated all the powers of the board, subject to any restrictions imposed from time to time.

Standing committees include civil justice, commercial law and real estate, criminal justice and civil liberties, legal aid, legal education, library and premises, membership programme and tariff committees. Ad hoc committees of the York Association are the following: bylaw reform, history of the association, land titles office reform, legal secretarial course adviser, summer sittings committees.

Membership in the York Association is divided into three classes. The honorary members include justices, judges, and masters, the Provincial Secretary for Justice, the Attorney General, the Solicitor General, Ministers of Canada and Ontario, the Treasurer of the Law Society and other designated persons. Life members include persons retired from judicial appointments who were honorary members and life members of the Law Society who have been members of the York Association for ten of the fifteen years preceding such appointment. Lastly, any member of the Law Society, other than student members, is eligible for membership as an ordinary member.

Bylaw 3 provides for termination of membership where a member ceases to be a member of the Law Society or by the board of trustees for failure to pay fees or infringement of the bylaw or the rules of the library.

VII.3 LIBRARY

One of the most visible functions of the York Association and an object of incorporation is the formation and support of a law library. Section 34 of the bylaw designates that the following persons shall have library privileges:

> "(a) All members in good standing in the Association;
>
> (b) Members (other than student members) of the Law Society of Upper Canada residing and practising outside the Judicial District of York while in Toronto on legal business;
>
> (c) All Supreme Court Justices, County and District Court Judges, Provincial Judges, Masters of the Supreme Court and Justices of the Peace;
>
> (d) The members of administrative or quasi-judicial boards or commissions or other tribunals established or provided for by any Act while exercising their functions in the Judicial District of York; and
>
> (e) Student members of the Law Society of Upper Canada, subject to such special rules and regulations as the board of trustees may from time to time prescribe having in mind the demands of members upon the library facilities.

Objection has been raised to the fact that these library facilities are not accessible to the public. It has been argued that law libraries, as the primary storage of legal information, should be maintained by public funds for the use of public as well as for the profession.

VII.4 LAW SOCIETY CONTROL OF COUNTY AND DISTRICT LAW ASSOCIATIONS

Sections 27-39 of the Regulation to The Law Society Act govern the formation, control and funding of a county or district law association (the "Association"). Formation of an Association by members of a county or part thereof requires approval of Convocation. The association is required to incorporate and thereafter send to the Chief Librarian a certified copy of its letters patent, bylaws and any subsequent amendments thereto. The Association must also provide proof of the condition of its funds and that proper accommodation has been provided for its library together with an undertaking that the Association will comply with the regulations pertaining to county law libraries. Thereafter, the Association must report annually to the Law Society showing the state of its finances and of its library, together with other information as requested by the Libraries and Reporting Committee (the "Committee"). Failure to provide this report may result in a suspension or reduction of the grant from the Law Society.

Pursuant to section 30, the trustees of the Association hold the county library books in trust for the Law Society. Where the Association dissolves or winds up or the Committee is of the opinion that the county law library is not being cared for properly or satisfactorily maintained, the trustees must return the books to the Law Society.

The library is maintained by at least half the fees received by the Association and grants received from the Law Society. The Regulation describes the first-year, annual and special grants available to the Association.

VII.5 BENEFITS TO MEMBERS

Apart from the obvious benefit to members of the maintenance of the law library as described above, the York Association provides, as an adjunct to the library, facilities for photocopying and dictating. Dinner meetings, held periodically during the year and attended by many honorary members of the York Association from the bench and government, provide a common meeting ground for lawyers, judges and others involved in the administration of justice. Publication and revision of a suggested schedule of fees for solicitors in non-contentious matters may be valuable to new lawyers as a guide to fee determination.

VII.6 REPRESENTATIONS TO GOVERNMENT

The York Association, through its committees and board of trustees, makes representations on behalf of the profession in the Judicial District of York to the Law Society and to governmental or judicial agencies on matters of current concern. While the York Association may support the position taken by the Law Society for example with respect to legal aid, they are also willing to assume an independent position as they did with respect to specialization. Apart from matters which directly affect the profession, the primary concern with other legislation is for procedural rather than substantive law reform to permit the lawyer to function more effectively and efficiently within the system. For example, they have made representations and submitted briefs on the administration of courts and the administrative aspects of the registry system.

VII.7 FEE SETTING

The county law associations have established tariffs for fees. With the support of Rulings in the Professional Conduct Handbook, the county law association has been authorized to investigate breaches of tariff and initiate formal disciplinary proceedings. In addition, the county law association could enforce fee schedules by ostracizing the member, both socially and professionally, e.g. through removal of library privileges. With the passage of amendments to The Combines Investigation Act, county law associations, where they maintain a tariff, are only likely to be free of prosecution if the tariff is a "suggested" fee schedule, and no direct or indirect measures are taken to enforce it. In its brief to the Ministry of Consumer and Corporate Affairs submitted in 1972 discussing the proposed amendments to competition legislation, the York County Law Association supported fee schedules as an indication to individual practitioners of a reasonable range of fees and as a necessary criterion to assist the public in assessing fees charged. The association concluded "it would be more of a detriment than an asset in serving public interest" for suggested fee schedules to be prohibited.[210]

VIII. THE CANADIAN BAR ASSOCIATION

VIII.1 HISTORY OF THE CANADIAN BAR ASSOCIATION

The erosion of the nineteenth century concept of individualism was marked in the legal profession by the formation of the Ontario and Canadian Bar Associations. The formation of these associations was viewed as a response

to the challenge to the status of the profession. "The bar association, by bringing lawyers into contact with one another, would foster an exchange of ideas and would perhaps bring a certain amount of common purpose and identity to a profession which had been noted for an absence of both."[211] "The larger goal of the Canadian Bar Association would be to advance the science of jurisprudence throughout Canada; but of no less importance would be the establishment of cordial intercourse among the members of the bar and the defence of the honour of the profession of law."[212]

The movement to form the Canadian Bar Association originated with the Nova Scotia bar. As a result of a circular mailed to members of the profession in each province, a preliminary conference was held in Montreal, 15 September 1896. As a result of that meeting, the original Canadian Bar Association was formed with dominion officers and a vice-president for each of the then existing provinces as well as one to represent the Northwest Territories, but it lasted only three years. However, the need for a national bar association did not die. Stimulated by the American Bar Association through example and encouragement, in 1914 the Canadian Bar Association was organized informally in an unincorporated body as a national voluntary association of lawyers. In 1921, the Association was incorporated by Private Act of the Parliament of Canada, "An Act to incorporate the Canadian Bar Association", [S.C.1921, c.79.] The objects of incorporation as stated in the charter included the objects of the informal association and read as follows:

> "The objects of the Association shall be to advance the science of jurisprudence; promote the administration of justice and uniformity of legislation throughout Canada so far as is consistent with the preservation of the basic systems of law in the respective provinces; uphold the honour of the profession of the law, and foster harmonious relations and co-operation among the incorporated

> law societies, barristers' societies and general corporations of the Bars of the several provinces and cordial intercourse among the members of the Canadian Bar, encourage a high standard of legal education, training and ethics; publish its own transactions as well as reports of cases and information and decisions concerning the law and its practice, and generally to do all further or other lawful acts and things touching the premises."

The first concern of the Canadian Bar Association was to advance and be seen to advance the standards of legal practice. In 1920, when the Canadian Bar Association adopted a formal code of ethics, its primary purpose was to standardize the professional conduct of the lawyer in society and thereby improve the status of the profession in the eyes of the public.

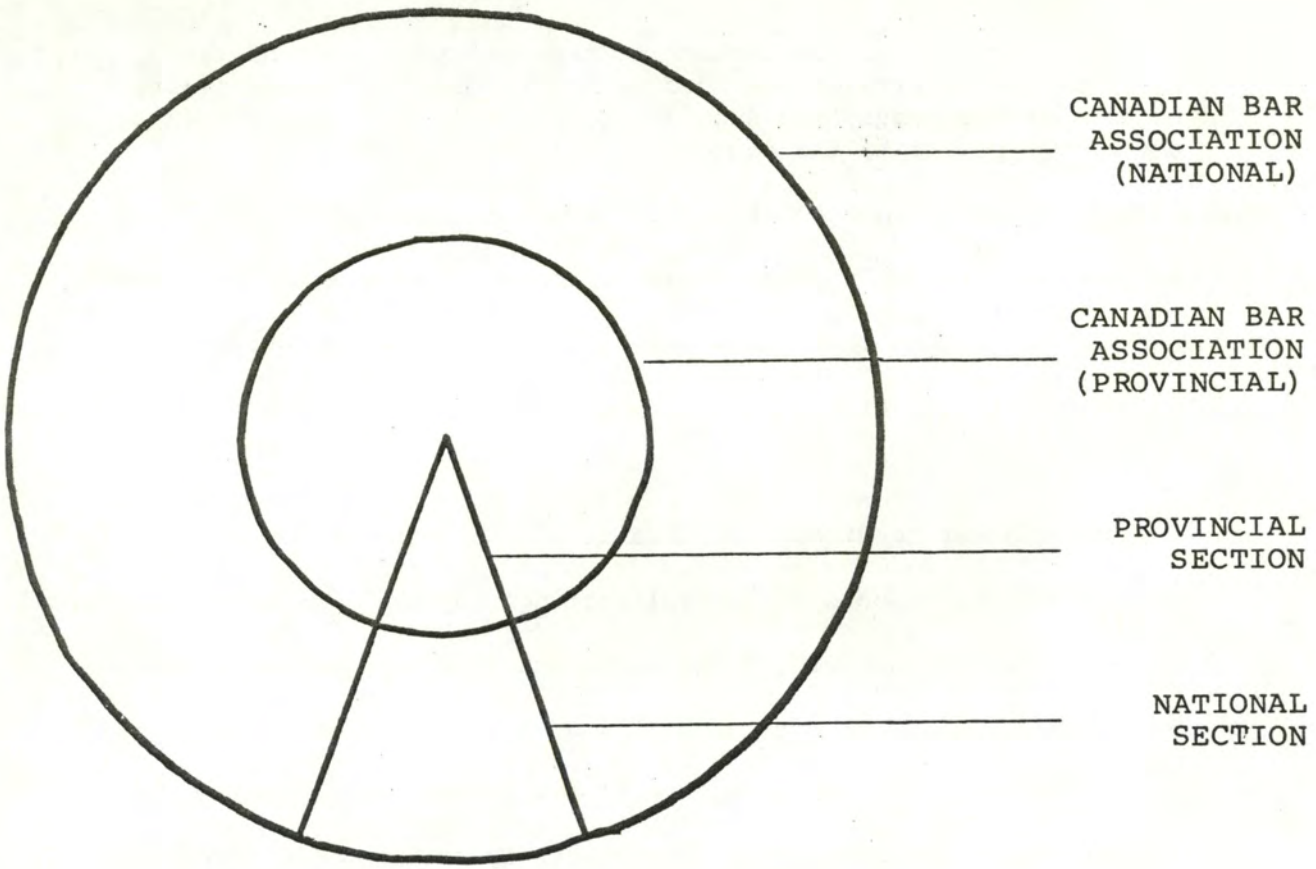
> "Even at that time the profession was concerned with the change of status of the lawyer from that of an old family lawyer to a businessman, with the ethics of the profession, and with the use of administrative tribunals. But the most important topic of consideration was that of law reform. This included both the efficiency of the courts and the efficiency of the profession."[213]

VIII.2 THE STRUCTURE OF THE CANADIAN BAR ASSOCIATION

The organization of the legal profession by province for the purpose of licensure, together with division of legislative power between the federal government and the provinces according to the Constitution, has made it essential that the Canadian Bar Association be able to accommodate provincial as well as federal interests of their membership. The structure that resulted to provide this flexibility involves a National Association comprised of Provincial Branches. The National Association has National Sections divided according to subject matter. These National Sections are concerned primarily with federal legislation. The Provincial Branches have Provincial Sections which concentrate on provincial legislation. Figure VIII.1 illustrates the structure.

FIGURE VIII.1

CANADIAN BAR ASSOCIATION STRUCTURE



VIII.3 ROLES AND POWERS OF THE CANADIAN BAR ASSOCIATION (the "National Association")

By its Act of Incorporation, 1921, all the present and future members of the Canadian Bar Association were given the power to make rules or bylaws to:

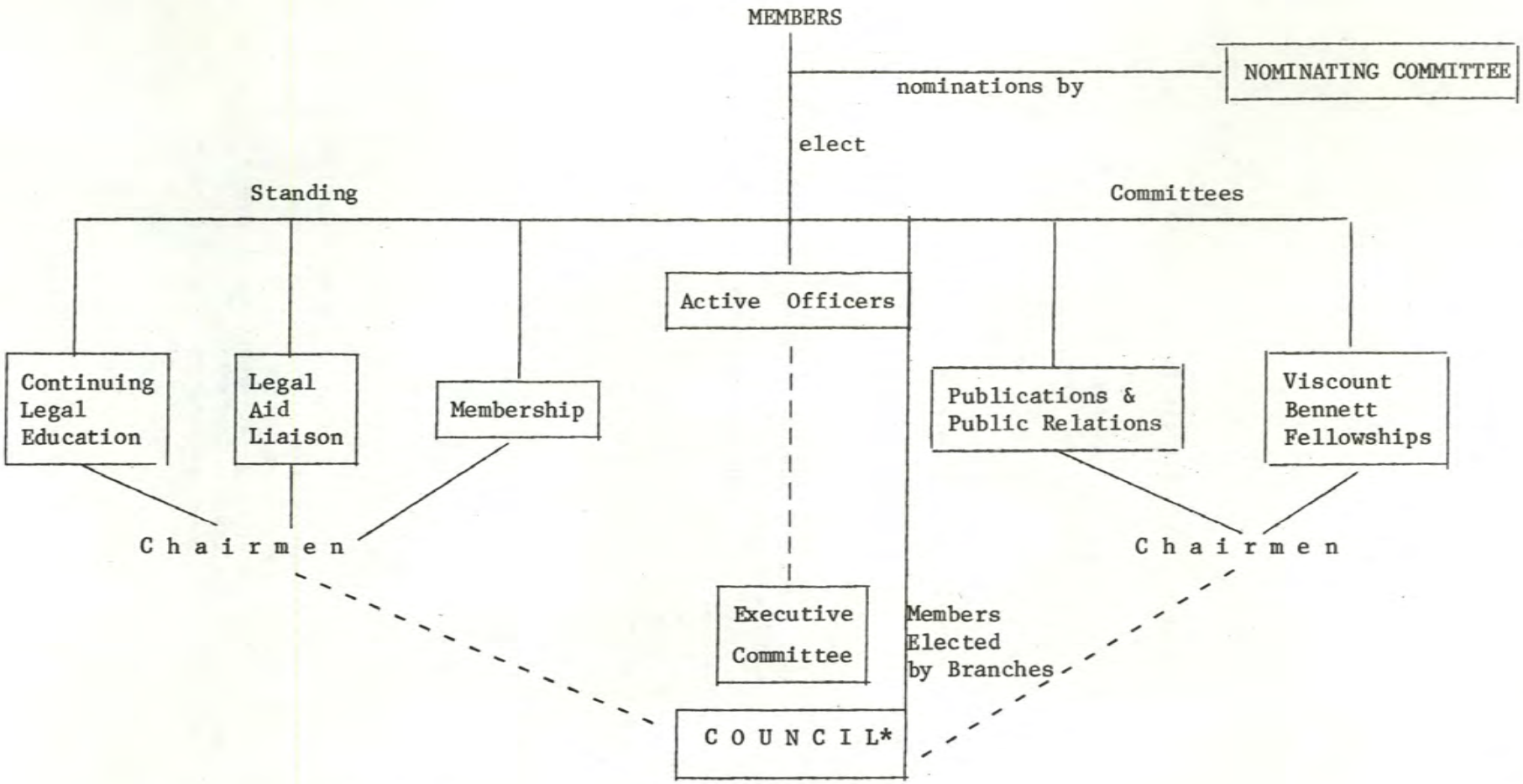
Section 4(4) "Provide for the administration and management of the business and affairs of the Association and the furthering of its objects and purposes, and such delegation as it may deem proper of any of its powers to the council of the Association."

The letters patent of incorporation define the membership and powers of the National Association and the bylaws elaborate on its administration and management. Figure VIII.2 illustrates the governmental structure of the National Association.

While ultimate power to direct the affairs of the National Association lies in the hands of the members at general meetings, Bylaw 1 delegates to Council the duty to carry on the work of the Association as well as the power to pass Rules and Regulations for the better administration of its affairs. A subgroup of Council is the Executive Committee which advises and assists the President and between meetings of Council has all the powers of Council, except the power to pass bylaws. The Council also appoints an Executive Director as Chief Administrative Officer of the National Association to administer the general affairs of the Association and manage the Association office as well as advise and assist the Executive Committee and other Committees except the Nominating Committee. Table VIII.1 shows the composition of the National Council and Executive Committee. All active officers (other than provincial chairmen and the Executive Director), and the Chairman, Vice-Chairman and members of the Standing Committees are

CANADIAN BAR ASSOCIATION

GOVERNMENT STRUCTURE



_____ elected persons

- - - - - - - - these persons become part of Council by virtue of the position

* for the complete composition of Council see Table VIII.1

FIGURE VIII.2

TABLE VIII.1

CANADIAN BAR ASSOCIATION

COUNCIL AND EXECUTIVE COMMITTEE COMPOSITION

C O U N C I L

EX-OFFICIO MEMBERS

Minister of Justice (Canada)
Attorney General of each Province
* President
* National Vice President
Chairman for each Province
Treasurer
* Seven Members of Executive Committee elected at large
Executive Director
All former - Presidents
- Members of Executive Committee
- Provincial Chairmen (two terms)
Editor of Canadian Bar Review
Foundation for Legal Research - Chairman of Trustees
- Chairman of Fellows
Being Members of the Association:
- President, Vice President, two directors, Secretary-Treasurer of the Law Societies of Canada
- Deputy Minister of Justice (Canada)
- Chairman, Vice Chairman, Secretary of National Council on the Administration of Justice in Canada
- Chairman and Vice Chairmen of the National Law Reform Commission
- Chairman of each Provincial Law Reform Commission

If not otherwise Members of Council:
- Chairmen of Sections and Standing Committees
- Chairmen of Special Committees

If not otherwise elected:
- Provincial Vice Chairmen, Secretaries, Treasurers, Secretary-Treasurers, Membership Chairmen and Public Relations Chairmen

APPOINTED MEMBERS:
Two members appointed by each provincial governing body or Law Society
ELECTED MEMBERS
Elected by Northwest Territories and Provincial Branches
- Number of representatives corresponds to size of Province's membership

EXECUTIVE COMMITTEE
President
Immediate Past President
National Vice President
Treasurer
Chairman of Publications and Public Relations Committee
Chairman of Membership Committee
Chairman of Younge Lawyers Conference
Seven Members Elected at Large at least two of whom are members of Young Lawyers Conference

Executive Director

elected at the annual meeting of members viva voce unless a vote by ballot is demanded. Nominations for the election are submitted by the Nominating Committee consisting of the President, the Chairman for the Provinces, the Immediate Past President and four other Past Presidents elected by their number, or by a member filing a memorandum of a nomination supported by ten members in the province of the candidate and ten members from at least two other provinces.

VIII.4 MEMBERSHIP

Membership in the National Association is open to any member in good standing of the Bar or of the Law Society of any province or its equivalent in the Northwest Territories; any judge or retired judge of any Court of Record in Canada, any Notary in good standing in Quebec, any person who ceased to be a member of the Bar or a Notary in Quebec by reason of accepting or holding any appointment in the public service, or any professor of law in one of the provinces on application in writing and the payment of prescribed fees. Members are designated as active or special members. Active members may be classified as regular members, life members, or junior members; the last category being persons in their first five years of practice. Special members include honorary members and student associate members, neither of whom has any right to vote.

VIII.5 SECTIONS

Any member in good standing of the Association may become a member of one or more of the following sections authorized under section 49 of Bylaw 1:

administrative law; air law; civil justice; civil liberties; commercial, consumer, and corporate law; comparative law; constitutional and international law; criminal justice; environmental law; family law; insurance law; labour relations; law office economics and management; legal education and training; maritime law; media and communications law; municipal law; natural resources and energy; real property; taxation; wills and trusts; and young lawyers conference. Each section elects a chairman, a vice-chairman, and a secretary. The Provincial Section, which is a subsection of each section, is organized in each province.

VIII.6 REPRESENTATIONS TO GOVERNMENT

One of the most important functions of the Canadian Bar Association is the preparation and presentation of proposals relating to Federal and Provincial legislation. Proposals to pronounce policy or to take action as an association require a resolution passed and approved by the National Association, the Council or the Executive Council. Resolutions may be tabled for consideration by either a section or an individual. Before a resolution can be submitted for a vote at the annual meeting, it is referred to the Resolutions Committee composed of the past president and the provincial chairmen who may redraft the resolution and decide whether it should be submitted to the membership or referred back for further study. Resolutions approved by a majority of members are adopted by the Association. A list of the resolutions so adopted at the annual meeting is submitted to the Federal government and to the appropriate Provincial government. Resolutions of the Provincial Council and Provincial Sections require the approval of a majority of the Provincial Sections before they

are deemed to be passed by the National Section and forwarded to the Executive Committee for consideration. Unless a resolution involves a matter which the Executive Committee deems more appropriate for reference to the annual meeting, or, for further review by the section, such resolution will be implemented by the Executive Director.

In addition to submission of formal resolutions, the Canadian Bar Association makes its position known informally through consultation with government officials and through interchange at social and educational functions.

VIII.7 ROLES AND POWERS OF THE CANADIAN BAR ASSOCIATION (ONTARIO BRANCH)

The Ontario branch of the Canadian Bar Association (the "Ontario Branch") was formally established in 1921, at the time of incorporation of the Canadian Bar Association nationally although records show meetings of an association of lawyers in Ontario shortly after the turn of the century. The Ontario Branch is governed by the national letters patent. However, it does have bylaws which describe the branch government. In addition to the objects of the National Association mentioned earlier, the Ontario branch has as its stated objectives the following:

"(a) Promote, stimulate and participate in legal research and law reform;

(b) Improve and promote the availability and quality of legal assistance to all residents of the Province;

(c) Enter into arrangements with the Law Society of Upper Canada for the assumption by the Branch, either jointly with the Society or alone, of such of the Society's non-statutory functions as may be appropriate.

As a provincial branch, the Ontario Branch has power to organize those Ontario Sections outlined in Bylaw 1 of the National Association unless Council decides otherwise. The sections are open to all members of the Ontario Branch with the Chairman, Vice-Chairman and Section Co-ordinator of the Ontario Branch as ex officio members of each provincial section. Subject to ratification by the section members, the Executive Committee of Council appoints a chairman for the section for a fixed term or one year, whichever is longer.

The eighteen Ontario sections and membership in those sections as of 1 February 1977 are:

Commercial	2,068
Family	1,703
Real Property	1,700
Wills and Trusts	1,584
Administrative	917
Air	350
Constitutional and International	617
Criminal	1,336
Environmental	619
Insurance	720
Labour	1,090
Law Office Management	1,076
Legal Education	139
Maritime	229
Media and Communications	123
Municipal	1,097
Natural Resources and Energy	643
Taxation	1,292
Civil Litigation	1,300

The Executive Committee is composed of the officers of the Ontario Branch, namely: the Chairman, the Vice-Chairman, the Secretary, the Treasurer, the Section Co-ordinator, four other branch members, one of whom is a student associate member and the immediate past Chairman. The active officers are appointed or elected by Council or elected by the branch members if Council so determines. Nominations for positions as officers are made by

the Nominating Committee made up of the Chairman, two immediate past chairmen, and three branch members elected by Council, or by a nomination signed by nine branch members. The election procedures are described in Section 16(5) of the bylaws. Officers may be removed for incapacity by a vote of Council of seventy-five per cent of those present at a meeting called for that purpose. The Executive Committee appoints an Executive Director to manage the permanent office of the Ontario Branch.

The Provincial Council consists of:

1) (a) The active officers of the Branch;

(b) The Attorney General for the Province of Ontario, who shall be Honorary Chairman;

(c) The President and the Executive Director of the Association and the other members of the National Executive Committee, if resident or actively practising law in the Province;

(d) Two members of the Branch appointed by the Law Society of Upper Canada, at least one of whom shall be a Bencher.

Liaison between the National Association and the Ontario Branch is achieved through the dual representation of the sixty persons who are elected to the National Council who also sit on the Provincial Council. Nominations for the election of members of the National Council are made by the Nominating Committee or by nine members resident or practising in the electoral district of the Nominee. Members vote by electoral district roughly proportionate to membership. Representation is as follows: North - 4, East - 10, West - 18 and York - 28. The electoral districts are shown on Figure VIII.3. To provide continuity, National Council members are elected for two years on a rotational basis, with half the Council members being replaced each year.

FIGURE

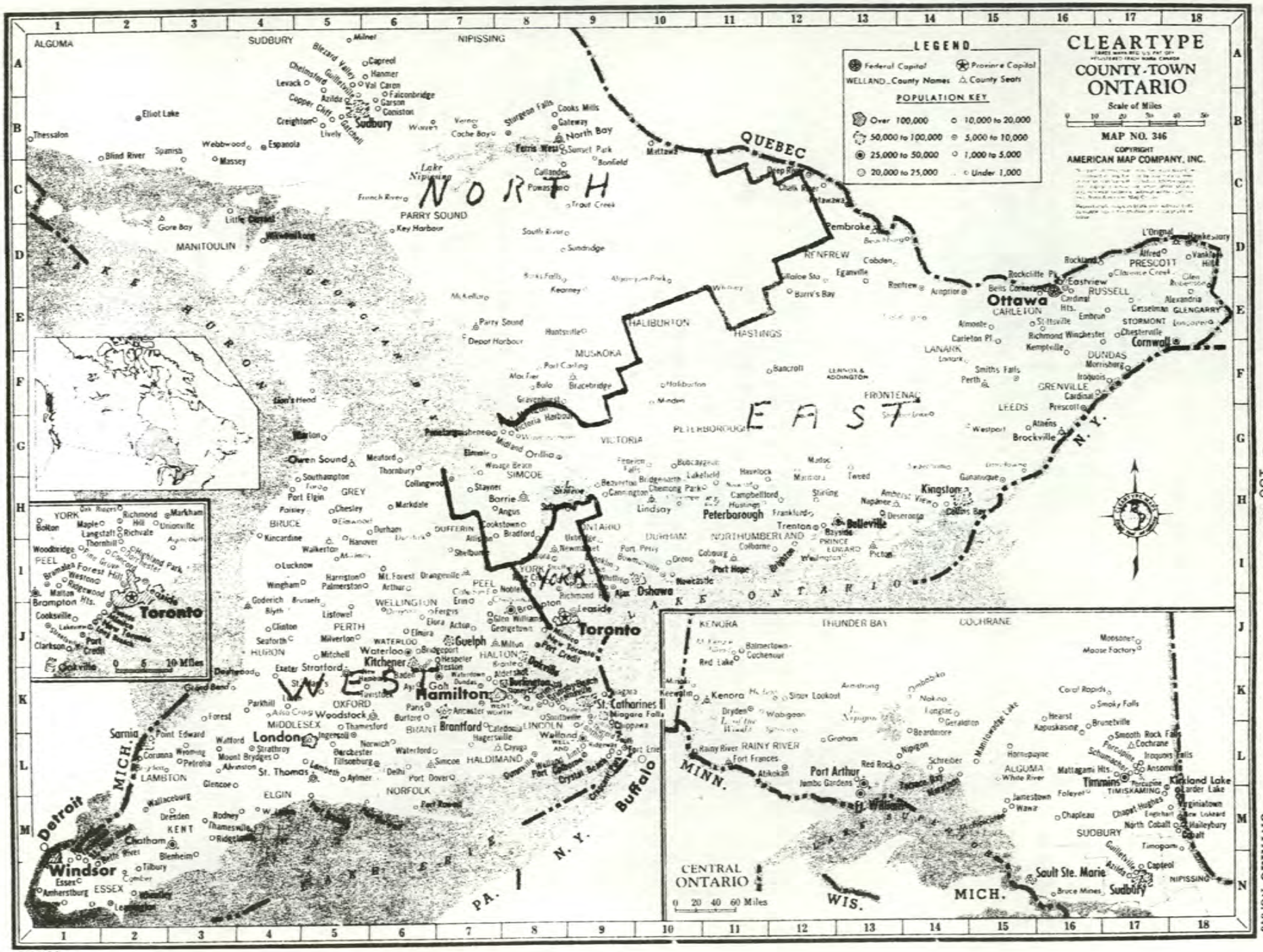


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FIGURE VIII. 3
ONTARIO NO. 346

Section 23 of the Bylaws provide for a meeting of the Ontario Branch at the time of the annual meeting of the National Association as well as an annual "mid-winter meeting". Special meetings may be called by the Executive Committee or upon the written requisition of fifty branch members specifying the intended purpose of the meeting. A quorum for an annual or a special meeting is twenty with the exception of bylaw amendments which require a quorum of seventy-five. Section 23 further outlines notice and procedure requirements of branch meetings.

VIII.8 FUNDING

Membership dues are collected by the National Association and a rebate, based on the percentage of provincial members in the National Association, is paid to the provincial branches. Sources of funding for the Ontario Branch are the rebate to the province on fees, the mid-winter meetings, and the continuing education programmes.

VIII.9 REPRESENTATIONS TO GOVERNMENT

One of the most important functions assumed by the Ontario Branch is the review of proposed and current Provincial legislation. The legislation is studied by the appropriate Ontario Sections and reports and recommendations resulting therefrom are communicated to the appropriate governmental or other official concerned. Views are presented either formally by the submission of briefs or informally by using the forum of branch meetings and inviting the relevant officials to participate. Social gatherings also provide informal opportunities for exchange of views. Although the Ontario

Branch recognizes the value of such informal exchanges, Section 24 of the Bylaws places limits on statements and submissions of members as follows:

> Statements and submissions may not be made on behalf of a Provincial Section, a Provincial Committee or the Branch or any purported division of the Branch or the Association in Ontario by any member or group of members except as herein provided:
>
> (1) Any statement purported to be made on behalf of a Section may deal only with a subject under study by that Section to the knowledge of the Branch Chairman or Section Co-ordinator and must, to the satisfaction of the Branch Chairman, represent the views of a majority of active members of the Section. Any such statement shall clearly state that it represents the views of that Section only and not of the Branch.
>
> (2) Any statement purported to be made on behalf of a Provincial Committee may deal only with some subject under study by that Committee, to the knowledge of the Branch Chairman, and must to the satisfaction of the Branch Chairman, represent the views of a majority of all members of that Committee and shall clearly state that it represents the views of that Committee only and not of the Branch.
>
> (3)(1) All other statements and submissions may be made only with the prior consent of the Council except for statements or submissions made in the following circumstances:
>
> a) statements and submissions made by a Section or Committee of the Branch only to its National Section Chairman or National Committee Chairman of the Association.
>
> b) statements and submissions made by a Section or Committee to the Executive Committee.
>
> c) statements and submissions made by a Section or Committee to the general membership at any meeting of the Branch.
>
> d) statements and submissions made and approved in accordance with Section 56 of Bylaw No. 1 of the Association.
>
> (2) If the Council is not in session and the matter is of such urgent nature that, in the opinion of the Chairman the preceding subsection cannot be followed, then the consent of the Branch may be given by the Executive Committee.

Where issues or proposed legislation could concern the National Executive, they are brought to the attention of the National Executive Director before any reports or recommendations are submitted to the Provincial government.

VIII.10 CODE OF ETHICS

Until 1974, the Canadian Bar Association had a code of ethics dating back to 1921 which formed Ruling 1 of the Professional Conduct Handbook. In 1974 the National Association adopted the Code of Professional Conduct (the "Code"). The Code contains rules of ethics as well as commentary on the rules including cases and articles in support. Ethical problems of lawyers are dealt with under the topics of Integrity, Competence and Quality of Service, Advising Clients, Confidential Information, Impartiality and Conflict of Interest, Outside Interests and the Practice of Law, Preservation of Clients' Property, the Lawyer as Advocate, The Lawyer in Public Office, Fees, Withdrawal, The Lawyer and the Administration of Justice, Making Legal Services Available, Responsibility to the Profession Generally, Practice by Unauthorized Persons, Responsibility to Lawyers Individually, Avoiding Questionable Conduct. Convocation of the Law Society has adopted the Code in principle and is in the process of integrating the Code with existing Professional Conduct Handbook.

VIII.11 DISCIPLINE

Although the Canadian Bar Association has a code of ethics, they have no enforcement provisions in their letters patent or bylaws to discipline members. Although no complaints bureau has been established, the Executive Director for Ontario fields complaints referring complainants to the Law Society or, where complaints related to overcharging, quoting the suggested fee schedule.

VIII.12 BENEFITS TO MEMBERS

Members receive the National, a news publication of the National Association, containing reports on activities of the branches and the National Association, articles on topics of interest to the profession and announcements of National and branch activities. Members also receive the Canadian Bar Review which contains articles, comments and book reviews of interest to the profession. The Ontario sections hold six or seven meetings yearly and distribute news and material to their members. The Association offers group insurance to members as well as sponsoring continuing legal education programmes. There are also the social benefits to lawyers of meeting and exchanging ideas with other lawyers. It is hoped that the establishment of the joint public relations council with the Law Society will improve relations between the profession and the public.

IX. SUBSIDIZED SERVICES

IX.1 HISTORY OF LEGAL AID IN ONTARIO

Before 1951, legal aid in Ontario was provided on an informal basis. Lawyers, in recognition of a duty to society, frequently provided services to needy persons free of charge or for a reduced fee. However, it was estimated in Ontario during this period that sixty per cent of all persons charged with a serious crime could not afford counsel and that, in all criminal matters, only one person out of six who required legal aid was receiving it.[214] The only representation provided was in the case of

indigents charged with criminal offences. Individual lawyers representing such accused were provided with a modest counsel fee and some of the disbursements involved in obtaining transcripts and perfecting appeals by the Attorney General. "Some lawyers who practised before 1951 definitely recall defendants convicted of very serious charges without benefit of counsel."[215]

In 1950, in response to recommendations of the Rushcliffe Committee, the British Government passed legal aid legislation. Prompted by concern within the profession and the appointment of the British Rushcliffe Committee, the Law Society had appointed its own committee in 1948 under the chairmanship of R.M. Willes Chitty. The committee strongly recommended establishment of a scheme of the same nature as that recommended by the Rushcliffe Report.

Accordingly, The Law Society Amendment Act of 1951, approved a plan to be administered by the Law Society through local directors or Legal Aid Committees in each county or district. The services of lawyers were provided without remuneration although a fund of $30,000 was created by the provincial government from which legal disbursements could be paid.

Similar to the British plan, control rested in the hands of the legal profession who expressed a strong desire to shoulder the legal aid burden without external interference. Unlike the British plan, the services of lawyers were provided gratuitously on a purely voluntary basis. "The Profession was unwilling to admit that it could not care for the legal needs of indigents without receiving a fee from the government for

each case taken."[216] Also, the Ontario plan had far more stringent financial eligibility requirements than did the British scheme. Initially, services were provided to those unmarried persons with a maximum annual income of $900 and to married persons with an annual income of $1,500, plus $200 for each dependant. From time to time, upward adjustments were made to the financial eligibility requirements but the plan continued to omit services to substantial numbers of persons in need of legal aid.

The plan went into operation in October 1951; however, the needs of the public for legal aid soon outgrew the plan. In the late 1950's, criticisms of the plan came from both inside and outside the profession. The major failings of the plan included: the wide discretion to refuse legal aid, the strict financial eligibility requirements, the lack of assistance to the accused between the time of arrest and his first court appearance and, most important, the diminishing numbers of volunteers who were willing to provide free services. During the beginning of 1963 "public criticism of the profession's posture towards those unable to pay for legal services [became] a very important motivating factor"[217] for improving legal services. In response to increasing public pressure, the York County Law Association proposed a Royal Commission to investigate legal aid in Ontario.

IX.2 THE ORIGIN OF THE PRESENT LEGAL AID PLAN

In July of 1963, the Attorney General established a Joint Committee on Legal Aid (the "Joint Committee") composed of members of the Law Society

and the civil service of Ontario under the chairmanship of W.B. Commons, Q.C., Deputy Attorney General. Its terms of reference were, in essence, to inquire into and report on the existing Ontario legal aid plan, and to investigate and report upon legal aid and public defender schemes in other jurisdictions. The Joint Committee held public hearings and invited submissions. The briefs submitted by the Law Society and the York County Law Association favoured administration by the profession, payment by the government of a percentage of the fee, a certificate system, repayment in whole or part by those assisted, and initial restrictions on the plan's field of operation to the criminal side, leaving open the possibility of a later inclusion of civil matters.

The report of the Joint Committee was tabled on 13 April 1965. It recommended a comprehensive legal aid plan administered by the Law Society and subsidized by the provincial government. The Legal Aid Act, 1966, as drafted by a committee of the Law Society to implement the report includes voluntary participation by lawyers on a fee-for-service basis according to a tariff agreed upon by the Law Society and the government. The fees of the lawyers are then reduced by 25%.

Administration of the plan is accompanied by a large expenditure of public funds. Protection of the public interest is provided for through the requirement of annual reports by the Law Society, including a statement of the nature and amount of legal aid given during the year, a statement of the receipts and disbursements of the Fund, a copy of the auditor's report, and other information as requested (s.10);[218] the requirement for the Attorney General to approve appointments of the Director of Legal

Aid, Area Directors, and other employed personnel (s.8). There is provision in the Act for an Advisory Committee composed of a judge of the Supreme Court, a judge of the county or district court, a provincial judge, two members of the bar of Ontario, a person holding a responsible position in the field of public welfare and such other persons as the Attorney General may appoint (s.9). The Advisory Committee was instituted to report at least once a year to the Attorney General on the operation of the legal aid plan and on the annual report of the Law Society (s.9(3)).

IX.3 ADMINISTRATION

The plan[219] is administered by a Director of Legal Aid appointed by the Law Society, subject to the approval of the Attorney General. The province is divided into forty-six legal aid areas which, for the most part, coincide with the counties and districts of Ontario. In each area there is an area director who is responsible for maintaining an area legal aid office, and establishing and maintaining the duty counsel and legal advice panels for his area. A legal aid applicant who has received a certificate must choose his lawyer from the names on the legal aid panels which are grouped according to subject matter. In some areas, such as Toronto, the legal aid recipient is also directed to the Law Society Lawyer Referral Service. Choice of counsel remains a critical problem for applicants for certificates in civil cases and first-time criminal offenders who have previously had little contact with lawyers in spite of recent efforts to make the Referral Service more useful by adding the name of a lawyer's firm, its address and the year of the

L E G A L A I D S T R U C T U R E

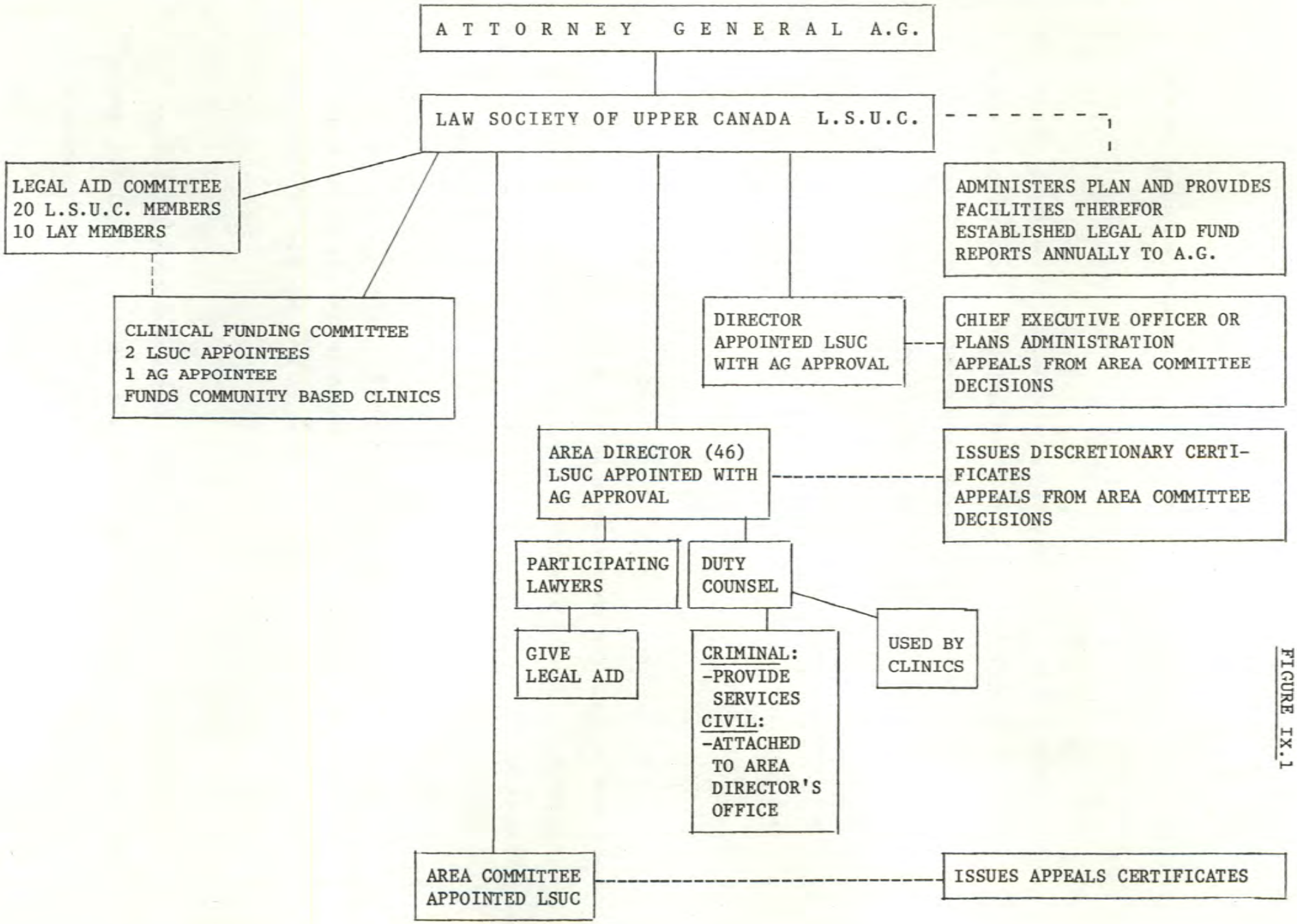

FIGURE IX.1

lawyer's call, to the information on the panel of lawyers. Both specialization and increased advertising have been suggested as possible solutions.

Pursuant to the Act, the Law Society established and maintains a fund, known as the Legal Aid Fund, into which are paid all moneys appropriated by the legislature for the fund, all costs awarded to recipients of legal aid, all contributions made by recipients of legal aid who are required to pay any part of the costs and a contribution from the Law Foundation of Ontario (s.51(a)). From these funds expenses of administration, together with fees and disbursements of barristers and solicitors acting under legal aid are paid.

The Law Society administration of the Legal Aid plan creates a possibility of conflict with the government in several areas. While the Law Society has chosen to proceed slowly with proposals for specialization and advertising, there remains a need for the public and especially legal aid recipients, to have more information to enable them to choose legal counsel. The tariff of fees which requires periodic review by the Law Society and the government could be a source of conflict if they cannot agree. Lastly, there is pressure on the Law Society to extend legal aid services and, at the same time, pressure to keep the cost of legal aid within economical limits.[220]

An example of this conflict occurred recently when early in 1976 the Attorney General, in referring to the mounting cost of Legal Aid, stated[221] that open-ended programme funding was over. The Law Society responded

by stating it was ready to assist the government in implementing its decision to control legal aid expenditure despite the position officially adopted by the Law Society to broaden and extend services to a wider segment of the population.

> "During a full discussion, the 39 benchers present [at Convocation] made two things clear. First, they are strongly opposed to Legal Aid Services being reduced. Second, as administrator of the Plan, the Society is not the policy maker. The government makes the policy and when it has decided what changes it considers necessary to keep the Plan within the government's present financial limits, the Society will carry out its administrative duties."[222]

IX.4 COVERAGE UNDER THE PLAN

The original Regulation governing legal aid was criticized for the discretion the area directors were given in granting certificates. In an effort to reduce the discretion, section 12 of The Legal Aid Act provides:

> (1) Except as otherwise provided in this Act or the regulations, a certificate shall be issued to a person otherwise entitled thereto in respect of any proceedings or proposed proceeding, (emphasis added)
>
> (a) in the Supreme Court;
>
> (b) in a county or district court;
>
> (c) in a surrogate court;
>
> (d) where the applicant is charged with an indictable offence or where an application is made for a sentence of preventive detention under Part XXI of the Criminal Code (Canada);
>
> (e) under The Extradition Act (Canada) or The Fugitive Offenders Act (Canada); and
>
> (f) in the Exchequer Court of Canada.

The section indicates a mandatory requirement for the issuance of a certificate. However, section 16(5) tempers this requirement by stating that the "area director may issue a certificate...only where, in the opinion of the area director, the issue of a certificate is justified". Accordingly, it is left to the discretion of the area director when a certificate is justified. Furthermore, section 13 provides that the issuance of a certificate in the following cases is subject to the discretion of the area director:

> "(a) in any summary conviction proceeding under,
>
> (i) an Act of the Parliament of Canada or of the Legislature of Ontario, or
>
> (ii) a bylaw of a municipality as defined in The Department of Municipal Affairs Act or of a metropolitan, district or regional municipality or local board thereof,
>
> if upon conviction there is likelihood of imprisonment or loss of means of earning a livelihood;
>
> (b) in any proceeding,
>
> (i) in a provincial court (family division),
>
> (ii) in a small claims court,
>
> (iii) before a quasi-judicial or administrative board or commission otherwise than in an appeal thereto,
>
> (iv) in bankruptcy subsequent to receiving order or an authorized assignment, or
>
> (v) for contempt of court, or
>
> (c) for drawing documents, negotiating settlements or giving legal advice wherever the subject matter or nature thereof is properly or customarily within the scope of the professional duties of a barrister and solicitor."

Therefore, it is clear on the face of it, from a combination of these sections, that no Legal Aid certificate is granted as of right. The granting of a certificate for appellate proceedings is subject to the

approval of the area Legal Aid Committee (s.14). An appeal from a refusal by the area committee to grant a certificate may be taken to the Provincial Director. The regulations prohibit the granting of applications for legal aid in cases where:

(a) it appears that,

(i) the applicant requires legal aid in a matter in which he is concerned in a representative, fiduciary or official capacity and it appears the costs can be paid out of any property or fund which is sufficient to pay such costs,

(ii) the applicant is entitled to financial or other aid or has reasonable expectations of such aid and has failed to satisfy the area director that such aid is not available to him,

(iii) the legal aid applied for is frivolous, vexatious, an abuse of the process of the court, or an abuse of the facilities provided by the Act,

(iv) the relief can bring no benefit to the applicant over and above the benefit that would accrue to him as a member of the public or some part thereof,

(v) the relief sought, or obtained, is not enforceable in law,

(vi) the applicant has failed without reasonable justification in any obligation to the Law Society with respect to legal aid, or

(vii) the professional services sought are available to the applicant without legal aid.

Discretion is allowed in the granting of an application in cases where:

(i) the applicant is one of a number of persons having the same interest under such circumstances that one or more may sue or defend on behalf of or for the benefit of all,

(ii) the applicant has the right to be joined in one action as plaintiff with one or more other persons having the same right to relief by reason of there being a common question of law or fact to be determined,

(iii) the application is for legal aid for which the applicant has previously received a certificate with respect to the same action or matter,

(iv) the relief sought is enforceable only in some other jurisdiction,

(v) the cause of action may be prosecuted or defended only in a court of some other jurisdiction, or

(vi) no sufficient reason for the granting of the certificate is shown at this particular time.

These provisions for the granting of services have come under criticism, not only for the discretion allowed to the area director, but also for the effective prohibition against group applications. Although section 13 allows the area director to grant a certificate for drawing documents and negotiating settlements or giving legal advice, such use of legal aid has not been promoted until recently.

IX.5 ELIGIBILITY

Financial eligibility under the Act for legal aid estimated to cost in excess of $60 is determined by an assessment officer, being an officer of the Ministry of Community and Social Services, who must report on the application before a certificate can be granted. The welfare officer considers the income, disposable capital, indebtedness, requirements of persons dependent upon the applicant, and other relevant circumstances to determine the extent to which an applicant can contribute. A "needs" rather than a "means" test is applied and balanced against the cost of the legal aid required. The requirement of at least two interviews of an applicant for legal aid, one of which would determine his financial eligibility and one of which would determine whether or not his legal

problem fell within the ambit of the Act, has been criticized because the dual process tends to deter applicants from pursuing their right to legal aid.

Recently pilot projects were run in Ottawa-Carleton and York Counties to streamline the procedures and prevent legal aid applicants from undergoing separate financial interviews. These projects were successful in reducing the number of legal aid applicants who dropped out before the financial interview could be completed. Accordingly, the single application form which combines both the financial and legal information needed has been implemented as of May 1976 on a permanent basis.

IX.6 LEGAL SERVICES

In addition to providing legal aid advice on a certificate basis, the legal aid plan also provides for criminal duty counsel at all Juvenile Courts and Provincial Courts (Criminal and Family Divisions) in the area. The duty counsel are to advise a person taken into custody, and before any appearance to the charge, of his rights and to take steps to protect those rights as the circumstances require. They attend to such immediate problems as remands, bail applications and guilty pleas. Civil duty counsel are available at the legal aid office to assist the area director with interviews and giving on-the-spot advice not requiring the issuance of a certificate.

IX.7 LEGAL AID IN THE SEVENTIES

It is understandable that a plan devised and appropriate in 1966 would display shortcomings in meeting the needs of a new decade. Pre-occupation with protecting individual rights has been tempered by concern with group interests and needs. Experience with The Legal Aid Act led to efforts to improve and refine its administration. As part of an ongoing review, in November 1971 the Law Society appointed a subcommittee of the Legal Aid Committee to make a formal review of the effectiveness of the Ontario Legal Aid Plan in civil matters. "The Subcommittee concerned itself not only with topical questions related to the delivery of necessary civil legal services to the poor, but also with the availability of such services in some geographic areas and the potential effect of circumstances of chronic poverty, cultural sensitivity, fear of lawyers...and the like may have in producing abnormal reticence toward legal services extended through conventional law offices".[223]

As well as approving release of the Community Legal Services Report, the Law Society approved:

1. a pilot project in Hamilton on a clinical model (see section IX);
2. a pilot project in the Advice and Assistance Programme involving elimination of the area director's discretion in minor legal matters involving advice and summary legal assistance up to a prescribed maximum number of hours of a lawyer's time (this project was shelved pending the Osler Task Force Report) (the "Peterborough Project");

3. the decentralization of the operations in York County.

Convocation also approved in principle:

4. increased lay participation on area committees;

5. improved reporting and planning functions of area committees;

6. relaxation of legislative prohibitions against assisting legal aid applicants in selection of counsel and establishment of more referral and appointment services.

Other recommendations included suggestions for greater attention to necessary law reforms in poverty law area; more intensive and specialized training for counsel; improvement in the system of financial assessment; increased visibility and accessibility to low income individuals; and additional means of community education in law.

IX.8 OSLER TASK FORCE ON LEGAL AID

The Attorney General established a Task Force on Legal Aid effective 2 January 1974 under the chairmanship of Mr. Justice John H. Osler of the Supreme Court of Ontario. The Task Force was to make a formal review of legal aid and particularly:

(a) to examine and evaluate the effectiveness of the Ontario Legal Aid Plan in the context of the experience gained since its inception;

(b) to ascertain and assess the need for the provision of services under the Legal Aid Plan in low-income urban and rural communities and native population areas;

(c) to ascertain and assess the availability of subsidized legal assistance to middle-income groups;

(d) to examine and evaluate the method of funding the Legal Aid Plan, having regard to available resources;

(e) to recommend organizational or operational modifications to the Legal Aid Plan or variations in priorities within the Plan, required to provide legal assistance not presently available under the Plan as aforesaid, having regard to available resources.

Part 1 of the Report of The Task Force on Legal Aid was submitted to the Attorney General on 29 November 1974.

Part 2 of the Report has never been released to the public. The Report includes a useful review of the salient features of the Ontario plan with evaluation and comment. Recommendations of the Task Force were reported under the following headings:

1. structure of the plan;
2. coverage under the plan;
3. delivery of legal services;
4. duty counsel;
5. legal aid in criminal matters;
6. student legal aid societies and articled students;
7. financial eligibility and assessment;
8. payment of lawyers under legal aid;
9. group certificates;
10. education, advertising and information; and
11. legal aid in Metropolitan Toronto;
12. other recommendations.

While all of the ninety-six recommendations made by the Task Force form a coherent plan for improved legal services in Ontario, five deserve particular attention here, namely:

1. administration of the plan;
2. issuance of certificates;
3. legal services delivery techniques;

4. remuneration of lawyers;

5. group certificates.

1. Administration of the plan:

While the Task Force stated emphatically that no actual conflict of interest arose in the administration of legal aid by the Law Society, the Task Force recommended that control and administration of the Legal Aid Plan be vested in a statutory non-profit corporation named Legal Aid Ontario. The proposal attempts to divest the Law Society of control. However, leaving the Law Society to appoint nine of twenty members of the board of directors of the corporation means the Law Society may retain de facto control. As an interim measure, the Task Force recommended necessary amendments to permit the appointment of lay members to the Law Society's Legal Aid Committee. This recommendation has been implemented and there are at present ten lay members on the Legal Aid Committee along with the nineteen Law Society members and one student member.

2. Issuance of certificates:

The Task Force states that it is desirable that "so far as finances will permit to legislate the broadest possible area of availability".[224] This desire translates into recommendations to expand the categories of granting certificates as of right and to reduce the discretionary powers to be exercised under the plan.

3. Legal services delivery techniques:

While the Task Force supports the retention of fee-for-service in criminal cases, they also recommend the development of a variety of delivery techniques, including the use of neighbourhood clinics with salaried solicitors and paraprofessionals to meet the special needs of low income communities. They also recommended the pursuit of the "Peterborough Project" as recommended in the Law Society's Community Legal Services Report[225] to determine the best techniques for establishing an "advice and assistance" programme.

4. Remuneration of lawyers:

Although the Task Force supported the use of a tariff to establish fees, they recommended elimination of the twenty-five per cent charitable contribution by lawyers but provided for a ten per cent reduction in its place to allow for the fact that there are no bad debts in legal aid cases. The recommendation of salaried lawyers in clinics has been criticized because of the potential conflict of interest for the solicitor employed by the government representing clients or groups of clients in disputes with the government.

5. Group certificates:

Subject to the availability of funds, the Task Force recommended the granting of assistance for group proceedings and class actions. Guidelines for the exercise of the discretion in granting group certificates should be established.

In a press release of 14 March 1975, the Law Society responded to the Task Force recommendations. It opposed the corporation structure of administering legal aid not only because of the cost factor of paying administrators who now perform voluntarily but also because of the response lawyers might have to merely selling services to a corporation. The Law Society also questioned the use of salaried lawyers in the clinic situation and expressed concern that such a lawyer would not have freedom to advance his client's interests where these involved disputes with the government.

Potential loss of control of Legal Aid is viewed by the profession as a blow to the independence of the bar. The Quebec Legal Aid Plan has often been cited as an example of the erosion of the independence of the Quebec bar.

> "The effect of this has been that to use the City of Montreal, for example, 85% of the legal aid work in criminal cases goes to staff lawyers, and 60% of the matrimonial work and 90% of the administrative and social welfare matters. Indeed the private Bar now finds itself advertising for business."[226]

In January of 1976 a brief was submitted by Action on Legal Aid to the Ontario Government in response to the Osler Task Force Report. In their brief, they press for action on the Osler recommendations with some modifications. With respect to administration of Legal Aid, the brief suggests that limitations be placed on the representation to be afforded any one group on the board of the administrative corporation with no special status being given to the Law Society or government representatives. In addition to supporting certificates as of right, group certificates and legal advice and assistance programmes, the brief gave full support to community based legal services organizations making use of legal workers

other than lawyers. In addition to recommending adequate training and insurance schemes for such workers, they suggested that a study be made of self-regulatory powers for legal workers other than lawyers. The brief also requested that a substantial increase in interim funds for the delivery of legal services not await policy decisions about the future of legal aid but be made immediately to preserve some of the community organizations now serving the public.

There has been no action to implement the Osler Task Force recommendations as a whole. However, efforts have been made by the Law Society to benefit from the Task Force recommendations and improve legal aid along the lines proposed in the Community Services Report and the Osler Task Force Report by establishing the Hamilton Clinic project and other legal aid clinics as well as recommending funding for community groups that provide free legal services.

IX.9 PROGRESS IN LEGAL AID

Hamilton Clinic Project:

Unlike conventional legal aid, the Hamilton project provides for the delivery of summary legal services in civil matters at a clinic rather than in a law office. By dispensing with the requirement of a certificate and leaving financial eligibility to the counsel giving oral advice and summary assistance, civil matters can be dealt with more expeditiously. Where a civil matter requires a certificate, the client has the option to choose the interviewing lawyer and avoid duplication of process.

Legal Aid Clinics:

Legal Aid Clinics along the lines of the Hamilton Project were set up in London and Windsor and have amalgamated with law school clinics to give unified legal service.

Interim Funding of Community Legal Projects:

On the recommendation of the Clinical Funding Committee, a sub-committee of the Legal Aid Committee, regulation 146-51, was passed in March 1976 to provide grants for community clinics, conditional on the clinic delivering legal or para-legal services other than by way of fee-for-service. The groups which had already shown an established pattern of service to the public include:

Canadian Environmental Law Research Foundation	Toronto
Injured Workmen's Consultants	Toronto
Legal Assistance of Windsor	Windsor
London Legal Clinic	London
Metro Tenant's Legal Services	Toronto
Neighbourhood Legal Services	Toronto
New Welfare Action Centre	Toronto
Parkdale Community Legal Services	Toronto
People and Law Research Foundation	Toronto
Problem Central	Toronto
Tenant Hot Line	Toronto
Toronto Community Law School	Toronto

The Attorney General designated $950,000 for the grants to March 1977.

IX.10 PREPAID LEGAL COSTS INSURANCE

As the result of a request by the Deputy Superintendent of Insurance for the views of the Law Society as to whether prepaid legal cost insurance coverage should be permitted, the Law Society formed a special committee under the chairmanship of W. David Griffiths to report on the issues. The Committee reported to Convocation in 1972.[227] For the purposes of its report, the Committee defined prepaid legal services to be "a system in which the costs of possible legal services needed in the future are prepaid in advance by, or, on behalf of the client who receives such services. The Plan is generally offered on a group basis". The purpose of such plans is to assist mainly middle class persons who are now deterred from going to a lawyer because of the anticipated high cost of legal services and who do not qualify for legal aid, by providing services at a moderate cost.

Based on the American experience cited, the Committee discussed advantages and disadvantages of such a plan. Absence of actuarial data on the frequency of certain legal occurrences makes it difficult to establish a plan to cover such events. A question arises whether the plan should provide partial indemnity or provide full cost indemnity. From the profession's point of view, there is a danger with such plans that the insurer would gain indirect control over fees.

The Committee recommended that the Superintendent of Insurance be advised:

(1) that the Law Society does not oppose licensing an insurer to offer prepaid legal insurance but requests an opportunity to assist in drafting the required legislation and in the approval of the proposed form of policy;

(2) that the Law Society establish guidelines for coverage including freedom of choice of lawyers by the insured without steering by the insurer;

(3) that administration of the plan avoid placing solicitors operating under it in conflict with rulings of the Law Society; and

(4) that the Law Society is prepared to liaise with the Department of Insurance on problems under such coverage.

The report contains reference to the appointment of a committee of the Canadian Bar Association (Ontario Branch) under Mr. Warren Winkler to study the issue of Prepaid Legal Serivces. A bibliography on the subject is attached to their report.[228]

X. PARAPROFESSIONALS

The term paraprofessional in the legal framework encompasses anyone who performs functions of a legal nature apart from members of the profession of law itself. The categories of paraprofessionals examined here include legal secretaries, law clerks, and community oriented paraprofessionals. It is interesting to compare the latter two groups that fall within the term paraprofessional. Whereas the law clerk is an outgrowth of traditional law practice, the community paraprofessional was spawned by public interest groups. While these groups were originated by lawyers and law students, their aim is to involve and serve the community. The law clerk's aim is to serve the lawyer although he may also be involved to some extent with the client. Business efficiency led to the use by lawyers of law clerks. The use of community paralegals by these community services resulted not only from the economics of delivering legal services to low income clients but also from the perception that current legal training may be inappropriate

to solve the socio-legal problems of the clientele. Law clerks are trained primarily through educational institutions. Community paraprofessionals are trained either on the job at the clinic at which they work or through another community service. The work of the law clerk is supervised directly by the lawyer for whom he works. Where the work of the community paraprofessional involves legal tasks, he works under the supervision of a lawyer; however, many of the tasks undertaken by community paraprofessionals are of an educational or social service nature and legal supervision is unnecessary. Law clerks are concerned with obtaining acceptance in the established legal community. For community paraprofessionals, acceptance by the community they serve is the most important consideration.

The use of the term paraprofessional in this context includes lay advocates and community legal workers. Although the functions of lay advocates and community legal workers overlap, the latter group appears to emphasize community education over case-by-case service.

X.1 LEGAL SECRETARIES

Although legal secretaries are not labelled paraprofessionals within the profession, more skilled and experienced legal secretaries perform many legal functions as an adjunct to their secretarial positions and therefore should be considered within the broad definition of paraprofessionals.

(1) Metropolitan Toronto Legal Secretaries Association (Canada) (The Association)

Legal secretaries have joined other non-professionals in efforts to map out their domain in the legal setting. However, they have chosen not to become an organization exclusively composed of legal secretaries but have opened membership to a broad spectrum of legal personnel. The National Association of Legal Secretaries (International) was founded in the United States more than twenty-five years ago. A Toronto chapter was chartered on 8 May 1974. The objectives of the association are "to provide continuing education through seminars, workships and informative meetings with knowledgeable and qualified teachers, speakers and professionals in the legal field; to provide a forum for the mutual exchange of ideas; to maintain a high standard of professional practice and conduct among its membership; and to provide an opportunity for self-development".

(2) Organizational structure

The by-laws of the Association state that there are two classes of members: active and honorary members. Section 2 defines active members as follows:

> "Active members shall consist of any person employed in a legal office, licensed to practice law, employed in the court, a legal assistant, or in any public or private institution or corporation or office directly engaged in work of a legal nature, including the public offices of the Canadian government, provinces, cities, municipalities or townships."[229]

The Board of Directors (the "Board") has general supervision of the business affairs of the chapter between regular meetings. Furthermore, the Board can "make recommendations to the membership for their approval or disapproval,

dispose of matters that require immediate action, which action must be reported to and ratified by the membership, but shall have no authority to dictate the policies of this association". (Articles VIII, section 2). Consequently, this section suggests that the final power is left in the hands of the membership. However, Article XXII, section 1, states that amendments to the bylaws must be submitted to the National Parliamentarian for approval.

The Board of Directors consists of the elected and appointed officers and any or all chairmen of standing committees. Upon nomination of the Nominating Committee composed of three members appointed by the president, there is an annual election of the president, vice-president, recording secretary, corresponding secretary, treasurer and National Association of Legal Secretaries representative. All active members in good standing are eligible to hold office and vote. However, the office of president is only open to members who have served at least one term as a member of the Board of Directors. The president thereafter appoints, subject to the approval of the Board of Directors, two further officers whose titles are parliamentarian and historian. Also within thirty days after election, the president appoints the chairmen of the following standing committees: Bar Liaison, Budget, Bulletin, Constitution and By-laws, Day-in-Court, Legal Education, Membership, Public Relations, Professional Legal Secretary, Program, Reservations, Ways and Means. The two new committees proposed in the bylaw amendments are the Official Course Committee and the Scholarship Committee. The duties of these committees are outlined in Article XII.

(3) Benefits to members

Benefits to members include seminars, annual workshops, an opportunity to participate in group life and health insurance, and the receipt of a monthly publication, the Writ, which is intended to provide educational articles and keep members informed of current programmes of the chapter and of the Association generally.

(4) Code of ethics and disciplinary actions

Article XVIII of the bylaws requires every active member to subscribe to the code of ethics adopted by the National Association of Legal Secretaries. The International Association recently revised its code of ethics in July 1976. The new code reads as follows:

> Members of the NATIONAL ASSOCIATION OF LEGAL SECRETARIES (INTERNATIONAL) are bound by the objectives of this Association and the standards of conduct required of the legal profession. Every member shall:
>
> Encourage respect for the law and the administration of justice;
>
> Observe the rules governing privileged communication and confidential information;
>
> Promote and exemplify high standards of loyalty, cooperation, and courtesy;
>
> Perform all duties of our profession with integrity and competence; and
>
> Pursue a high order of professional attainment.

Article XIX of the bylaws describes the disciplinary action that may be taken in the event of a violation of the code of ethics or any rule by the members. Section 1 of Article XIX requires the vice-president to receive complaints and present them to the Board of Directors, which determines if

a violation has occurred and what action is necessary. The charged member receives notice of the pending action, together with a copy of the charges at least fifteen days prior to a regular meeting. At the meeting, if two-thirds of all active members present vote in favour of such pending action, then the member shall be expelled and removed from the roster. An expelled member has a right of appeal as provided by Article XVIII, Section 2, of the National bylaws.

The bylaws do not indicate whether any other action apart from expulsion may be taken or whether, if such other action is taken, the membership has a vote and an appeal is available.

(5) Education

Although the Association has no direct involvement in the initial education of its members, a recognized professional certification programme started in the United States is being adapted for Canadian members. A member who has at least five years legal experience is eligible to sit an examination and, if successful, will receive the designation Professional Legal Secretary (P.L.S.). The goal of the Association is to have the designation recognized by the legal profession.

In addition to establishing a continuing education course, which is preparatory to the Professional Legal Secretary examination, the Association has sponsored workshops and an annual seminar.[230] The Association also holds monthly dinner meetings which serve a social as well as informational purpose.

(6) Legal secretaries and their future

Members of the Metropolitan Toronto Legal Secretaries Association (Canada) see themselves at a crossroads, brought about by technological changes, social changes and the rise of the legal assistant. The concern is that if they do not receive recognition as legal assistants with the professional status and responsibility commensurate with their skills and experience, they will become machine operators and word processors. They are seeking equality with other law support personnel and express some apprehension that law clerks and other para-legals will occupy the field and prevent legal secretaries from performing the legal functions they are qualified to perform or from receiving recognition for so doing.

The Association sees professionalization as one of its main objectives. They want to be recognized as professionals and granted the self-governing powers other professional groups have.

X.2 LAW CLERKS

Law clerks may operate either as salaried employees within a firm assisting lawyers with matters including probate, collections, trial, real estate and corporate proceedings, or as free-lancers acting mainly as title searchers or conveyancers. The ultimate responsibility for the actions of salaried law clerks lies with the lawyer supervising them. Therefore, they are subject to the Law Society rulings regarding ethics, advertising and discipline. While the lawyer who certifies the title searched by the free-lancer is responsible for his or her competence, the free-lancer is

nevertheless free from ethical obligations and disciplinary proceedings by the Law Society. The only encounter such independent operators may have with the Law Society is for infringement of the sections of The Law Society Act governing unauthorized practice.

Free-lance law clerks are not formally organized and it is impossible to guess their number, educational background, experience or income. The fee charged by the free-lancer is set by negotiation by the firm retaining him or her. The present interest in law clerks from the public's standpoint is whether their use will directly or indirectly effect a reduction in fees. This view is supported by the Canadian Bar Association (Ontario Branch) in its resolution of November 1975[231] which suggests that the delivery of legal services at a reasonable cost can be aided by the use of legal assistants.

(1) History of the Institute of Law Clerks (the "Institute")

In the early history of the legal profession before 1940, there was no need for the law clerk as we know him today. The lawyer could look to either his secretary or law students to perform the functions delegated to them. However, "[d]uring World War II the supply of law students became so small that some substitute for their efficient labours was necessary".[232] Firms began to hire women to search titles to property and to assist generally with real estate transactions. It is not difficult to see how, with the proliferation of legislation and its related practice and procedure, the lawyers attempted to delegate routine matters as much as possible. Although law students were in greater supply following the war, law firms

saw the value of employing non-legal personnel who would remain with the firm as opposed to law students who moved up, or out, within a relatively short time. Also, it was no longer always cheaper to hire students whose salaries had increased. Similar to the apprenticeship of law students in the nineteenth century, non-legal personnel received their basic training from the firm itself. "[T]oo few lawyers were prepared to devote much time in training a person to be a law clerk, hence a large number of law clerks [were] imported from the United Kingdom where they had received good basic training."[233]

Like the lawyers themselves in their organization of the law society, this English element was a strong motivating factor in the desire to organize the law clerks in the way they were organized in England. There was a mushrooming growth in the use of law clerks. The proponents of incorporation sought to control their vocation by gaining certification. Through certification, the organizers hoped to exclude non-members who were free-lancing from gaining employment with firms.

Supported by an encouraging response from law clerks in the firms they polled, a group of law clerks approached the Law Society in 1967 and, after extensive correspondence with the Law Society and discussions with a special committee of Benchers under the Chairmanship of B.J. MacKinnon, Q.C. (now MacKinnon, J.A.), an agreement was reached between the parties that the Law Society would co-operate with the application for incorporation made by the organizers subject to the following terms:

1. the term "Law Clerk" be promoted and used in preference to "Legal Executives" or "Legal Assistant" as the Law Society

felt that term was most widely known and accepted in Ontario;

2. the structure of the Institute, restrictions in the Letters Patent and the By-laws or any substantial amendments thereto had to be approved by the Law Society;

3. the Secretary of the Law Society would be an ex officio member of the Institute;

4. proposals for the preparation and introduction of a basic training course for Law Clerks were made from which guidelines were established;

5. the Institute would not look to the Law Society for financial assistance; and

6. the Institute would not become a bargaining agent for its members nor support with its funds any advance of trade unionization.

Thus the Institute of Law Clerks was incorporated by letters patent in May 1968. The application was in fact opposed, but it was eventually approved in November 1968 and back-dated to May. The Institute's brochure states the following as objects:

"THE INSTITUTE OF LAW CLERKS OF ONTARIO

...provides an organization to promote unity, co-operation and mutual assistance among Law Clerks in Ontario, advance and protect their status and interests and particularly to promote their general and legal education for the purpose of increasing their knowledge, skill and efficiency."

At present the Institute has no certifying, licensing or accrediting powers. Its main concern for the future is to obtain for the Institute and its members standing before the courts as well as recognition through certification.

(2) Services and benefits of the Institute of Law Clerks

The services and benefits now offered to members of the Institute include:

1. courses of instruction sponsored by the Institute in co-operation with the Law Society;
2. a registered retirement savings plan available to members only; and
3. circulation of a newsletter published by the Institute including announcements and job opportunities of interest to the members.

(3) Membership

The Institute is a voluntary association representing law clerks in Ontario. It is the only formal organization to which paraprofessionals can apply for membership yet membership in the Institute is limited by Bylaw 3(e) which defines a law clerk to mean "a trained specialist, capable of doing independent legal work, which may include managerial duties, under the general supervision of a Barrister and/or Solicitor, and whose function is to relieve a Barrister and/or Solicitor of routine legal administrative matters and to assist him in the more complex ones". There are five categories of members, namely:

1. ordinary members;
2. associate members;
3. fellows;
4. honorary members; and
5. ex officio members.

The membership is now in excess of 250 members. The first three categories of members require Ontario residence and "qualifying employment" which is

further defined in By-law 3(a) to be "whole-time employment as a law clerk in the office of either a barrister and solicitor or a firm of barristers and solicitors in private practice, or employed as such in any office, department, corporation, or undertaking whatsoever whether governmental, public, municipal, foreign, commercial or otherwise under the direct supervision of a barrister and/or solicitor".

The three levels of membership have increasing age, experience and education requirements. The ordinary member must be at least seventeen years of age and have been in qualified employment for six months. The associate, in addition to passing examinations set by the Institute, must be at least twenty years of age and in qualified employment three years, one of which must be in Ontario. By-law 8(b) allows the board of directors discretion in setting terms and conditions for accepting the transfer of an Associate of the Institute of Legal Executives of the United Kingdom after one year's employment in Ontario. To become a fellow of the Institute, a person must be twenty-five years of age, in qualified employment seven years, at least one of which is in Ontario, have taken prescribed courses and passed the Fellow's examination. In addition, the person must have "satisfied all the requirements which may be set from time to time by the Board of Directors...in respect of fitness for enrollment as a Fellow". This provision obviously gives the board of directors a wide scope for arbitrary action without provision for any right to hearing by the applicant. The board of directors' absolute discretion to refuse enrolment as an ordinary member, associate or fellow is emphasized in By-law 14(a) which permits the board to refuse membership "notwithstanding that [the applicant] has fulfilled all the conditions specified in the bylaws of the Institute which

are applicable to his case". There are provisions for the transfer of Fellows of the Institute of Legal Executives of the United Kingdom, similar to those described above for Associates.

There exists only one honorary member to date, who "by [his] contribution to the development and welfare of Law Clerks [is] considered worthy of recognition for such service"[234] by the unanimous vote of the board of directors. The Secretary of the Law Society is the only ex officio member. The letters patent state that only associates, fellows and ex officio members shall have a vote. Thus, neither honorary members nor ordinary members, which constitute over half the membership, are allowed to vote. The failure of the Institute to give ordinary members a vote is explained by the fact that an ordinary membership requires a minimum of experience and no specialized training.

(4) Organizational structure

The head office of the Institute is in Toronto with a Durham branch now open and the possibility of an Ottawa branch being discussed. The branches operate within the limitations prescribed by the bylaws as to organization, membership and fees. According to the bylaws, the Institute is controlled by the board of directors of eleven members, composed of one past president, a maximum of two ordinary members and the balance associates and fellows. There are six standing committees in operation comprising: education, finance, membership, programme, publications and public relations. The Board sits as a whole on the ethics committee. Figure X.1 on the following page shows the organization structure of the Institute in graphic form.

INSTITUTE OF LAW CLERKS OF ONTARIO

ORGANIZATION STRUCTURE

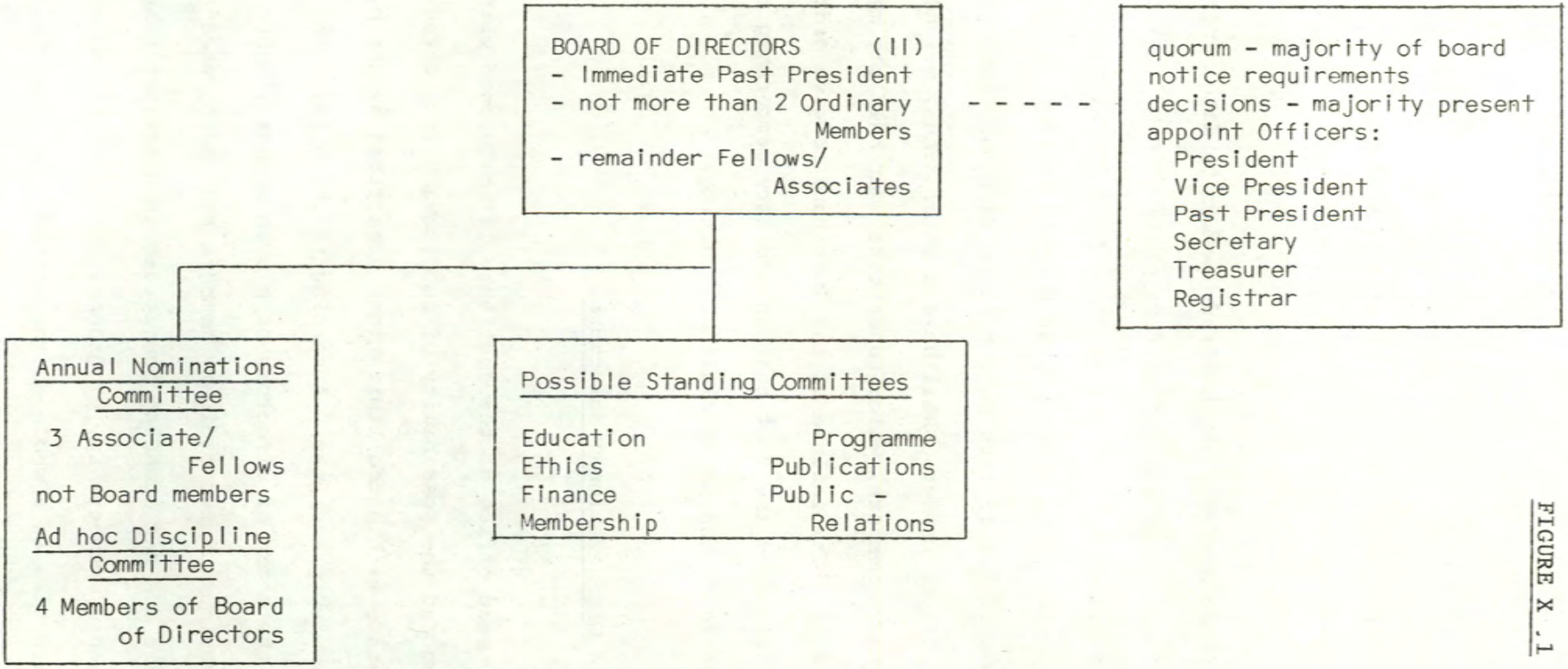

FIGURE X .1

The Nominations Committee is appointed by the board of directors and is composed of the three non-board members who are associates or fellows. Any group with a minimum of five associates or fellows may nominate a candidate. The Nominations Committee completes the slate if an insufficient number of nominations has been received from groups. Once elected, the board of directors appoints or elects as officers a president, a vice-president, a secretary, a treasurer and a registrar. The president and vice-president must be members of the board and members, that is associates or fellows, because ordinary members are not recognized as members (Bylaw s.7(b)). The secretary must be a member of the board but there is no specific restriction against an ordinary member being the secretary. All other officers need not be members of the board but must be members (associates or fellows). In practice, the Institute requires only that presidents and vice-presidents be associates or fellows.

(5) Discipline and ethics

The Institute has a disciplinary code and disciplinary machinery which may be invoked on an ad hoc basis. Bylaw 19 provides for the establishment of a Disciplinary Committee of not less than four members of the board to whom the board of directors as a whole may delegate completely their power to hear a complaint, make a finding and punish the member. This committee is established by resolution of the board of directors. There has been only one disciplinary action to date and the case involved misappropriation of funds. An ordinary member, associate or fellow may become liable to be excluded or suspended from membership if, in the opinion of not less than three-quarters of the directors, he is guilty of

conduct unbefitting such member. In the first formal code of ethics approved by the Institute in February 1977, the Institute set out the responsibility of law clerks to the lawyers employing them. However, beyond stating that law clerks should keep the client's information confidential and not steal his money, no other duties to the public are made explicit. It is not made clear which breaches of this code of ethics will result in disciplinary action. Furthermore, there is no definition of the phrase "conduct unbefitting a law clerk". The code of ethics reads as follows:

"Code of Ethics

1. The duties performed by the Law Clerk shall at all times be subject to the supervision of his Principal. The Law Clerk shall at no time represent himself to a client as a lawyer. He shall not counsel or give legal advice to a client without the direction of his Principal at which time the Law Clerk shall advise the client it is his Principal's counsel and/or legal advice.

2. The Law Clerk must discharge his duty to his Principal and the client of his Principal with honesty and integrity.

3. The Law Clerk should serve his Principal in a conscientious, diligent and efficient manner and he should provide a quality of service at least equal to that which Lawyers generally would expect of a competent Law Clerk.

4. The Law Clerk has a duty to hold in strict confidence all information acquired in the course of this professional relationship concerning the business and affairs of his Principal and his Principal's clients and he should not divulge any such information unless he is expressly authorized by his Principal or required by law so to do.

5. The Law Clerk owes a duty to his Principal to observe all relevant rules and laws regarding the preservation and safekeeping of the property of the client entrusted to the Principal.

6. The Law Clerk should assist in maintaining the integrity of the legal profession and should participate in its activities within the limits imposed by the Law Society of Upper Canada or other governing body.

7. The Law Clerk's conduct toward his Principal and other Lawyers should be characterized by courtesy and good faith.

8. The Law Clerk shall observe the rules of conduct set out in this Code of Ethics in the spirit as well as in the letter.

9. Any business cards used by a Law Clerk shall include the name of his employer and specify the occupation of Law Clerk or such other description as shall, from time to time, be approved by the Institute and/or The Law Society of Upper Canada."

Before he is excluded or suspended, the member is entitled to a hearing before the board of directors or before the Disciplinary Committee to whom they have delegated their power. Such hearing requires ten days notice and an opportunity to be heard in person and by counsel. The decision to the member must be in writing. The board of directors has the power to admonish, reprimand, suspend or expel the member. Bylaw 21 specifically provides that there is no right to appeal from a decision of the board of directors or the Disciplinary Committee unless the resolution establishing the committee so provides an appeal. The bylaw states that by applying for membership, a member consents to be bound by the decision.

(6) Education

While, at present the Institute allows applicants for associate membership to try Institute examinations without taking specific courses, the Institute was active in preparing a basic training course at Humber College for evening students to prepare students for trying the examinations. With the assistance of lawyers, a syllabus was prepared for the course. This syllabus was sent to other colleges setting up courses to train law clerks. However, apart from submitting the syllabus, the Institute has no direct input into the courses now offered at community colleges.

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8. The Law Clerk shall observe the rules of conduct set out in this Code of Ethics in the spirit as well as in the letter.

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The legal assistants course is now being offered at the following community colleges: Algonquin, Cambrian, Centennial, Durham, Fanshawe, Loyalist, Niagara, Seneca, Saint Clair and St. Lawrence. In 1969, the Ministry of Colleges and Universities (the "Ministry") accepted the statement prepared by the Law Society on course content setting out the minimum requirements for substantive and procedural legal instruction in the fields of real estate, civil procedure, consumer rights, commercial law, surrogate court practice, criminal procedure, domestic relations, landlord and tenant and legal aid. The Ministry has now expressed an intention to review this statement. The decision as to compulsory and elective courses, as well as sequence of courses, is left to the college.

The establishment of a legal assistants programme at a community college requires the approval of the Ministry. A local advisory committee appointed by the community college submits recommendations to the Board of Governors of the college who, in turn, approve the recommendations and submit them to the Council of Regents (the "Council"), the advisory council to the Ministry. The Council, after completing its own survey of need and programme content, will recommend the programme to the Minister for final approval. The main guideline for Ministry approval is manpower needs or the determination of the employability of students in directly related work. The Ministry has not yet exercised its powers to place quotas on student admissions due to the fact that the colleges report that 80 to 85 per cent of their graduates do find jobs in related fields. There are no reliable data available to support this finding one way or the other.

Admission to the legal assistants programme offered by community colleges

of 1973 the Institute submitted a brief (the "Brief") to the Law Society requesting that the Law Society grant the Institute official recognition. The Brief was mainly a response to a report of the Professional Conduct Committee of the Law Society of 15 July 1973 which contained, as part of a ruling on the use of professional cards by law clerks, a preference for the use of the designation "Legal Assistant" on their cards. The Institute felt there was a lack of understanding by the Law Society who itself had imposed the use of the label "law clerks" contrary to the wishes of the Institute. The Institute also expressed a distinct distaste at the suggestion of any regulations to control law clerks.

> "We consider that the profession, together with the Institute, is quite capable of providing adequate control and training of law clerks to protect the profession, the law clerks concerned and the general public whom they serve."[235]

Within the Brief, the Institute also raised problems with respect to the courses for law clerks being offered at community colleges. The Institute restated its request for a liaison committee with the Law Society to exchange views and make recommendations on employment and training of law clerks. The Law Society had said such a committee was unnecessary. This attitude was consistent with the lack of interest the Law Society had shown in the activities of the Institute. There is to date no indication of any response by the Law Society to this Brief.

(b) Professional bodies:

Pursuant to a need for a comprehensive study of the programmes offered by colleges of applied arts and technology in Ontario for the training of law clerks, in 1974, the Ministry of Colleges and Universities formed an

Ad Hoc Advisory Committee consisting of representatives from the Law Society, the Canadian Bar Association (Ontario Branch), the Law Reform Commission of Canada, the Ontario Law Reform Commission, the Institute of Law Clerks, the Federal Department of Justice, the Ontario Ministry of the Attorney General, community colleges, the University of Toronto Student Legal Aid Society, and People and Law Organization. The group studied the education, function and the projected need for law clerks in the province. Primarily owing to philosophical differences among the diverse members represented, the Committee made no progress and was eventually disbanded.

The Executive of the Canadian Bar Association (Ontario Branch), impressed with the obligation of the legal profession "to provide legal services at reasonable cost to all members of the public", passed a resolution in November 1975 appointing a special committee of the branch to co-operate with the Law Society, the Institute, the Ministry of Colleges and Universities and other organizations engaged in the training of paralegal personnel, "to study and make recommendations with respect to the recognition, education and certification of legal assistants and the related problem of accrediting educational institutions training legal assistants".[236] The resolution specifically recognized the Institute as the only organization representing law clerks in the province.

(8) Manpower Statistics

There are no accurate data available on the total number of law clerks employed in Ontario for several reasons. First, the scope of duties of a law clerk is undefined. There is some reluctance by law firms to give their

personnel the title law clerks which might entitle them to higher pay. Also, many persons perform law clerk's functions with government departments and corporations under other classifications. Secondly, because law clerks may be trained through community colleges or on the job, the records pertaining to college graduation are not comprehensive.

The data that are available include:

1. information kept by the Ministry of Colleges and Education relating to graduates and their employment in related fields which includes a demographic, placement and salary survey;[237]

2. a 1972 survey of Law Clerks done by the Canadian Bar Association with the following results on a population of 78 (54 men and 24 women) from Ontario who responded to a mailed survey:

   (a) 32 per cent were born outside Canada;

   (b) 60 per cent were under forty;

   40 per cent were over forty;

   (c) average education for men was grade twelve equivalent; for women 1 - 2 years of college;

   (d) median of law office experience: men - 9 - 10 years
   women - 20 years;

   (e) median salary: men - $11,500
   women - 8,100;

   These data are obviously out of date mainly because of the influx of law clerks through community colleges;

3. Mr. John Velanoff, Programme Co-ordinator of Fanshawe College Law Resource Centre, reported a pilot survey of paralegals in London for the summer of 1976 with hopes of a province-wide survey late this year. The Professional Organizations Committee has requested further information.

X.3 COMMUNITY LEGAL SERVICE ORGANIZATIONS

A complete review of paraprofessionals would require a description of the legal services organizations in which they work. The following is a brief outline of the groups which use community paraprofessionals.

(1) Parkdale Community Legal Services

On 1 September 1971, Osgoode Hall Law School opened a free legal services clinic in the Parkdale area. The office forms part of the clinical training programme at the Law School. Students who participate are given four course credits. The activities undertaken by Parkdale include delivery of traditional legal services on a case-by-case basis, summary legal advice and assistance, community legal education activities, applying the experience gained from the cases to law reform and development projects of various kinds. Their funding application for 1976-1977 stated that their active case load was running at 800 files. A student's activities are limited to some extent by rules prohibiting his acting in higher courts. Legal education activities cited in the application included holding seminars, workshops, a full-time six month lay advocate course for three trainees, preparing and publishing legal booklets, a newsletter and law columns, assisting other groups and organizations with resources and speakers. In spite of this impressive list of educational activities, Parkdale has been criticized for failure to meet its educational objective because the constant turnover of students participating makes it impossible to both serve the public and to educate it adequately. Funding for Parkdale has included, from time to time, Local Initiatives Program grants, the

Canadian Donner Foundation, Metro Grant, Osgoode Hall Law School Contribution, private donations, legal aid with original funding from the Council on Legal Education for Professional Responsibility of the Ford Foundation and the Federal Department of Health and Welfare.

Parkdale employs five lay advocates who have been trained on the job to provide legal assistance and advice under the direction of the professional staff. Government of Parkdale is divided between the office committee composed of two staff lawyers, one director, three lay advocates, four students, one office manager and a secretary, and the Board of Governors composed of seven community members, the Director, one student, two faculty members, two professionals appointed by the faculty and one office representative. The office committee concerns itself with administrative functions. The Board takes responsibility for policy decisions. Recommendations of the office committee are translated into policy by the Board. A survey was conducted in 1975 to determine the impact of Parkdale on the community.

(2) Neighbourhood Legal Services

In the summer of 1972, Osgoode Hall Law students, with funding from an Opportunities for Youth grant, conducted a feasibility study into the use of a community-run legal service using tained paralegal personnel for tasks which did not necessarily require a lawyer's skill. It was expected that the office would handle individual cases but that the primary thrust would be placed on community education and test case litigation in the areas of welfare, housing, family and consumer law. In spite of a lapse in

activity over the winter due to lack of funding, the group was re-established in the following summer mainly owing to the efforts of Mr. Allan McChesney, a lawyer recently called to the bar. In the fall of 1973, the office was incorporated under the name Don District Training Programme as a charitable corporation. The bylaws provide for a Board of Directors composed entirely of persons working, residing or having an abiding interest in the Cabbagetown community. Early activities of the Neighbourhood Legal Services included education courses, community forums, submission of a brief to the Osler Task Force, and formation of a project on Roomer's Rights with related briefs. In spite of lack of substantial funding, the staff handled telephone referrals and gave summary advice as well as handling some cases under the supervision of the Legal Director. Neighbourhood Legal Services spawned a group called the Welfare Information Services, formed originally to conduct an in-depth study of the welfare system and subsequently active in dealing with the Ontario Housing Corporation. The main activities of 1975 were opening of "Skid-Row House", the sponsoring of community education projects including seminars to first-time offenders in the Don Jail, Contact Community School, Eastdale Collegiate and Public Health Nurses, and writing legal columns for the Seven News.

Neighbourhood Legal Services restricts its services to the Cabbagetown/ Riverdale area of Toronto. The office engages in case work only in the areas of welfare law, unemployment insurance benefits and housing with referrals or summary advice being given for other matters and to persons who live outside the area. Matters are referred to other community legal services, Lawline, The Ontario Legal Aid Plan, Civil Advice Duty Counsel or the Law Society Referral Service.

The Board of Directors has been assembled from the community. The Advisory Board composed of three lawyers, one law student, two doctors and an accountant consult on matters that are complex or have legal connotations. The Advisory Board also participates actively with the Board of Directors in the administration of the office.

There are five community legal workers who operate in areas not covered by legal aid certificates, such as landlord/tenant, Ontario housing, unemployment insurance and welfare appeals. They receive a formal three week training and thereafter on-the-job training, as well as training through courses offered by other community organizations and the Law Society.

(3) People and Law Research Foundation Incorporated

In 1972 with the rising interest in store-front legal operations, the firm of Thomson, Rogers supported a one-year experiment to supply legal services to the community in the Kensington Market area of Toronto. After one year they concluded that, although there were legal needs of the community not met by Ontario Legal Aid, an office which handles problems of the nature that exist in the community could not hope to be self-supporting. Furthermore, the expertise of the downtown office was irrelevant. In spite of the withdrawal of the law firm, the organization was continued through community co-operation and funding from the United Church, the Anglican Church, the Ontario Government, the Sir Joseph Flavelle Foundation, the City of Toronto and the Department of Justice of the Federal Government. As of 9 July 1973, People and Law Research Foundation was incorporated as a non-profit non-share charitable corporation.

The problems of these low-income and immigrant people did not need the expertise of lawyers. However, they could be handled adequately by a paraprofessional with some legal training. Because of inadequate funding, People and Law made a decision to put emphasis on training for paralegals and preventive legal education rather than on the provision of service.

The course offered in lay advocacy was designed to enhance the abilities of people already employed in service roles; however, People and Law has proposed itself as the main educator of persons for full-time employment as legal paraprofessionals. People and Law has held workshops on Workmen's Compensation as well as training the personnel of Tenant Hotline[238] prior to its opening. The office has also conducted courses for new Canadians as an Introduction to Canadian Law. As with other courses, the office encourages its graduates not only to help service the existing case load but to go out and conduct courses themselves with support and assistance from People and Law where necessary. As a further part of their self-help philosophy, People and Law encourages clients to take on solving their problems themselves as much as possible and encourages affected groups to take the relevant community education courses offered.

(4) Other community legal services

Other groups who hire paraprofessionals include Metro Tenants' Legal Services and Tenant Hotline, which are organizations funded through the clinical funding of the Legal Aid Plan of the Law Society. Both groups confine their efforts to landlord-tenant law. Tenant Hotline employs six paraprofessionals who were trained on the job or through a course on

Tenant Advocacy given by Parkdale Legal Services. The three paraprofessionals hired by Metro Tenants' Legal Services received similar training. However, the latter group has also participated in teaching other paraprofessionals about landlord and tenant law, not only at Parkdale but also at the Federation of Metro Tenants. In each case, legal supervision is supplied by Duty Counsel. Callers to Tenant Hotline receive summary advice and assistance and representation where necessary; however, emphasis is placed on educating tenants to help themselves. Metro Tenants' Legal Services prefer group representation over individual cases unless the nature of the individual case is such that it has wider effects on a group.

The Injured Workers Consultants hire eight paraprofessionals to advise, assist and represent injured workers on problems with respect to Workmen's Compensation, unemployment insurance and pension matters. They work under the supervision of a Board of Directors with two lawyers on it assisted by Duty Counsel. The paraprofessionals were trained on the job primarily with the assistance of materials developed through the Community Law Programme of the Faculty of Law at the University of Toronto and their own materials published through the Toronto Community Law Programme. They are funded through the Ontario Legal Aid Plan as well as Federal government departments and private sources.

In addition to those groups mentioned above, Ontario Law Schools operate student-run clinics. For example, students of the University of Toronto Law School operate the Student Legal Aid Society (S.L.A.S.) under the supervision of a lawyer and articling student and with the assistance of other law professors. In addition to a campus clinic, S.L.A.S. runs nine

clinics in various parts of Toronto. The students also man Lawline, a phone-in legal service where callers receive summary legal advice or referrals to other legal sources.

(5) Action on Legal Aid

Action on Legal Aid is an umbrella group representing the community law projects throughout Toronto. Its membership organizations include Campus Legal Assistance Plan of Osgoode Hall Law School, Canadian Environmental Law Association, Injured Workers' Consultants, The Law Union of Ontario, Metro Tenants' Legal Services, Neighbourhood Legal Services, Parkdale Community Legal Services, People and Law Foundation, Student Legal Aid Society of University of Toronto Law School, Law Line, Tenant Hotline, Toronto Community Law Program and Tenant Action Mississauga. In its Brief to the Ontario Government in Response to the Report of the Osler Task Force on Legal Aid, 9 January 1977, Action on Legal Aid restated its position with respect to the Osler Task Force recommendations. Action on Legal Aid has established on-going work groups with the Ministry of the Attorney General and hopes to establish joint committees with the Law Society to resolve matters of common concern.

The value of employing paraprofessionals is recognized in the Report of The Task Force on Legal Aid at p. 53.

> "Lawyers in practice have long understood the utility and economy of employing legal paraprofessionals to assist in many aspects of private practice. For the most part, these valued employees were trained by the lawyers themselves or by senior clerical staff. In more recent times, however, many of our community colleges have offered courses to legal paraprofessionals which are primarily designed to prepare them for employment in the private sector. We have

examined the curricula and have spoken with instructors from many of our community colleges and we were impressed with the manner in which they have been able to provide comprehensive courses staffed by able personnel for these purposes.

We are satisfied that a properly trained and supervised paraprofessional has an important role to play in the delivery of legal services by clinics. Because many of the problems that will be brought to the clinic may only have a marginal legal component, the paraprofessional may be better able to deal with them than a lawyer. In addition, paraprofessionals may be used to assist in Small Claims Court, the Family Court office and no doubt in many other respects under the new Plan."

Recommendations of the Task Force with respect to the establishment of neighbourhood legal aid clinics and the use of paraprofessionals therein include:

"1. A neighbourhood legal aid clinic may be established in any community or place on the terms and conditions established by the Board of Directors.

2. Area Committees will be encouraged to make recommendations to the Board of Directors regarding the advisability of, and the terms and conditions for, the establishment of neighbourhood legal aid clinics in their areas.

3. The Board of Directors after consultation with the Area Committee will establish the staffing requirements, the special projects and priorities if any, and the funding of each neighbourhood legal aid clinic.

4. The appropriate Law Society Regulations and policy should be amended so as to permit each clinic subject to the approval of the Board of Directors, to advertise the availability of its services. We would propose no restrictions on the advertising of an institutional type but no advertisement would include touting for individual staff members of the clinic, or would in any sense contrast the breadth of services or their quality as between the clinic and the private Bar.

5. In staffing clinics, it shall be permissible for the Board of Directors to appoint to each neighbourhood legal aid clinic salaried solicitors, articling students, paraprofessionals, social and other professional workers and clerical staff. Regardless of the mix of staff employed, every clinic will be under the immediate direction of a lawyer.

7. Consistent with our aim to establish a flexible Plan, any neighbourhood legal aid clinic may be given special priorities in its community, subject to consultation between the Area Committee

and the Regional Director. Such priorities might require restrictions on the kind of work for which the clinic will be available, emphasis on particular clientele or specialized projects such as community education or even simple advice and assistance. Generally speaking, however, neighbourhood legal aid clinic staff will be encouraged to give priority to requests for legal advice and assistance, community group advice and representation and the development of community education programmes.

8. Subject to any limits established as set out above, salaried solicitors on the staff of the neighbourhood legal aid clinic will be entitled to accept and conduct an applicant's case without restriction. Paraprofessionals and articling students may, subject to the direction of the clinic director, accept and conduct cases in tribunals in which they are entitled by law to appear.

9. Because of the priorities which are hereby proposed or which may be established by the Area Committee and the Regional Director for the neighbourhood legal aid clinic, the Regional Director and the Area Committee in consultation should also establish guidelines for and strictly control the case load of the staff professionals and paraprofessionals.

11. Each neighbourhood legal aid clinic will be encouraged as soon as possible after its formation to establish a Community Advisory Board comprising both lawyers practising in and lay members residing in the community that the clinic is designed to serve. The function of such a Board would be exclusively advisory and it is not intended that it should exercise any degree of control. In small communities there may be no need for such a Board, but in metropolitan areas especially where there may be more than one clinic such Boards can assist in determining community needs.

15. In conjunction with The Law Society of Upper Canada, the Board of Directors of Legal Aid Ontario should develop a programme to be conducted through the community colleges, in conjunction with the Bar Admission Course or elsewhere for the academic training of, and through existing neighbourhood legal aid clinics, for the practical training of law advocates or paraprofessionals."[239]

FOOTNOTES

1. John D. Arnup, "Fusion of the Professions", (1971), 5 Gazette 38 at 39. Throughout the historical section, this article is relied on heavily and frequent reference is made to Miles D. O'Reilly, "Genesis", (1972), 6 Gazette (Supp) 7, and C.A. Johnston, "The Law Society of Upper Canada 1797-1972", (1972), 6 Gazette (Supp) 1, articles in special commemorative issue.

2. 14 Geo. III, c.83.

3. Earl Jowitt (ed.), The Dictionary of English Law, London, (1959), Sweet & Maxwell Limited, at p.215.

4. Ibid., p.1652.

5. Ibid., p.177.

6. See Arnup, op.cit., n.1 above.

7. 31 Geo. III, c.31.

8. 34 Geo. III, c.6.

9. 37 Geo. III, c.13.

10. This section was amended in 1822 to limit transferees to those who had been called to practise at the bar of only superior courts of the named jurisdictions.

11. An Act to make the members of the Law Society of Ontario elective by the Bar thereof, S.O. 1870-71, c.15.

12. Johnston, op.cit., n.1 above at p.2.

13. C.H.A. Armstrong, The Honorable Society of Osgoode Hall, Clarke, Irwin & Co. Ltd., Toronto, 1952 at p.40.

14. The Statute Law Amendment Act, S.O. 1934, c.54, s.14.

15. 2 Geo. IV, c.5.

16. Johnston, op.cit., n.1 above at p.2.

17. The Law Society Act, R.S.O. 1970, c.238, s.4.

18. 4 Geo. IV, c.3.

19. 3 Vict., c.3.

20. 7 Wm.IV, c.2.

21. S.O. 1881, c.5.

22. See Arnup, op.cit., n.1 above.

23. Sir John A. Boyd, "Legal Profession in Ontario - its Origin and History", 1907 Can. Law Rev. 51 at 55.

24. Brian Bucknall, Thomas C.H. Baldwin, and J. David Lakin, "Pedants, Practitioners, and Prophets: Legal Education at Osgoode Hall to 1957", (1968), 6 Osgoode Hall L.J. 137 at 144.

25. The Hon. W. R. Riddell.

26. See section II.

27. See section IV.

28. See section IX.

29. R.S.O. 1970, c. 238.

30. R.S.O. 1970, c. 39.

31. R.S.O. 1970, c. 441.

32. Ontario, Ministry of the Attorney General, Ontario Law Reform Commission, Queen's Printer, 1973.

33. R.S.O. 1960, c. 378.

34. R.S.O. 1960, c. 30.

35. 37 Geo. III, c. 13.

36. See "History Admission to the Law Society - Call to the Bar", Section IV, for details.

37. 2 Geo. IV, c.5.

38. 2 Geo. IV, c.1, s.44.

39. An Act to establish a Court of Chancery, 7 Wm. IV, c.2.

40. 7 Wm. c.15.

41. 3 Vict., c.2, see also 10 & 11 Vict., c.29, ss. 1,2,3.

42. 13 & 14 Vict., c.51.

43. 20 Vict., c.63.

44. Ibid., s.XIX

45. S.O. 1881, c.5.

46. S.O. 1927, c.28, s.13.

47. S.O. 1934, c.54, s.19.

48. R.S.O. 1960, c.30, s.3.

49. S.O. 1873, c.3.

50. S.O. 1897, c.26, ss.1-4.

51. S.O. 1873, c.4.

52. An Act to amend the Laws respecting the Law Society, S.O. 1875-76, c.31.

53. S.O. 1881, c.17.

54. S.O. 1881, c.5.

55. S.O. 1886, c.20.

56. S.O. 1895, c.13, s.38.

57. C.S.U.C. 1859, c.33.

58. S.O. 1870-71, c.15.

59. S.O. 1875-76, c.31.

60. S.O. 1881, c.17.

61. S.O. 1892, c.32.

62. S.O. 1895, c.27.

63. S.O. 1897, c.15.

64. The Statute Law Amendment Act, S.O. 1934, c.54, s.14.

65. S.O. 1935, c.54.

66. S.O. 1951, c.45.

67. S.O. 1953, c.55.

68. Volume 3, "Self-Governing Professions and Occupations", p.1159.

69. Ibid., p.1166.

70. See Royal Commission Inquiry into Civil Rights, Report No. 1, Volume 3, p.1209.

71. S.O. 1973, c.49.

72. See section "Government of the Law Society", Section III, for a discussion of why the Law Society Council was disbanded.

73. Section 42.

74. Section 43.

75. Section 2.

76. R.S.O. 1970, c.89.

77. Section 24(1).

78. Section 24(2).

79. Section 36.

80. Section 9.

81. Section 3.

82. See Legislature of Ontario Debates, 19 May 1970, p.2865.

83. See H.W. Arthurs, "Authority, Accountability, and Democracy in the Government of the Ontario Legal Profession, (1971), 49 Can. Bar Rev.1.

84. Op.cit., n.68 above at p.1175.

85. Legislative Debates, op.cit., n.82 above at p.1491.

86. Ibid., at p.3239.

87. For reference to The Law Society Act, section numbers only will be shown - Rules and Regulations will be indicated specifically.

88. Section 26 was amended by S.O. 1973, c.49, s.2.

89. Arthurs, op.cit., n.83 above.

90. "The Future of the Law Society Council", (1973), 7 Gazette 87.

91. The lay benchers are Mrs. R. Tait, (Toronto), Joseph D. Carrier, (Toronto), Mrs. R. Sutherland, (Sudbury), and N. Ogilvie (Grimsby).

92. Letter from Peter B. Bell, Assistant Secretary of the Law Society to the Professional Organizations Committee, 13 September 1976. Document IV.1.

93. R. v. Zaza and D.A.S. Holdings Limited, May 1974, unreported, per Boland, Co. Ct. J.

94. [1952] O.R. 896.

95. See R. ex rel. Smith v. Ott, [1950], O.R. 493.

96. May 1974, unreported.

97. R.S.C. 1970, c.C-34, s.735(2).

98. R.S.O. 1970, c.450.

99. R.S.O. 1970, c.439.

100. S.O. 1971, c.47, s.10.

101. See Section V for a complete discussion of the Compensation Fund.

102. See Section V for a complete discussion of the Errors and Omissions Insurance.

103. Denis v. Burnett, "The Society's Computer", (1977), 11 Gazette 71.

104. Communiqué No. 64, 29 March 1977.

105. (1971), 5 Gazette 38 at 40.

106. Ibid., p.41.

107. (1856), 2 Upper Canada Law Journal 49.

108. Brian Bucknall, Thomas C.H. Baldwin and J. David Lakin, "Pedants, Practitioners, and Prophets: Legal Education at Osgoode Hall to 1957", (1968), 6 Osgoode Hall Law Journal 137 at 152.

109. C.A. Johnston, "The Law Society of Upper Canada 1797-1972", (1972), 6 Gazette (Supp).1 at p.3.

110. 20 Vict., c.63.

111. (1855), 1 U.C.L.J. 216.

112. (1904) Can. Law Rev. 101-7 at p.105.

113. Bucknall, Baldwin & Lakin, op.cit. n.108 above at page 162.

114. The Federation Act of 1887, s.5, ss.1, made provision for the establishment of a "teaching faculty" in law at the University of Toronto.

115. See Bucknall, Baldwin & Lakin, op.cit., n.108 above, p.191.

116. Ibid., p.196.

117. P.C. Jan.1939 cited in Bucknall, Baldwin & Lakin, op.cit., n.108 above, p.197.

118. Montgomery, "Problems of Legal Education", (1934), 12 Can. Bar Rev. 481 cited in Bucknall, Baldwin & Lakin, op.cit., n.108 above, p.191.

119. Dr. W.R. Lee, Chairman Legal Education Committee, Canadian Bar Association, (1934), 12 Can. Bar Rev. 153.

120. Bucknall, Baldwin & Lakin, op.cit., n.108 above.

121. Between 1887 and 1949, the Law Society rejected any university participation in legal education for Ontario lawyers. However, teaching law at the Faculty continued.

122. Fortnightly Law Journal, Wed., July 2, 1947, cited in Bucknall, Baldwin & Lakin, op.cit., n.108 above, p.209.

123. The following are "approved" law schools:

Osgoode Hall Law School, of York University, Downsview, Ontario
Dalhousie University, Halifax, Nova Scotia
Queen's University, Kingston, Ontario
The University of Alberta, Edmonton, Alberta
The University of British Columbia, Vancouver, British Columbia
Manitoba Law School, Law Courts, Winnipeg, Manitoba
The University of New Brunswick, Fredericton, New Brunswick
L'Universite d'Ottawa, Ottawa, Ontario
University of Saskatchewan, Saskatoon, Saskatchewan
University of Toronto, Toronto, Ontario
The University of Western Ontario, London, Ontario
McGill University, Montreal, Quebec
University of Windsor, Windsor, Ontario
University of Victoria, Victoria, British Columbia

124. "Legal Education Committee Report" (1973), 7 Gazette 98 at 100.

125. In some cases, an applicant may rely on The Judicial Review Procedure Act S.O. 1971, c.48, to review the refusal.

126. The seven core subjects now required by the Law Society are civil procedure, constitutional law of Canada, contracts, criminal law and procedure, personal property and torts.

127. "An Alternative Approach to Legal Education", (1975), 9 Gazette 108.

128. This reduction of university courses in law had been rejected by the MacKinnon Committee.

129. See Mr. Colin A. Isaacs of the Council of Ontario Universities for more information pertaining to the study.

130. S.C. 1974-75-76, c.76.

131. See G.D. Finlayson, Q.C., "Report of the Legal Education Committee", (1976), 10 Gazette 284.

132. Federation of Law Societies of Canada, "Report of Special Committee on Specialization in the Practice of Law.

133. "The Toronto Legal Profession: An Exploratory Survey", (1971), U. of T.L.J. 498.

134. V. Alboini, "A Lawyer's Limited Practice in Ontario", (1976), 10 Gazette 154.

135. V. Alboini, "Certification of Legal Specialists: A Progressive or Regressive Step", background paper for Committee on Specialization of the Canadian Bar Association, (Ontario Branch) at p.18, July 1973.

136. This is basically the plan in effect in New Mexico, see Alboini, ibid., p.134.

137. Report to Law Society of Alberta on Specialist Certification in the Legal Profession, November 15, 1972.

138. Joint Committee on Competence and Specialization to B.C. Law Society and Canadian Bar Association (B.C. Branch).

139. 1973 Report of Special Committee on Specialization accepted by the Federation of Law Societies.

140. 1973 Resolution passed approving certification of specialists.

141. Alboini, op.cit., n.135 above.

142. A brief informal report of the benchers' proceedings.

143. Alboini, op.cit., n.134 above.

144. Re Frances Blake, (1861), 30 L.J.C.L. (N.S.) 32.

145. Re Beatty, 29 Man. R.388.

146. Re a Practitioner of The Supreme Court, [1930] S.A.S.R. 142.

147. Re Swanwick (1883), 1 Q.L.J. 117.

148. Myers v. Elman, [1940] A.C. 282 at 288.

149. Grahame v. Attorney General of Fiji, [1936] 2 All E.R. 992; Re Hall Dollard v. Johnson, 27 L.T.O.S. 230.

150. MacAuley v. Judges of Sierra Leone, [1928] A.C. 344.

151. Re a Solicitor, ex parte Law Society, [1912] 1 K.B. 302.

152. Re A Solicitor, 68 Solicitors' Journal 756.

153. Re Hervey (1842), R.J. Pig. 309.

154. Re Currie, Gilleland v. Wadsworth, (1878), 25 Gr.338.

155. Re Titus, (1884), 5 O.R. 87.

156. Macauley, Sierra Leone Judges, [1928] A.C. 344(P.C.).

157. Willison v. Ward, (1920), 18 O.W.N. 190.

158. Re Solicitor, (1916) 37 O.L.R. 310; Re Solicitor, [1935] 3 W.W.R. 428; Fitzpatrick - Re A Solicitor, (1923), 54 O.L.R.3.

159. Smith, William J., Q.C., "Disciplinary Proceedings Before the Law Society", L.S.U.C. Special Lectures 1971.

160. See figure V.1 for a graphic description of the Informal Complaint Procedure.

161. R.S.O. 1970, c.151.

162. R.S.O. 1970, c.E.10.

163. Baron v. F., [1945] 4 D.L.R. 525.

164. Smith, op.cit., n.159 above at p.288.

165. Sheila Arthurs, "Discipline in the Legal Profession in Ontario", (1970), 7 Osgoode Hall L.J. 235.

166. Ibid., at p.236.

167. Report on the Compensation Fund, March 1975.

168. Op.cit., n.167.

169. Brenner v. Gregory, [1973] 1 O.R. 252 (H.Ct.Ont.).

170. Ibid., at p.247.

171. [1969] 1 A.C. 191.

172. (1975), 6 O.R. (2d) 404 (H.Ct.).

173. See Banks and Reid, ibid.

174. Dominion Chain Co. Ltd. v. Eastern Construction Co. Ltd., (1976), 12 O.R.(2d) 201 (C.A.).

175. The Law Society Act, s.53.

176. Mark M. Orkin, Legal Ethics, 1957, Toronto, Cartwright & Sons Limited at p. 253.

177. Ibid., p.255.

178. See Section VI.

179. John P. Nelligan, "Lawyers in Canada: A Half Century Count", (1950), 28 Can. Bar Rev. 727.

180. Noah M. Meltz, "A Review of Historical Terms and Projections of the number of lawyers and judges in the Ontario Labour Force", prepared for the Committee of Ontario Law Deans.

181. Arthurs, Willms, Taman, "The Toronto Legal Profession: An Exploratory Survey", (1971), 21 U.ofT.L.J. 498.

182. Linda Silver Dranoff, "Women as Lawyers in Toronto", (1972), 10 Osgoode Hall L.J.177.

183. John P. Nelligan, "Income of Lawyers", (1951), 29 Can. Bar Rev.34.

184. [1972] 3 O.R. 433.

185. See Gordon F. Henderson, "Advertising and Professional Fees under The Combines Investigation Act", speech to the March 1977 Lecture Series of the Law Society.

186. Letter from Gowling & Henderson to the Federation of Law Societies, dated February 24, 1976.

187. Letter from Blake, Cassels & Graydon to L.S.U.C. Special Committee re Solicitors Tariffs, dated April 3, 1975.

188. (1960), 126 C.C.C.133.

189. The Rules Committee established under s.114 of The Judicature Act, R.S.O. 1970, c.228, is composed of the Chief Justice of Ontario, the Chief Justice of the High Court, five other Supreme Court judges, the Chief Judge of the County and District Courts, two county and district court judges, the Attorney General, the Master of the Supreme Court, three lawyers appointed by the Law Society, and up to three lawyers appointed by the Chief Justice of Ontario.

190. All references to section numbers in this part are to The Solicitors Act, R.S.O. 1970, c.441.

191. Re Solicitors, [1972] 3. O.R. 433.

192. Ontario Law Reform Commission, Report on The Solicitors Act, (1973), Queen's Printer, has suggested reform of The Solicitors Act and all sections with respect to taxation of a client's bill of costs.

193. See discussion of lien in Re Gladstone, [1972] 2 O.R. 127 (Ont.C.A.).

194. In 1974, Alberta, British Columbia, Manitoba, New Brunswick, the Northwest Territories, Nova Scotia and Quebec all permitted regulated contingent fees.

195. Hughes v Architects' Council, [1957] 2 Q.B. 555 at 559-60 per Lord Goddard, C.J., (Q.B.D.).

196. Op.cit., n.186.

197. Henderson, op.cit., n.185 above at p.13.

198. See Bannion, Professional Ethics, p.154.

199. Henderson, op.cit., n.185 above at p.21.

200. Ibid., p.23.

201. Code, p.51.

202. See Section VI.

203. See discussion of the Compensation Fund in Section V.

204. See "Preliminary Report on Results of Questionnaire", (1962), 12 C.B.J.84.

205. A. Gordon Cooper, "The Cooper Report to the Executive Committee", (1969), 12 C.B.J. 326 at 329.

206. Professional Conduct Handbook, Ruling 1.

207. W.G. Gray, Q.C., "The Treasurer Reports", (1976), 10 Gazette 273 at 279.

208. Ibid., p.280.

209. R.S.O. 1970, c.89.

210. See York County Law Association, Brief to Ministry of Consumer and Corporate Affairs, 1972.

211. James Forbes Neuman, "Reaction and Change: A study of the Ontario Bar 1880 to 1920, (1974), 32 U. of T. Faculty L.R. 51 at p.59.

212. Ibid., p.60, citing Editor, "Canadian Bar Association", (1914),p.299.

213. D.P. Jamieson, "The Legal Profession in Canada", (1956) 34 Can. Bar Rev. 308 at p.310.

214. The Law Society of Upper Canada, Ontario Legal Aid Plan Annual Report, 1968, p.6.

215. Frederick H. Zemans, Community Legal Services in Perspective, 1972, p.94.

216. Ibid., p.98.

217. Ibid., p.93.

218. Reference to section numbers through this part are to The Legal Aid Act, R.S.O. 1970, c.239.

219. Figure IX.1 shows the Legal Aid structure.

220. See Appendix B for excerpts from the Law Society of Upper Canada Annual Report of the Ontario Legal Aid Plan for statistics and budget of the plan.

221. Speech referred to in Law Society Communiqué No. 48 dated 20 February 1976.

222. Communiqué No. 52 dated 23 April 1976.

223. Report of the Subcommittee on Community Legal Services made to the Legal Aid Committee of the Law Society, Future of Community Legal Services in Ontario: A Proposal and a Response.

224. Report of Task Force on Legal Aid, Part I, p.41.

225. Community Legal Services Subcommittee, op.cit., n.223.

226. (1976), 10 Gazette 125.

227. Report of Committee on "Prepaid Legal Costs Insurance", 1972.

228. Ibid.

229. The By-laws are presently being amended.

230. The 1977 Seminar was attended by over 500 persons.

231. Canadian Bar Association, Resolution, November, 1975.

232. L.F. Webster, "Non-legal Personnel", (1970), 1 C.B.J. (N.S.), 3:1.

233. Ibid.

234. By-law s.10.

235. Brief to the Law Society, (1973), p.8.

236. Canadian Bar Association, op.cit., n.231.

237. Gordon Fawcett, 9th Floor, Mowat Block, is in charge of Ministry statistics.

238. See "Other Community Legal Services" for brief description of Tenant Hotline.

239. See Report of Osler Task Force on Legal Aid (1974) at pp.54-55 for the complete recommendations.