

27th January, 2000

MINUTES OF CONVOCATION

Thursday, 27th January, 2000
8:30 a.m.

PRESENT:

The Treasurer (Robert P. Armstrong, Q.C.), Aaron, Backhouse, Banack, Bindman, Boyd, Braithwaite, Carey, Carpenter-Gunn, R. Cass, Chahbar, Cherniak, Coffey, Copeland, Cronk, Crowe, Curtis, Diamond, DiGiuseppe, E. Ducharme, T. Ducharme, Epstein, Farquharson, Feinstein, Furlong, Hunter, Jarvis, Krishna, Laskin, Lawrence, MacKenzie, Marrocco, Millar, Mulligan, Murphy, Murray, Orved, Pilkington, Potter, Puccini, Ross, Ruby, Simpson, Swaye, Topp (by telephone), Wardlaw, Wilson and Wright.

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The reporter was sworn.

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IN PUBLIC

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TREASURER'S REMARKS

The Treasurer advised that a quorum was required for the February Call to the Bar ceremonies in London and asked that Benchers who were available to contact the Bar Admission Office.

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REPORT OF THE PARALEGAL TASK FORCE

Discussions continued on the Report of the Paralegal Task Force.

It was moved by Ms. Ross, seconded by Ms. Curtis that the entire Report without any deletions or amendments be made public.

Carried

Paralegal Task Force
January 20, 2000

Report to Convocation

Purpose of report: Information

1. The Paralegal Task Force was appointed by Convocation in June 1999. The mandate of the task force is to study the issue of paralegals and present Convocation with policy options in March to consider for presentation to the Attorney General.
2. The task force has met frequently and is working on several parallel tracks since Convocation met in September 1999. At that meeting, Convocation approved a study that would provide:
 - an environmental scan evaluating current activities; and
 - practices of paralegals and a review of the key regulatory options and models.

The Strategic Counsel¹ in partnership with Professors John McCamus and Patrick Monahan of Osgoode Hall Law School have been commissioned to do the study and have begun the work.

¹The Strategic Counsel is one of six market research agencies of record for the Government of Ontario with extensive experience and credibility in this area of research. Their research is used regularly by government ministries in devising public policy and they conduct policy work for a wide range of public and private sector clients.

3. The research in the environmental scan is designed to:
 - review complaints to the Law Society about paralegals, and prosecutions to date for unauthorized practice;
 - investigate the impact of paralegal practice on the courts, and on the administration of justice;
 - identify key public stakeholder groups that may use and benefit from paralegal services (e.g., tenants, immigrants, the economically disenfranchised, home buyers, etc.);
 - examine the needs, attitudes, and knowledge of the users of paralegal services;
 - review the areas and ways in which paralegals are practising, and determine potential areas for expansion. The review includes:
 - a review of paralegal pricing and billing practices; and
 - a preliminary examination of paralegals' advertising practices; and
 - explore, in a preliminary way, other areas of activity in which paraprofessionals are engaging in "legal" work, including accountancies, multi-disciplinary professional practices, financial institutions, accident consultancies, document management services, immigration consultancies, and traffic ticket consultancies, among others.
4. The regulatory review will:
 - provide a detailed examination of various regulatory options including: the pros and cons of each model; the costs associated with each model; legislative, enforcement and implementation implications, and the relevant principles of regulation and their application within each model (including: licensing, education, codes of ethics, standards and competence, insurance and client compensation, discipline, etc.);
 - review paralegal regulation in other jurisdictions;
 - review other paraprofessional activity;
 - develop jurisdictional models that demonstrate levels of authority, risk and competence.
5. The research is being undertaken in five modules.

Module I – Advisory Forum of Experts

6. The forum was a half day session moderated by John McCamus and Michael Sullivan of Strategic Counsel, held on Friday December 17, 1999. Participants included academics, Law Society representatives, supervised and unsupervised paralegals, public advocacy representatives, and members of the bar.
7. The first issue discussed was the overall trend in independent paralegal activity. There were a number of suggestions that this is ground which has been well and truly plowed in the past. Reference was made to the reports filed with the A. G.'s subcommittee. Nevertheless, the consensus was that both the scope and scale of paralegal activity is increasing.

8. It was suggested that 650 paralegals are currently advertising in the Yellow Pages alone. Other, more informal, types of advertising (such as cards on bulletin boards in church basements and community centres and classified ads in community newspapers) were also mentioned. Paralegal practice areas cited include the following: insurance, corporate services, debt collection, accident benefits, family, criminal, immigration, landlord and tenant, real estate, wills and estates.
9. The question of who should be classified as a paralegal was posed. Although it would probably be inaccurate to suggest that there was universal agreement on this point, the consensus definition was "non-lawyers providing legal services directly to the public for a fee". One participant inquired whether the consensus definition would stretch to cover people such as non-lawyers working in legal clinics, those who work for not-for-profit organizations and Human Rights Commission Investigation Officers.
10. The next matter taken up was what people/organizations should be classified as stakeholders on this issue and these were all included in the list of stakeholders for the elite interview stage.
11. There was an exploration of key issues that will need to be addressed in the context of paralegal regulation.
12. Insofar as the public interest is concerned, it was observed that many lay people cannot reliably distinguish between paralegals and lawyers. It was therefore suggested that the regulations governing paralegals closely mirror those governing lawyers.
13. Discussion of the strengths and weaknesses of regulation did not yield many novel points. The primary perceived strength was improved protection for the public/clients. An interesting observation on the weakness side was that if the regulated paralegal profession is not made prestigious, or at least attractive in some respects, to belong to, it might simply serve to drive a proportion of paralegal practitioners "underground". This will, at best, create a detection and enforcement problem that will likely be both time-consuming and expensive to solve. Thus the suggestion was that whatever regulatory model is adopted must get "buy-in" from as many paralegals as possible.
14. On a related point, several participants wondered whether all "paralegals" could appropriately be covered under one scheme. Reference was made to community legal clinics, not-for-profit organizations and charitable endeavours. It was suggested that many people who discharge a paralegal function in such organizations "come up through the community" rather than through schools, and that many of them might be lost if a significant amount of mandatory education were required in order to comply with the new regulatory scheme.
15. The cost of whatever regulatory regime is adopted could also be problematic. One of the paralegals in attendance frankly admitted that the paralegal community would like the AG to bear the costs of any prosecutions.
16. Concern was expressed for the potential conflict between a provincially legislated regulatory model and federal legislation such as the *Criminal Code* and *Immigration Act*.
17. Standards of competence and education and training for paralegal practitioners were seen to be in many respects inter-related. Some doubt was expressed that a broad education at a community college would be adequate training for highly technical areas of practice. It was suggested that perhaps there ought to be separate exams for each discrete area of practice, and that the license to practice be restricted to areas in which the competency exam had been successfully taken.

18. Consideration of competency exams led to a discussion concerning what approach should be taken concerning paralegals who are already in practice at the time any new regulatory regime comes into force. "Grandfathering" these individuals was suggested by some, but this approach was by no means the unanimous preference of those in attendance. It was argued that "Grandfathering" would simply legitimize a number of "problem cases". No consensus was reached on this issue.
19. Likewise, there was little agreement on codes of professional conduct, insurance and complaints. There was consensus only insofar as it was generally acknowledged that these are important issues that will have to be addressed in any regulatory scheme.
20. The forum concluded with the discussion of potential regulatory models and was mostly devoted to the question of who/what the regulator is going to be. The positions taken on this were predictable: paralegal representatives argued the process should be "consumer-driven" and receive consumer "buy-in". Representatives of the legal profession argued that paralegals should be subject to precisely the same rules and regulations as those governing lawyers: "There has to be a level playing field."

Module II: Review of complaints and prosecutions

21. The Strategic Counsel will review volume and type of complaints to the Law Society about paralegals and the prosecution of unauthorized practice.

Qualitative Research

Module III: Impact of paralegal practice on the Courts and on the administration of justice.

22. Elite surveys² of approximately 25 individuals directly involved in or associated with the administration of justice are underway to assess the impact of paralegal practice on the courts and on the administration of justice.
23. The issues being examined include: the extent and areas of paralegal activity, competence, technical skills and knowledge, reliability, conduct, contingency fees, and the impact of paralegal practice on access to the courts for economically and otherwise disenfranchised segments of society.

Module IV: Views from key stakeholders

24. Any solution to the issues of paralegal representation will need to meet the test of being ultimately in the public interest. These interviews will explore views about the general role of independent paralegals and the models for regulating paralegals that are under consideration.
25. Issues to be considered in this module will include general perceptions of independent paralegals, scale and scope of activity, perceived needs assessment of client base, access to justice improved or hampered, value for services rendered, motivations and barriers in paralegal use, billing practices, views on types and need for regulation, and the perceived impact of regulation on constituencies.

Quantitative Research

26. Users of paralegal services has been broken down into to two distinct groups: individual and corporate users. These groups are being surveyed separately.

²These elite surveys are in-depth, one-on-one interviews with stakeholders and individuals directly associated with the administration of justice designed to achieve a higher level of discourse than other instruments such as a survey or focus group.

Module V: Survey of individual users of paralegal services

27. Although the incidence of paralegal use would seem to be low, the benefits of a random, telephone survey far outweighed the benefits of the more targeted methodologies. The government has suggested in past projects its preference for random or targeted intercepts as representative of the public's view.

Module VI: Survey of corporate users of paralegal services

28. A short survey of Ontario businesses that use legal services with the main objective of determining paralegal service usage within this context.

29. Some of the issues to be pursued in modules V and VI are:

- current legal needs of individuals and corporations;
- emerging legal needs of individuals and corporations;
- recent usage of lawyers versus paralegals;
- presence of in-house counsel and/or paralegals (corporate);
- attitudes towards lawyers;
- attitudes towards engagement of paralegal services;
- sources of information about paralegal services;
- satisfaction with services rendered (costs and quality of service);
- billing practices; and
- level of support for regulation of paralegals and views on the various regulatory options.

Module VII: Survey of paralegals

30. The independence of the Strategic Counsel is helpful in gaining a true picture of the activities of paralegals and helps to alleviate concern for the potential reticence of some paralegals to participate in this kind of survey for various reasons including a fear of prosecution by the Law Society.

31. The issues to be explored in the paralegal survey will include:

- type of organisation (sole, franchise, partnership, corporation);
- number of employees and offices;
- areas of practice;
- number of clients;
- amount of time in court (where applicable);
- pricing and billing practices;
- advertising and means of obtaining clients;
- education, training, and insurance; and
- existence of formal code of conduct.

32. The field work for quantitative work was conducted in January and the data are being analysed. The development of the policy work being conducted by Professors McCamus and Monahan is ongoing.

Government Activities

33. On November 17, 1999, the Attorney General appointed the Honourable Peter Cory, former Justice of the Supreme Court of Canada, to mediate the issue of the role of paralegals in the justice system.

34. Mr. Justice Cory plans to meet with representatives from the legal and paralegal communities to attempt to find agreement on areas of practice, governance and educational requirements for paralegals. Where consensus cannot be reached, he will be making specific recommendations.

- 35. The results of Mr. Cory's consultations, along with his recommendations, will be presented to the Attorney General by the end of May.
- 36. An advertisement has been placed in provincial newspapers calling for submissions to Mr. Justice Cory to be received by February 14, 2000. The advertisement also indicates mediation is expected to commence within approximately 3 weeks after that time.
- 37. The task force is developing strategies to manage the variances in the Society's and Mr. Justice Cory's time lines. More and updated government relations information will be presented in camera on January 27th at Convocation.

Task force activities

- 38. The Paralegal Task Force called for submissions, through the Ontario Reports, in the fall of 1999. The task force was pleased with the response of 47 submissions received by year's end. This included an omnibus submission from the CBAO that reflects several more presentations.
- 39. The submissions are under consideration by the task force as it formulates the policy options being developed for Convocation. The submissions were also provided to The Strategic Counsel.
- 40. At its meeting on December 11, 1999 the task force divided its work into three categories and is meeting in smaller working groups to achieve goals quickly and efficiently. The subgroups are:

Jurisdiction

George Hunter
 Stephen Bindman
 Gillian Diamond
 William Simpson
 Bradley Wright

Regulatory

Gregory Mulligan
 Todd Ducharme
 Charles Harnick
 Heather McGee

Reporting and Strategy

Stephen Bindman
 Charles Harnick
 Allan Lawrence
 Laura Legge
 Frank Marrocco

Jurisdiction

- 41. The jurisdiction sub-committee is examining issues related to the areas of practise of paralegals investigating the types of work they are doing and analysing public risk.
- 42. The jurisdiction committee is conducting two sets of hearings. The first were held on January 11th and 12th. Lawyers in eight practice areas described potential and current scenarios regarding paralegal practice related specifically to their area of practice highlighting the level of risk to the public.
- 43. The practice areas are family law, real estate, wills and estates, tribunals and courts, criminal, immigration, landlord and tenant, and accident benefits.
- 44. The jurisdiction committee will hold an additional day of hearings for stakeholders to present their views, concerns and comments on February 2nd.

Regulatory

- 45. The regulatory subcommittee is considering various potential models of self-regulation including:
 - >regulation by the Law Society;
 - >regulation by government ministry;
 - >regulation by a newly-created independent body of the government; or
 - >regulation by Legal Aid Ontario

46. Regulation of paralegals by the Law Society would mean the Society would move to regulate all legal service providers, not only lawyers.
47. Regulation by government ministry would follow the model of such industries as the real estate and insurance brokers that are often regulated by the Ministry of Consumer and Commercial Affairs.
48. Regulation by a newly created body independent of government includes self-regulation. Early discussions suggest that self-regulation might be premature because the paralegal industry is not easily identifiable at this stage in its development.
49. An alternative to strict self-regulation is regulation by a corporation that is independent of government. Some issues include funding, past regulatory experience (if the corporation already exists) and knowledge of the field to be regulated.
50. The fourth model that the subcommittee has considered is regulation by Legal Aid Ontario. This model is of interest to the task force as a possible creative and new solution for consideration. Although there are many easily identifiable challenges from the outset, there are many creative and interesting potential solutions that could satisfy many of the parties involved in the broader discussions.
51. A full consideration of these models will be provided for your consideration and recommendation in March. Pros and cons of each model will be incorporated into the Convocation report.

Reporting and Strategy

52. The reporting and strategy committee is charged with the responsibility of managing reports to Convocation and generating communications and government relations plans in consultation with the Government Relations and Public Affairs committee.
53. Despite difficult time lines the task force is confident that it will fulfil its mandate to report to Convocation with options for consideration in March.
54. The Strategic Counsel report will be received on March 1, 2000 and the task force will consider the findings and incorporate those findings with the conclusions of the subgroups in an intensive set of meetings and deliberations in early March.
55. Our intention is to cooperate fully with Mr. Justice Cory but until the discrete government relations discussions are concluded our specific strategies with regard to submissions currently requested for February 14th and subsequent negotiations are continuing to evolve.

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TREASURER'S REMARKS

The Treasurer commented on the recent deaths of former Bencher, The Hon. Justice Meyer Lerner and Mrs. Mary Lamont, wife of Bencher, Donald Lamont and extended sympathy on behalf of the Benchers to their families.

MOTION - DRAFT MINUTES

It was moved by Mr. Wilson, seconded by Mr. Banack THAT the following Draft Minutes of Convocation be adopted:

October 28th and 29th, 1999;
November 10th, 25th and 26th, 1999; and
December 10th, 1999

Carried

MOTION - COMMITTEE APPOINTMENTS

It was moved by Mr. Banack, seconded by Mr. Wilson -

THAT Janet Stewart, Q.C. be appointed as a member to the Equity and Aboriginal Issues Committee.

THAT Dean Alison Harvison Young and Dean Peter Hogg be appointed as members to the Admissions Committee.

THAT Bonnie Warkentin (CBA-O) and N. William C. Ross (MTLA) be appointed as members to the Task Force on Courthouse Facilities.

Carried

BACKHOUSE/MILLAR MOTION

It was moved by Ms. Backhouse, seconded by Mr. Millar that 25 honorary memberships in the Osgoode Society be awarded annually to meritorious students of the Bar Admission Course to be chosen by the Director of Education.

Carried

Convocation took a recess at 10.20 a.m. and resumed at 10.45 a.m.

CDLPA MOTION

Curtis/Backhouse Motion

That the allocation in the budget of \$90,000 for CDLPA be eliminated.

Ms. Curtis spoke to her motion. She advised that Mr. Copeland was now seconding the motion, Ms. Backhouse having withdrawn as seconder.

A debate followed.

Ms. Curtis moved an amendment to her motion, seconded by Mr. Copeland that the operating budget for CDLPA be eliminated exclusive of the funds allocated for the merger discussions.

Lost

ROLL-CALL VOTE

Aaron	Against
Backhouse	Against
Banack	Abstain
Bindman	Against
Braithwaite	Against
Carey	Abstain
Carpenter-Gunn	Against
Chahbar	Against
Cherniak	Against
Coffey	Against
Copeland	For
Cronk	Against
Crowe	Against
Curtis	For
Diamond	Abstain
DiGiuseppe	Against
E. Ducharme	Against
T. Ducharme	Against
Epstein	Against
Feinstein	Against
Hunter	Against
Krishna	Against
Laskin	Abstain
MacKenzie	Against
Marrocco	Against
Millar	Against
Mulligan	Against
Murray	Against
Ortved	Against
Pilkington	Against
Potter	Against
Puccini	Abstain
Ross	Against
Ruby	For
Simpson	Against
Swaye	Against
Topp	Against
Wilson	Against
Wright	Against

Vote: 3-For, 31-Against, 5 Abstentions

It was moved by Mr. Swaye, seconded by Mr. Aaron that the total funding for CDLPA be \$150,000 rather than \$140,000.

Carried

It was moved by Mr. Cherniak, seconded by Mr. Epstein that the Finance and Audit Committee be directed to consider CDLPA funding in relation to universal funding of libraries, the role statement of CDLPA and the Law Society.

Carried

REPORT OF THE LAWYERS FUND FOR CLIENT COMPENSATION COMMITTEE

Re: Appeal Procedures in the Grant Making Process

Mr. Ruby presented the Report of the Lawyers Fund for Client Compensation Committee for approval.

Lawyers Fund for Client Compensation Committee
November 26, 1999

Report to Convocation

Purpose of Report: Decision Making, Information

Prepared by the Lawyers Fund for Client Compensation Department

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TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Lawyers Fund for Client Compensation Committee ("the Committee") met on September 23rd 1999. In attendance were:

- Clayton Ruby (Chair)
- Robert Aaron (Vice Chair)
- Nancy Backhouse
- Stephen Bindman
- Gordon Bobesich
- Ronald Cass, Q.C.
- Abdul Chahbar
- Barbara Laskin

Staff: Sara Hickling, Maria Loukidelis, David McKillop, Arie Odinocki, Evan Shapiro

60. This report contains:

- a report on appeal procedures in the grant making process;
- the Committee's information report on sub-committee appointments;
- the Committee's information report on future demands on the balance of the Fund;
- the Committee's information report on recent Fund statistics;
- the Committee's information report on claims paid from the Lawyers Fund for Client Compensation since its last report in March of 1999.

DECISION MAKING

I. APPEAL PROCEDURES IN THE GRANT MAKING PROCESS

A. NATURE AND SCOPE OF THE ISSUE

1. Staff recently presented a memorandum to the Review Committee which described the facts of a unique case. As the facts were not in dispute it was simply a question of policy as to whether the Review Committee wished to use its discretion to pay a grant in the situation presented. The decision of the Review Committee was that no grant be paid.

2. Counsel for the claimant subsequently contacted the Law Society and asked about appeal procedures from the decision of the Review Committee. The particular situation was not covered by current appeal procedures and therefore the advice of the Chair was sought. The Chair, who had reservations as to whether there should be any right of appeal from the Review Committee, directed the broader issue of appeals be placed before the Committee.

B. BACKGROUND

Current Procedures

3. Section 51(5) of the *Law Society Act* provides that Convocation in its absolute discretion, may make grants from the 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.
4. Section 51(10) provides that Convocation may delegate any of the powers conferred upon it by virtue of Section 51 to a committee of Convocation. This delegation has taken place and therefore the Lawyers Fund for Client Compensation Committee is responsible to Convocation for the administration of the Fund.
5. Up until the late 1980's, all grant recommendations, whether coming from staff or referees, were considered by the full Committee. In order to streamline the procedures for making grants, a sub-committee was formed with Bruce Noble, Q.C. as chair to suggest improvements. The Noble Report on the Procedure for Review and Appeal was adopted by Convocation in February 1988. The adoption of this report established the Review and Appeal Sub-Committees which remain in place to date.
6. The majority of claims to the Fund are settled without the need of a Referee hearing. Assuming staff counsel are of the opinion a grant is appropriate in the circumstances, the Law Society and the claimant negotiate a resolution and a recommendation is forwarded to the Review Sub-Committee (hereinafter referred to as the "Review Committee"). If counsel is of the opinion that no grant should be paid or is unable to agree upon a quantum in an attempted negotiated resolution, the claim is referred to a Referee for hearing. The Review Committee also receives the recommendations of Referees and makes the determination as to whether the recommendation will be followed.
7. If a claimant is unhappy with the decision of the Review Committee, at present, the claimant has a right of appeal to the Appeal Sub-Committee (hereinafter referred to as the "Appeal Committee") which, like the Review Committee, is a sub-committee of the full Lawyers Fund for Client Compensation Committee. An appeal is not a hearing *de novo*. The Appeal Committee receives the Referee report, the transcript and exhibits received at the hearing together with written submissions of both the appellant and respondent.

C. POLICY ISSUE

The Issue - Appeals from the Review Committee

8. The issue is what to do when the Review Committee refuses to approve a staff or Referee recommendation. The current guidelines permit the claimant to appeal that decision to the Appeal Committee whose membership, like the Review Committee, is taken from the full Lawyers Fund for Client Compensation Committee. The issue is whether it is proper for one set of benchers at the Appeal Committee level to have a right of review over a different set of benchers at the Review Committee level when all of the benchers concerned sit on the same committee of Convocation.
9. The Law Society of Upper Canada is unique in offering claimants an appeal procedure from the body that has the authority to determine whether a grant will be paid. In virtually every Commonwealth or United States jurisdiction, the decision of their equivalent Review Committee is final and not subject to appeal.

D. THE COMMITTEE'S PROPOSAL

Recommendation

10. It is the recommendation of the Lawyers Fund for Client Compensation Committee that the Appeal Committee be abolished and that decisions of the Review Committee become final.
11. Where the Review Committee is minded to refuse or vary a staff recommendation, i.e. where no Referee hearing has been held, to the detriment of the claimant, the Committee shall postpone the making of any decision, cause the claimant to be notified of the nature of the issue that concerns it and request written submissions on the question. The Committee may set time limits within which those submissions shall be received. In most cases, this will enable the Committee to make a fair decision. However, if the Committee chooses, it may elect to hear evidence or refer a claim to a Referee for an evidentiary hearing and recommendation. If a matter is referred to a Referee, the Committee does not remain seized of the claim.

Decision for Convocation

12. Convocation must decide whether:
 - a. to accept the Committee's proposal as set out in paragraphs 10 and 11 above;
 - b. to accept the Committee's proposal with amendments Convocation deems appropriate;
 - c. to decide upon other options to be articulated by Convocation.

INFORMATION

I. SUB-COMMITTEE APPOINTMENTS

13. On the assumption that Convocation adopts the Committee's recommendation to abolish the Appeal Committee, the Committee has determined that the following benchers shall serve in panels of three on the Review Committee:
 - Clay Ruby
 - Bob Aaron
 - Bob Topp
 - Nancy Backhouse
 - Stephen Bindman
 - Gordon Bobesich
 - Ron Cass, Q.C.
 - Abdul Chahbar
 - Gary Gottlieb, Q.C.

II FUTURE DEMANDS ON THE BALANCE OF THE FUND

14. Ex Officio Bencher James Wardlaw, Q.C. wrote to the Chair during the summer expressing concern about future demands on the Fund. Mr. Wardlaw was concerned that the surplus of the Fund should be built up in good economic times to ensure adequate resources when the economy inevitably takes a turn for the worse.
15. Mr. Wardlaw's inquiry was referred to Craig Allen, Vice President and Actuary for LPIC. It is part of Mr. Allen's duties to track Fund claim statistics and offer predictions on future payments from the Fund. Further, Mr. Allen recommends the annual levy upon the profession for the Fund.

16. Mr. Allen's response was that his analysis was restricted to estimating future payments on claims which have already been reported. It is not part of his function to predict what claims may be like in the future. However, it should be noted that the Fund currently carries a healthy surplus of approximately \$14 million, although it is declining. Mr. Allen predicts the Fund surplus (i.e., the amount presently left beyond immediate needs) to be in the area of \$11 million by the end of 1999.
17. One of the best ways to ensure adequate funding for future claims is to prevent further decline to the Fund balance. This is not to say that a surplus of \$11 million is going to be adequate should there be a marked increase in the number and amount of claims received. There is no "magic" Fund balance. The Committee will consider this factor when it comes to recommend the levy for next year.
18. The exchange of correspondence between Messrs. Ruby, Wardlaw, Allen and the Committee Secretary are attached for the information of Convocation at Appendix A which is found starting at page 19 of this report.

III. RECENT FUND STATISTICS

19. One of the reasons for the decline in the Fund balance is the large amount that has been paid out in grants to date. As of October 31st 1999 the Fund has paid grants totalling \$6.1 million. This is the most the Fund has ever paid out in a single year and the year still has two months to go. The large payments are not indicative of an adverse trend for the Fund. Rather, the large payments indicate staff effectiveness in clearing the current file inventory. Fortunately, the number and dollar value of claims continue to decline. This downward trend has continued unabated since December of 1997 as is evidenced by the following diagram:

(Graph - see Report in Convocation file)

20. As the older file inventory is paid out and closed, new claims are coming in at a slower pace. Consequently, the number of open claims has been declining since December of 1997 and, as the following diagram indicates, has now fallen below 200. There have not been fewer than 200 claims in the file inventory since February of 1991.

(Graph - see Report in Convocation file)

IV GRANTS FROM THE LAWYERS FUND FOR CLIENT COMPENSATION

- ◆ The Secretary wishes to report that the list of grants attached to this report and marked as Appendix "B" have been approved by the Review Sub-Committee and grants in the amounts shown have been paid out or are in the process of being paid out.

APPENDIX "B"

GRANTS APPROVED BY THE REVIEW COMMITTEE, APPEAL COMMITTEE AND BY
THE LAWYERS FUND FOR CLIENT COMPENSATION COMMITTEE
THURSDAY, SEPTEMBER 23, 1999

REFEREE AND/OR COMPENSATION STAFF	SOLICITOR	NUMBER OF CLAIMANTS	TOTAL
C. Anthony Keith, Q.C.	Paul D. Squires (Disbarred September 22, 1994)	2	Nil
	John A. Sproule (Deceased August 19, 1994)	1	\$31,400.50
	Roger Bellefeuille (Permitted to Resign June 26, 1997)	1	\$24,700.00
	Roger Lewis Clark (Disbarred September 28, 1995)	1	\$15,000.00
June A. Maresca	Solicitor #10 (Suspended - Filings September 8, 1999)	1	Nil
Heather A. Werry	Daniel Joseph Shaheen (Disbarred May 19, 1999)	11	\$443,704.81
	Solicitor # 6 (Suspended - Filings July 23, 1999 Discipline Pending)	1	\$15,000.00
	Brian Madigan (Disbarred March 31, 1999)	11	\$99,989.53
	Wm. J. Marinac (Disbarred January 29, 1987)	2	\$50,000.00
	Morris Calvin Orzech (Permitted to Resign April 15, 1996)	2	\$28,000.00
	Frank Mott-Trille (Disbarred October 29, 1997)	3	\$105,000.00
	Harold Spring (Disbarred June 25, 1987)	1	\$50,000.00
	Solicitor #45 (Discipline Pending)	1	\$30,000.00

APPENDIX "B"

GRANTS APPROVED BY THE REVIEW COMMITTEE, APPEAL COMMITTEE AND BY
THE LAWYERS FUND FOR CLIENT COMPENSATION COMMITTEE
THURSDAY, SEPTEMBER 23, 1999

REFEREE AND/OR COMPENSATION STAFF	SOLICITOR	NUMBER OF CLAIMANTS	TOTAL
	Solicitor #1 (Suspended - Filings July 23, 1999)	1	\$8,500.00
	Solicitor #48	1	\$91,000.00
	Roger Lewis Clark (Disbarred September 28, 1995)	1	\$45,000.00
	Moshe Teller (Disbarred June 26, 1997)	3	\$958.33
	Douglas Robert Wilson (Discipline Suspension October 24, 1996)	1	\$250.00
	Solicitor #27 (Suspended Non-Payment LPIC Fees October 1, 1997)	1	\$800.00
	Pierre Ouellette (Disbarred November 23, 1995)	1	\$500.00
	Lorenzo A. DeFranco (Disbarred January 25, 1996)	2	\$225.00
	Farida M. Shaikh (Retired or Not Working May 26, 1993)	1	\$4,200.00
	Josefino C. Rivera (Disbarred June 24, 1999)	1	\$250.00
	Morris A. Baker (Suspended by Discipline October 24, 1996)	1	\$4,000.00
	Solicitor #9 (Suspended Filings July 23, 1999)	1	\$1,500.00
	Leon Wickham (Disbarred September 22, 1994)	1	\$250.00

APPENDIX "B"

GRANTS APPROVED BY THE REVIEW COMMITTEE, APPEAL COMMITTEE AND BY
THE LAWYERS FUND FOR CLIENT COMPENSATION COMMITTEE
THURSDAY, SEPTEMBER 23, 1999

REFEREE AND/OR COMPENSATION STAFF	SOLICITOR	NUMBER OF CLAIMANTS	TOTAL
	Solicitor #39 (Suspended Filings September 8, 1999 Discipline Pending)	2	\$1,790.00
	Solicitor #55 (Suspended Filings September 8, 1999 Discipline Pending)	1	\$741.09
Sara Hickling	R. Noel Bates (Disbarred May 22, 1997)	1	\$12,627.50
	Lee Edward Fingold (Disbarred January 25, 1996)	4	\$40,301.64
	John A. Sproule (Deceased August 19, 1994)	1	\$31,400.50
	Oscar Mullerbeck (Deceased May 29, 1995)	2	\$45,981.67
	Helen Bernice Shaw (Disbarred January 25, 1996)	1	\$6,250.00
	Peter D. Clark (Disbarred January 23, 1997)	2	\$3,475.00
	Thomas D. Shortill (Deceased July 24, 1997)	2	\$479.63
	Sydney Ezrin (Deceased 25, 1995)	1	\$200.00
	Solicitor #54 (Suspended Filings July 23, 1999 Discipline Pending)	1	\$3,000.00
	Jeffrey Mark Levy (Disbarred June 22, 1995)	2	\$4,917.77
David McKillop	Paul Douglas Squires (Disbarred September 22, 1994)	14	\$282,156.72

APPENDIX "B"

GRANTS APPROVED BY THE REVIEW COMMITTEE, APPEAL COMMITTEE AND BY
THE LAWYERS FUND FOR CLIENT COMPENSATION COMMITTEE
THURSDAY, SEPTEMBER 23, 1999

REFEREE AND/OR COMPENSATION STAFF	SOLICITOR	NUMBER OF CLAIMANTS	TOTAL
	T. Hugh Buchanan (Retired September 24, 1992)	2	\$6,667.04
	Solicitor #51	3	\$64,520.00
	David J. Parsons (Permitted to Resign September 27, 1996)	1	\$595.00
	Timothy Salomaa (Suspended by Discipline November 26, 1999)	1	\$518.00
	Solicitor #56 (Suspended Filings August 20, 1999 Discipline Pending)	1	\$1,600.00
Maria Loukidelis	Arnold Handelman (Disbarred January 23, 1992)	2	\$38,500.00
	Michael DeCosimo (Disbarred March 25, 1999)	29	\$1,097,037.82
	Richard P. Ranieri (Suspended by Discipline September 24, 1992)	1	\$300.00
	Solicitor #5 (Suspended Filings December 1, 1995 Pending Discipline)	2	\$2,806.71
	Timothy Kinnaird (Disbarred April 3, 1997)	1	\$425.00
	Frederick Bernard Sussman (Permitted to Resign April 3, 1997)	2	\$500.00
	Sadrudin Jaffer (Disbarred April 24, 1997)	3	\$1,342.00
	Philip Gregory Evans (Disbarred May 23, 1996)	1	\$500.00

APPENDIX "B"

GRANTS APPROVED BY THE REVIEW COMMITTEE, APPEAL COMMITTEE AND BY THE LAWYERS FUND FOR CLIENT COMPENSATION COMMITTEE THURSDAY, SEPTEMBER 23, 1999

REFEREE AND/OR COMPENSATION STAFF	SOLICITOR	NUMBER OF CLAIMANTS	TOTAL
	John D. Wright (Permitted to Resign March 25, 1999)	2	\$100.00
	Irvine Usprech (Deceased November 8, 1998)	1	\$2,000.00
	Solicitor #46 (Suspended LPIC levy June 1, 1998 Discipline Pending)	2	\$2,900.00
	Solicitor #47 (Suspended - Filings November 19, 1999)	2	\$500.00
	Solicitor #49 (Suspended - Filings September 8, 1999)	2	\$182.68
Evan Shapiro	Solicitor #47 (Suspended Non-Payment LPIC - September 8, 1998)	21	\$926,571.30
	Solicitor #10 (Suspended Filings September 8, 1999 Discipline Pending)	44	\$2,099,464.00
	Harvey Howard Hacker (Resumed practice April 23, 1998 following 15 month suspension)	2	\$120,000.00
	Solicitor #1 (Suspended Filings July 23, 1999)	17	\$26,509.25
	Solicitor #3 (Suspended - LPIC Fee June 1, 1993 Discipline Pending)	1	\$60,000.00
	John D. Wright (Permitted to Resign March 25, 1999)	2	\$950.00

APPENDIX "B"

GRANTS APPROVED BY THE REVIEW COMMITTEE, APPEAL COMMITTEE AND BY
THE LAWYERS FUND FOR CLIENT COMPENSATION COMMITTEE
THURSDAY, SEPTEMBER 23, 1999

REFEREE AND/OR COMPENSATION STAFF	SOLICITOR	NUMBER OF CLAIMANTS	TOTAL
	David J. Colman (Disbarred October 22, 1998)	1	\$250.00
	Solicitor #20 (Discipline Pending)	1	\$3,450.95
	Solicitor #52 (Discipline Pending)	1	\$5,000.00
	Solicitor #16 (Suspended Non-Payment LPIC Fees December 2, 1994 - Discipline Pending)	2	\$4,840.00
	Solicitor #43 (Suspended Filings July 23, 1999 Discipline Pending)	2	\$1,082.00
	Peter Simons (Permitted to Resign November 25, 1993)	1	\$2,500.00
	Joseph Marc Balen (Disbarred June 16, 1999)	1	\$5,000.00
	Solicitor #42 (Suspended Filings September 8, 1999 Discipline Pending)	1	\$3,340.00
	TOTAL GRANTS PAID	243	\$5,892,400.94

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

- Copy of a letter from Clayton Ruby to David McKillop dated June 18, 1999;
- Copy of a letter from Craig Allen to David McKillop dated September 2, 1999
- Copy of a letter from David McKillop to Clayton Ruby and James Wardlaw dated September 7, 1999
- Copy of a letter from James Wardlaw to Clayton Ruby dated September 14, 1999

(Appendix 'A' pages 11 - 16)

It was moved by Mr. Ruby, seconded by Mr. Aaron that the Report be adopted.

Carried

REPORT OF THE STRATEGIC PLANNING COMMITTEE

Mr. MacKenzie gave an oral report on the status of the Committee's work.

REPORT OF THE FINANCE AND AUDIT COMMITTEE

Mr. Krishna presented the item in the Report dealing with the timetable for the 2001 budget.

Finance and Audit Committee
January 28, 2000

Report to Convocation

Purpose of Report: Decision Making
 Information

Prepared by the Finance Department
Andrew Cawse (947-3982)

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Finance and Audit Committee ("the Committee") met on January 13, 2000. Committee members in attendance were Krishna V. (c), Crowe M. (v-c), Swaye G. (v-c), Cass R., Chahbar A., Epstein S., Murphy D., Puccini H., Wardlaw J., Wilson R., Furlong P. Staff in attendance were: Saso J., Tysall W., Tinsley R., Smith C., Strom M., Grady F., White R., Cawse A.

2. The Committee is reporting on the following matters:

For Decision

- Insurance Levy Waiver Fund
- 2001 Operating Budget Process

Information

- LPIC Financial Report September 30, 1999
- Investment Compliance Report

FOR DECISION

Insurance Levy Waiver Fund

- 3. The Insurance Levy Waiver Fund ('the Fund') was instigated by the Finance and Audit Committee in November 1994 as a result of a recommendation in the Insurance Task Force report which stated:

"The Task Force and Insurance Committee accept that the Society should, as a matter of policy, defer, subsidize or even on occasion waive the cost of insurance, including tail premiums for some members or former members in appropriate circumstances such as unemployment, sickness and maternity or paternity leave, to list but a few examples. But the cost of this generosity should be borne by all members of the Society, not just those who pay the E & o levy. Consequently, the Taskforce and Insurance Committee recommend that the funding of deferrals, waivers or subsidies of the insurance levy or any surcharge in appropriate circumstances be dealt with by the Finance Committee after establishing appropriate guidelines. But these costs should be a general Society cost charged to the E & O program."

- 4. The Committee then worked with staff to develop guidelines and established a Fund by charging a small fee to all members. The Fund did not subsidize annual membership fees.
- 5. At the January 2000 meeting of the Finance and Audit Committee the status of the Fund was reviewed. Payments to ten applicants (total of \$37,000) were made in 1998, and payments to seven applicants (total of \$21,000) were made in 1999. Balances in the fund are summarised below:

DATE	BALANCE
December 31, 1995	\$43,000
December 31, 1996	\$126,000
December 31, 1997	\$247,000
December 31, 1998	\$235,000
December 31, 1999	\$234,000

- 6. The Committee considered whether to continue or discontinue the Fund, particularly as LPIC's finances have improved, leading to the reduction of financial obligations on members. Also, the 2000 budget does not provide any financing for the Fund. The Committee elected not to continue the Fund beyond processing current applications, and considered the following alternatives to bring the fund to a conclusion:
 - a) Exhaust the Fund Assistance could be provided to a limited number of members utilising the current Fund. The customer service implications of providing a closed end fund are not favourable. There would be administrative costs to this option.
 - b) Turn the Fund over to LPIC. LPIC has implemented payment plans and other measures to assist financially constrained members.
 - c) Terminate the Fund after processing current applications, and transfer the Fund balance to a working capital reserve. Convocation has already approved the establishment of a working capital reserve, and this would be a prudent use of the available funds.

Request of Convocation

- The Finance and Audit Committee's recommended disposition of the Insurance Levy Waiver Fund is that:
 - a) Grant applications received up to January 27, 2000 be reviewed by the Committee, who would make recommendations to Convocation;
 - b) The subsequent balance remaining in the Fund, currently at \$234,000, be transferred to the Working Capital Reserve.

2001 Operating Budget Process

7. It was noted that there was widespread support in Convocation and the Committee for the budget process to be started and completed earlier in the year so that:
 - A target membership fee can be set early in the budget process;
 - Convocation can be involved earlier in the budget process;
 - The budget process can be better integrated into the greater Law Society operations;
 - Program priorities can be established early in the budget process;
 - New programs can be assessed in greater depth. It is envisaged that the financial impact of new programs must be analysed by the early provision of standardised information. A draft of a form which must be used for this analysis is attached. Committee and staff feedback is being obtained on this form, prior to its requested adoption by Convocation.
8. A consequence of bringing the budget process forward earlier in the year is that the risk of deficits or surpluses increases, as assumptions and forecasts are made based on less information. A Working Capital Reserve would ameliorate this risk. The Committee noted that the establishment of a Working Capital Reserve was endorsed by Convocation as part of Convocation's approval of the Law Society's financial policies in January 1997. Based on the current operating budget, a reserve of \$3,000,000 would be appropriate, which should be in place by December 31, 2003.
9. A Working Capital Reserve would also assist in stabilising member's fees, facilitate Law Society cash flows at the beginning of the year, assist in meeting the financial obligations of new initiatives, and reduce the effect of fluctuations in revenues and expenses.
10. The role of the budget and the Committee can be integrated into the Strategic Plan. The Strategic Planning Committee is contemplating a 4 year cycle which would synchronise with a rolling four year budget contemplated by the Committee. Budgets would be prepared in diminishing detail for years 2, 3 and 4 so that the longer term financial consequences of assumptions, forecasts and programs can be assessed.

Request of Convocation

- The Finance and Audit Committee recommends that Convocation approve the following timetable for the 2001 budget.

March 2000 Strategic direction and priorities are identified by Convocation, and a target membership fee is set.

April 2000 Staff develop a budget to meet Convocation's priorities constrained by the membership fee target.

May 2000 Financial submission of budget initiatives from Committees for inclusion in the 2001 draft budget. A preliminary draft submitted for review to the Finance and Audit Committee. Report from Finance and Audit Committee to Convocation on the status of 2001 budget development.

- June-August Budget modifications resulting from reviews incorporated into the 2001 draft budget. Initiatives developed or proposed by Benchers and Committees are compiled in standard format for consideration at Convocation.
- September Review of draft budget by Finance and Audit Committee, and recommendation to Convocation.

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

- (1) Draft form for new programs entitled Convocation and Committees, Analysis of Costs Associated with New Initiatives (“the Initiative”).
- (2) Lawyers’ Professional Indemnity Company Report to the Finance & Audit Committee of The Law Society of Upper Canada January 13, 2000 - Third Quarter 1999.

CONVOCATION ADJOURNED FOR LUNCHEON AT 1:00 P.M.

CONVOCATION RECONVENED AT 2:30 P.M.

PRESENT:

The Treasurer, Banack, Bindman, Boyd, Braithwaite, Carey, Carpenter-Gunn, R. Cass, Chahbar, Cherniak, Coffey, Copeland, Cronk, Crowe, Curtis, Diamond, DiGiuseppe, E. Ducharme, T. Ducharme, Epstein, Feinstein, Furlong, Hunter, Krishna, Laskin, Lawrence, MacKenzie, Millar, Mulligan, Murphy, Murray, Pilkington, Potter, Puccini, Simpson, Swaye, Topp (by telephone), Wardlaw, Wilson and Wright.

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IN PUBLIC

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RESUMPTION OF THE REPORT OF THE FINANCE AND AUDIT COMMITTEE

Re: 2001 Operating Budget Process

The following amendments were accepted by the Chair:

- (1) Timetable - April 2000 to read:
 “Staff develop a budget to meet Convocation’s priorities showing a range of membership fees that follow”
- (2) Explanatory Notes (iii) (ii) to read:

“Estimates are reviewed and commented on by the Finance Department and SMT”

- (3) That review of the draft budget by the Finance and Audit Committee and recommendations to Convocation be scheduled in September and October.

It was moved by Mr. Millar, seconded by Mr. Edward Ducharme that the words “and a target membership fee is set” be deleted under the heading March 2000 of the budget process. It would then read:

“Strategic direction and priorities are identified by Convocation.”

Carried

It was moved by Mr. Krishna, seconded by Mr. Epstein that the Budget Timetable and Process as amended be adopted.

Carried

Re: Insurance Levy Waiver Fund

It was moved by Mr. Krishna, seconded by Mr. Chahbar that the disposition of the Insurance Levy Waiver Fund be adopted as follows:

- (a) that grant applications received up to January 27, 2000 be reviewed by the committee which will make recommendations to Convocation; and
- (b) that the subsequent balance remaining in the Fund, currently at \$234,000, be transferred to the Working Capital Reserve.

Carried

REPORT OF THE PROFESSIONAL REGULATION COMMITTEE

Mr. MacKenzie presented the Report of the Professional Regulation Committee for approval.

Professional Regulation Committee
January 13, 2000

Report to Convocation

Purpose of Report: Decision and Information

Prepared by the Policy Secretariat

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TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Professional Regulation Committee ("the Committee") met on January 13, 2000. In attendance were:

Gavin MacKenzie (Chair)

Niels Ortvad (Vice-Chair)

Carole Curtis
Gary Gottlieb

From the Professional Development and Competence Committee:

Earl Cherniak (Acting Chair)

Stephen Bindman
Kim Carpenter-Gunn
Dino DiGiuseppe
Seymour Epstein
Greg Mulligan
Marilyn Pilkington
Judith Potter
William Simpson
James Wardlaw

The Treasurer, Robert P. Armstrong

Staff: Janet Brooks, Lesley Cameron, Margot Devlin, Scott Kerr, Gillian Roberts, Suzanne Jarvie, Elliot Spears, Sophia Sperdakos, Richard Tinsley, Paul Truster, Jim Varro, and Jim Yakimovich.

2. This report contains the Committee's policy reports on:

- amendments to the Protocol for Complainants in the Law Society's Discipline Process, and to the Rules of Practice and Procedure;
- amendments to By-Law 17; and

information reports on:

- the application form for resignations under By-Law 14;
- file and related statistics respecting matters handled by the Advisory and Compliance and Investigation departments;
- distribution of decisions of Hearing and Appeal Panels;
- new issues under review by the Committee.

I. POLICY

AMENDMENTS TO THE PROTOCOL FOR COMPLAINANTS
IN THE LAW SOCIETY'S DISCIPLINE PROCESS
AND TO THE RULES OF PRACTICE AND PROCEDURE
(Joint Meeting with the Professional Development and Competence Committee)

A. NATURE OF THE ISSUE

3. In November 1997, the Law Society adopted a Protocol for complainants in the discipline process (Appendix 1), which sets out a scheme for informing and communicating with complainants. Much of the Protocol was a codification and refinement of processes already in place in the Society's investigatory and discipline departments.
4. The Protocol pre-dated the amendments to the *Law Society Act* ("the *Act*") in force February 1, 1999, which established three types of proceedings which might result from a complaint, namely, conduct (formerly discipline), capacity (formerly section 35) and competence proceedings. The amendments also codified an obligation of confidentiality.
5. The amendments have necessitated revisions to the Protocol to encompass all three types of hearings and the changes to the Law Society's governing legislation.
6. This report reflects the conclusions reached by a joint meeting of the Committee and the Professional Development and Competence Committee after review of a memorandum of a working group of both Committees¹ and includes proposals for Convocation's consideration respecting amendments to the Protocol and to the Rules of Practice and Procedure.

B. BACKGROUND

7. Appendix 2 provides background information prepared by Lesley Cameron, Senior Counsel - Discipline, for the working group on the regulatory context before and after the February 1999 amendments to the *Act*, which identifies some of the issues raised by the new legislative scheme. As noted above, the Protocol was approved by Convocation prior the amendments.

C. THE COMMITTEES' REVIEW

8. The underlying policy issue which the Committees addressed was what information may be disclosed to complainants in light of section 49.12 of the *Act*?
9. Three stages at which communication of information to a complainant becomes relevant were identified:
 - a. during the investigation;
 - b. after the investigation but before service of a notice of application on the member; and
 - c. after service of a notice of application.

Investigation

10. Section 49.12 of the *Act* requires that staff, benchers and other agents or representatives of the Society keep confidential all information arising out of investigations, audits and reviews. The exceptions set out in this section are very general. Section 49.12 reads:

¹Todd Ducharme and Bill Simpson, assisted by Lesley Cameron and Jim Varro.

Confidentiality

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

Exceptions

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

Testimony

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

11. The Committees were of the view that the exceptions set out in subparagraphs 49.12(2)(a) and (b) should be interpreted to permit the disclosure of information to a complainant at the investigation stage. This interpretation is required to allow the Society to fully investigate. The Society needs to be able to share a member's answer to a complaint and any other relevant information with complainants. The Committees considered that this is clearly essential to the administration of the part of the *Act* conferring an authority to investigate.

After Investigation and Before Service of an Application on a Member

12. The Committees concluded that a staff decision to close a file at the completion of an investigation falls within the ambit of section 49.12(2)(a) and may be communicated to the complainant. Indeed, to give meaning to the option of complaints review, such communication is essential. The same rationale applies to the fact that a matter has been referred to the Proceedings Authorization Committee ("PAC"), because without this information, the complainant would again not know whether the option of complaints review is available.
13. The more difficult issues were whether the complainant should be told what staff are recommending to the PAC and what the PAC has decided, namely, whether a proceeding has been authorized and if so, the nature of the proceeding. The staff's recommendation is not determinative of the outcome as the PAC can authorize a different type of proceeding than that recommended by staff or decline to authorize any proceeding. Possible scenarios include:
 - a. a matter is referred to the PAC recommending a conduct, capacity or competence application and authorized in accordance with the recommendation;
 - b. a matter is referred as a conduct, capacity or competence matter and authorized as a different type of application than that recommended;
 - c. a matter is referred as a conduct, capacity or competence matter and not authorized, or authorized in part only; or

- d. after a specific authorization by the PAC, discipline or competence counsel return the matter to PAC as a result of new information and the PAC changes or withdraws its first authorization.
- 14. In conduct matters, the fact of an authorization is made public as soon as the conduct application is served on the member.
- 15. In competence and capacity matters, the Committees concluded that communication of the mere fact that the matter has been referred to the PAC and that a capacity or competence application has been authorized by the PAC would not destroy the confidentiality that is an important component of the capacity and competence streams, as all details with which the complainant is not already familiar would not be disclosed.
- 16. In determining the question whether a complainant should be advised of the authorization of a capacity or competence hearing, the Committees concluded that complainants should be informed of the fact that a matter is being referred to the PAC and of the authorization by the PAC in any of the three streams of conduct, capacity and competence, without any further information being disclosed. Implicit in the legislative scheme is a responsibility to encourage complainants to come forward and to treat them fairly. Not providing this information to a complainant is inconsistent with these goals.

After Service of the Application

- 17. It follows that a complainant will already be aware of any information which he or she is entitled to know, subject only to any further information which can be provided under section 49.12(2) of the *Act*.
- 18. Based on the Committees' conclusions on how section 49.12 should be interpreted, the Committees discussed the implementation issues arising from those conclusions, including the time at which a complainant should be informed that an application has been authorized.
- 19. The Committees propose that issues of confidentiality arising after issuance and service of an application be dealt with by amending the Rules of Practice and Procedure. In particular, rules 3.04 and 3.04.1 should be amended, with a definition of "complainant" added to rule 1.02(2), to permit the Law Society to notify a complainant of the fact of an application after notice to the affected member. Suggested amendments to the language of these rules are set out in Appendix 3, together with a formal motion for amendment if Convocation agrees with the amendments. One of the exceptions to the confidentiality provisions described in a section 49.12(2)(a) of the *Act* is "disclosure required in connection with...the rules of practice and procedure". Confidentiality issues arising before the hearing stage cannot be dealt with in this way because section 61.2 of the *Act* limits the passing of rules to deal with "proceedings before the Hearing Panel and the Appeal Panel and to the making of orders ...".
- 20. In arriving at the above conclusions, the Committees discussed in some detail two issues:
 - a. Whether a rule amendment was actually necessary, give the interpretation proposed for section 49.12 of the *Act*;
 - b. the timing of information to a complainant of the authorization of an application.
- 21. With respect to the necessity of a rule amendment, the Committees were of the view that it was desirable to amend the rules to avoid an interpretation issue arising, and to clarify the circumstances in which a complainant is to receive information about such applications.

22. With respect to the timing issue, it was determined that to ensure fairness to the member, the complainant should not receive information about the application before the member receives it. Preferably, the notice to the member and the complainant should be simultaneous, although practically that may not be possible, as in most cases the member is served with notice of the application by mail.² Accordingly, the Committee determined that in the redrafting of the Protocol, as discussed more fully below, particular attention must be paid to ensuring that if at all possible notification to the member and the complainant should be simultaneous, but that in any event, the member must not receive notice after the complainant.

Language Changes

23. The Committees also agreed that significant changes are required to the text of the Protocol not only to incorporate the Committees' proposals, if adopted by Convocation, but to reflect the legislative scheme and the Society's current organizational structure. In this latter respect, it is suggested that the time lines set out in the Protocol be revisited in light of the new approach to investigations through teams for those matters of a more serious nature and through the resolution and compliance stream for other matters. Consultation with the managers of those departments is required to understand the streaming of complaints and appropriate time frames for communications with complainants. Certain language changes will also be required, to deal with such things as references to the *Act* and internal departmental name changes.

D. SUMMARY OF THE COMMITTEES' PROPOSALS

24. Based on the above analysis, the Committees propose that:
- a. a form of protocol should continue to be used to reflect the scope of appropriate communications with complainants at all stages;
 - b. subsections 49.12(2)(a) and (b) of the *Act* should be interpreted to permit the disclosure of the following information to complainants:
 - i) as needed during an investigation;
 - ii) a staff decision to close a file;
 - iii) a staff decision to refer the matter to the PAC for consideration;
 - iv) a decision of the PAC to close the file; and
 - v) a decision of the PAC to authorize a proceeding and the type of proceeding which has been authorized, whether conduct, capacity or competence;
 - c. amendments should be made to rules 1.02(2), 3.04 and 3.04.1 of the Rules of Practice and Procedure to permit a complainant who referred a matter to the Society which is now at the hearing level to be notified of the *fact* of a capacity or competence application, without more;
 - d. The language of the existing Protocol should be substantively revised to reflect the current state of affairs organizationally within the Society and to ensure that complainants are not notified that an application has been authorized before affected members are notified.

E. DECISION FOR CONVOCATION

25. The Committees request that Convocation consider the above proposals and if in agreement, approve:

²The Rules of Practice and Procedure state that where service is by mail, a member is deemed to have been served on the fifth day after mailing.

- a. the policy direction with respect to the content of the Protocol,
- b. the drafting of amendments to the Protocol as described above, and
- c. amendments to the Rules of Practice and Procedure set out in Appendix 3.

AMENDMENTS TO BY-LAW 17 ON FILING REQUIREMENTS

A. NATURE OF THE ISSUE

26. On December 10, 1999, Convocation approved in principle an amendment to By-Law 17 to exempt from the requirement that members file the Member's Annual Report ("MAR") those members who wind up their practices, who are incapacitated or do not continue to act as estate trustees or hold powers of attorney over client accounts.³
27. This report provides proposed language to effect the amendment to the By-Law based on Convocation's decision.

B. THE PROPOSED AMENDMENT

28. Currently, By-Law 17 (Appendix 4) requires all members of the Society to make an annual filing "in respect of the member's practice of law and other related activities"⁴. This includes those members who are unable to practise law by reason of permanent disability or who have reached age 65 and are retired. These members may apply for exemption of payment of the annual fee under By-Law 15⁵.
29. The amendments to By-Law 17 are based on the scheme for exemption in By-Law 15, and appear in the motion set out in the next section of this report.

C. DECISION FOR CONVOCATION

30. Convocation is requested to approve the amendments to By-Law 17 appearing in the following motion for the amendment:

³In brief, the decision was based on information from Forms Services that these members question why they are subject to the filing requirement, given that they are no longer in active practice, hold no trust funds and do not otherwise carry on any activities that would necessarily attract the interest of the Society as a matter of annual reporting. Convocation agreed that these members be exempt from the filing requirement, which as of October 1999 consists of one form, the Member's Annual Report, provided that these members do not continue to act as estate trustees or hold powers of attorney over client accounts. These circumstances, under the Law Society's current trust account reporting scheme, would require the member to report notwithstanding that no active practice of law is conducted. Convocation also endorsed the suggestion that each member who is exempt from the filing requirement in the by-law or who winds up a law practice and becomes exempt from filing as a retired member undertake to notify the Society if he or she returns to the active practice of law.

⁴By-Law 17, subsection 2(1).

⁵Subsection 4(1) of By-Law 15 states:..

- A member may apply to the Society for an exemption from payment of an annual fee if he or she,
- (a) is over sixty-five years of age and is permanently retired from the practice of law in Ontario; or
 - (b) is permanently disabled and, as a result, is unable to practise law.

THE LAW SOCIETY OF UPPER CANADA

BY-LAW 17
[FILING REQUIREMENTS]

made under the
LAW SOCIETY ACT

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON JANUARY 27, 2000

MOVED BY

SECONDED BY

THAT By-Law 17 [Filing Requirements] made by Convocation on January 28, 1999 and amended by Convocation on February 19, 1999, May 28, 1999 and October 29, 1999 be further amended as follows:

1. Section 2 of the By-Law is amended by adding the following subsections:

Exemption from requirement to submit annual report

(3) The following members may apply to the Society for an exemption from the requirement to submit a report under subsection (1):

1. A member who is over sixty-five years of age and who,
 - i. does not practise law in Ontario,
 - ii. is not an estate trustee, and
 - iii. does not act as an attorney under a power of attorney for property given by a client or former client.
2. A member who is incapacitated within the meaning of the Act.

Application by member's representative

(4) The Secretary may permit any person on behalf of a member to make an application under subsection (3).

Application form

(5) An application under subsection (3) shall be in a form provided by the Society.

Documents and explanations

(6) For the purposes of assisting the Secretary to consider an application under subsection (3), the member or the person applying on behalf of the member shall provide to the Secretary such documents and explanations as the Secretary may require.

Consideration of application

(7) The Secretary shall consider every application made under subsection (3) and if the Secretary is satisfied that the member is eligible for an exemption under paragraph 1 or 2 of subsection (3), the Secretary shall approve the application.

Duration of exemption

(8) A member whose application is approved is exempt from the requirement to submit a report under subsection (1) in respect of the year in which the application is approved and in respect of every year thereafter if the member remains eligible for the exemption throughout the entire year.

Interpretation: practising law

(9) For the purposes of subsection (3), a member practises law if the member gives any legal advice respecting the laws of Ontario or Canada or provides any legal services.

II. INFORMATION

STATISTICAL REPORT ON COMPLAINTS AND INVESTIGATIONS

31. The Secretary, Richard Tinsley, reported to the Committee on file management and progress on work in the Advisory and Compliance and Investigations Departments. Information forming the basis of his statistical report is at Appendix 5.
32. The Committee was advised that capability for providing comprehensive statistics for all regulatory functions will be achieved once the new unified ORACLE system is completely operational throughout the Society. It is anticipated that this will occur within the next few months.
33. The Committee will be receiving quarterly reports from Mr. Tinsley with statistics, the next to be provided through the Committee to Convocation in April 2000.

APPLICATION FORM UNDER BY-LAW 14 - RESIGNATIONS

34. The Committee reviewed a new form of application for resignation under By-Law 14, which follows amendments made by Convocation to By-Law 14 on December 10, 1999. The form was provided to the Committee for suggestions as to content, with advice from staff that the form has been used on a test basis for a number of weeks, with very favourable results.
35. This is not a prescribed form under the by-law and therefore is not required to be approved and adopted by Convocation. A copy of the form, which includes changes suggested by the Committee, is at Appendix 6.

INFORMATION FOR BENCHERS ON DECISIONS OF
HEARING AND APPEAL PANELS

36. As a result of the new hearing procedures under the amended *Law Society Act*, and the fact that Discipline Convocations are being phased out, benchers no longer receive reports of discipline or conduct decisions, or decisions in respect of competence or capacity.
37. The Chair of the Committee, after consultation with staff, is making arrangements for distribution on a regular basis of all decisions of the Hearing Panels and the Appeal Panel to benchers who are eligible to sit on Hearing and Appeal Panels, as a matter of information and education.

NEW ISSUES UNDER REVIEW BY THE COMMITTEE

38. A number of new issues are the subject of review by the Committee and will form the basis of reports to Convocation in the next few months. They include:

- review of circumstances involving resignations under By-Law 14 of members subject to an order of a Hearing Panel under Part II of the *Law Society Act*;
- policy review respecting the decision-making function of the Law Society to appeal Hearing Panel orders under Part II of the *Law Society Act*;
- amendments to the Guidelines for Suspended, Resigned or Disbarred Members;
- review of the provision of information to benchers of members subject to a summary suspension order.

APPENDIX 1

Law Society of Upper Canada PROTOCOL FOR COMPLAINANTS IN THE LAW SOCIETY'S DISCIPLINE PROCESS

(adopted by Convocation November 28, 1997; amended May 29, 1998)

Generally:

1. A Complainant should at all times be treated professionally and with courtesy, respect and candour by Law Society staff, outside investigators and counsel engaged by the Society with respect to the Complainant's matter.
2. A Complainant should have unimpeded access to information about the Law Society's regulatory processes.
3. The Society should dedicate itself to communicate with a Complainant in "plain language".
4. The Society should communicate with a Complainant, if the Complainant so requests, in French, and use its best efforts to communicate with a Complainant in the language of his or her choice.
5. The location of meetings at the Society with a Complainant, as much as practicalities permit, should be comfortable and convenient for a Complainant.

In the investigatory stage:

6. The Society should assist a complainant, where necessary, in recording a complaint about a lawyer for the purpose of an investigation by the Society. As a rule, complaints are requested to be made in writing, but the Society will accept complaints recorded on audiotapes or videotapes.
7. A Complainant has a right to be informed of the status of the complaint with which he or she is involved. Accordingly, a Complainant should be regularly informed of and have the ability to access information on his or her complaint. For those matters investigated through the post-screening investigatory units of the Complaints Department and ongoing investigations in the Audit and Investigations Department (as a result of a matter directly referred to that department by a Complainant), a status report on the progress of the investigation should be provided at least every 90 days, unless otherwise agreed upon by the Complainant and the Society's investigator.
8. The Complainant should be appropriately and reasonably accommodated with his or her requests for meetings on the complaint matter with the Society as required for pursuit of the investigation, and in the scheduling of meetings with the Complainant as requested by the Society;

9. All written (including facsimile) or electronic communications from a Complainant should be acknowledged within 14 days of receipt by the Law Society. Telephone messages from a Complainant should be returned at the latest the next business day.
10. At the conclusion of an investigation, written reasons for not taking further action on a complaint (based on Law Society staff's or outside counsel's view of the matter, as the case may be) should be provided to a Complainant with an opportunity for review, in accordance with the complaints review procedures and the policies related thereto.
11. A Complainant should be advised of the disposition of a complaint by the Chair and Vice-Chairs of Discipline, other than an authorization for disciplinary action, within 14 days after notification to the member of the disposition.
12. A Complainant should be advised of the fact of an authorization for disciplinary action authorized by the Chair and Vice-Chairs of Discipline based on his or her complaint within 14 days of such a decision.

In the discipline hearing stage:

13. Discipline counsel should make themselves available to respond to a Complainant's inquiries or requests for interviews at any stage of the discipline process.
14. At an early stage in the prosecution of a member, discipline counsel should seek the views of a Complainant on his or her expectations of the outcome of the discipline proceedings against the member being disciplined as a result of the Complainant's complaint.
15. Unless a Complainant advises that he or she does not wish to be kept informed, discipline counsel should:
 - i. Following service of a sworn complaint on the solicitor within the meaning of section 33(13) of the *Law Society Act*, write to all Complainants advising that a sworn complaint has been issued, setting out a brief explanation of the discipline hearing process and advising of a Complainant's right to be present at the hearing;
 - ii. Once a hearing date is set, advise the Complainant of this date and any subsequent changes in this date;
 - iii. Where practicable, advise the Complainant of significant decisions regarding the withdrawal or amendment of particulars with which that Complainant is involved;
 - iv. Where practicable, advise the Complainant of any joint submissions as to penalty;
 - v. Where a Complainant is a witness for the Society at a discipline hearing, adequately prepare the Complainant for the hearing;
 - vi. If the Complainant does not attend at the hearing, write to the Complainant advising of the final disposition of the sworn complaint and provide a copy of any written reasons of the hearing panel and/or Convocation;
 - vii. In the event of an appeal, advise the Complainant of the appeal, the hearing date of the appeal and the outcome.
16. The use of "victim impact statements" and the participation in and representation of a Complainant at discipline hearings will continue to be dealt with by the existing policy dated May 29, 1992, amended to provide for videotaped statements from Complainants where the Complainant and the parties to the proceeding agree. The policy should be brought to the attention of Complainants so that they are aware of the opportunity to provide a victim impact statement to the Discipline Committee.

APPENDIX 2

BACKGROUND INFORMATION RELATING TO
THE COMPLAINANT'S PROTOCOL

Regulatory Context - before 1998 amendments

The *Law Society Act* as it read immediately before and after the amendments effected by the *Law Society Amendment Act, 1998*, will be referred to as the "Act" and the "Amended Act", respectively.

Section 33(4) of the Act provided that all conduct and capacity hearings "shall be closed to the public" with an exception where the person under investigation requested otherwise. A copy of this provision is attached at Appendix A. This provision was followed until February 27, 1986, when Convocation recognised that it was inconsistent with section 9 of the *Statutory Powers Procedure Act*, a copy of which is at Appendix B. Convocation adopted a policy that from February 27, 1986 forward, hearings were to be in public, unless ordered to be otherwise. A copy of the policy adopted by Convocation is at Appendix C.

The Act had no provision expressly dealing with the confidentiality of information prior to the hearing stage. Convocation had approved policy on this issue to the effect that prior to service and filing of an authorised discipline complaint, all information was confidential. A copy of this policy is at Appendix D. However complainants were treated differently than other members of the public in that they were given some confidential information, including whether staff had decided to close the file or seek authorisation, the type of authorisation sought, and the result of any request for authorisation.

In 1997, Convocation adopted a "Protocol for Complaints in the Law Society's Discipline Process" (the "Protocol"), which provides in part as follows:

In the investigatory stage:

10. At the conclusion of an investigation, written reasons for not taking further action on a complaint (based on Law Society staff's or outside counsel's view of the matter, as the case may be) should be provided to a Complainant with an opportunity for review, in accordance with the complaints review procedures and the policies related thereto.
11. A Complainant should be advised of the disposition of a complaint by the Chair and Vice Chairs of Discipline, other than an authorization for disciplinary action, within 14 days after notification to the member of the disposition.
12. A Complainant should be advised of the fact of an authorization for disciplinary action authorized by the Chair and Vice Chairs of Discipline based on his or her complaint within 14 days of such a decision.

The Protocol goes on to provide for the continuing provision of information to and consultation with complainants in the discipline hearing stage. A copy of the Protocol is found at Appendix E.

Regulatory Context - after 1998 amendments

The Amended Act includes a new section dealing with the Law Society's obligation to keep information confidential. Section 49.12 provides in part:

- (1) A benchler, officer, employee, agent or representative of the Society shall not disclose any information that comes to his or her knowledge as a result of an audit, investigation, review, search, seizure or proceeding under this Part.
- (2) Subsection (1) does not prohibit,
 - (a) disclosure required in connection with the administration of this Act, the regulations, the by-laws or the rules of practice and procedure;
 - (b) disclosure required in connection with a proceeding under this Act;
 - (c) disclosure of information that is a matter of public record;
 - (d) disclosure by a person to his or her counsel; or
 - (e) disclosure with the written consent of all persons whose interests might reasonably be affected by the disclosure.

A copy of all of section 49.12 is at Appendix F.

Following the Amended Act, Convocation also amended the Rules of Practice and Procedure (the "Rules"). Rule 3.01 provides that in proceedings other than capacity and professional competence proceedings, hearings are open to the public except where the tribunal orders otherwise. A copy of Rule 3 is at Appendix G.

Rule 3.04 deals with capacity proceedings and provides as follows:

- (1) A proceeding shall, subject to subrule (2), be held in the absence of the public if it is a proceeding in respect of a determination of incapacity.
- (2) At the request of the person subject to the proceeding, the tribunal may order that the proceeding be open to the public.
- (3) An application for a determination of incapacity shall not be made public by the Society except as required in connection with a proceeding, except as provided for in the Act, or unless the proceeding before the tribunal is open to the public as provided by subrule (2).
- (4) where the hearing of an application for a determination of incapacity has been open to the public in accordance with subrule (2), the decision, order and reasons of the tribunal are a matter of public record.
- (5) where the hearing of an application for a determination of incapacity has been closed to the public, and where the tribunal has made an order suspending or limiting the member or student member's rights and privileges, the order is a matter of public record but the tribunal's reasons shall not be made public.

Rule 3.04.1 deals with professional competence proceedings and provides as follows:

- (1) A proceeding shall, subject to subrule (2), be held in the absence of the public if it is a proceeding in respect of a determination of whether a member is failing or has failed to meet standards of professional competence.

- (2) At the request of the person subject to the proceeding, the tribunal may order that the proceeding be open to the public.
- (3) An application for a determination of professional competence shall not be made public by the Society except as required in connection with a proceeding, except as provided for in the Act, or unless the proceeding before the tribunal is open to the public as provided by subrule (2).
- (4) where the hearing of an application for a determination of professional competence has been open to the public in accordance with subrule (2), the decision, order and reasons of the tribunal are a matter of public record.
- (5) where the hearing of an application for a determination of professional competence has been closed to the public, and where the tribunal has made an order suspending the member's rights and privileges, the order and the decision of the tribunal are a matter of public record.
- (6) where the hearing of an application for a determination of professional competence has been closed to the public, and where the tribunal has made an order limiting the member's rights and privileges, the tribunal shall determine what aspects of the order shall be made public in order to protect the public interest.

Appendix A

Law Society Act, R.S.O. 1990, c. L.8.

Re: Section 33(4)

(see Report in Convocation file)

Appendix B

S. 9 The Annotated Statutory Powers Procedure Act

(see Report in Convocation file)

Appendix C

Copy of Policy of Convocation (Approved on February 27, 1986)

Re: Direction to Discipline Committee Panels Concerning Conduct of Public Hearings

(see Report in Convocation file)

Appendix D

Copy of Policy of Convocation (Approved on May 31, 1991)

Re: Report of the Special Committee on Reforms Implementation

(see Report in Convocation file)

Appendix E

Protocol for Complainants in the Law Society's Discipline Process
(adopted by Convocation November 28, 1997; amended May 29, 1998)

(see Report in Convocation file)

Appendix F

Copy of section 49.12

(see Report in Convocation file)

Appendix G

Rules of Practice and Procedure (the "Rules")
Re: Rule 3.01

(see Report in Convocation file)

APPENDIX 3

PROPOSED AMENDMENTS TO THE RULES OF PRACTICE AND PROCEDURE

THE LAW SOCIETY OF UPPER CANADA

RULES OF PRACTICE AND PROCEDURE

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON JANUARY 27, 2000

RULE 1 - GENERAL RULES

MOVED BY

SECONDED BY

That rule 1 be amended by adding the following immediately after the definition of "Appeals Management Tribunal" in rule 1.02(2):

"complainant" means a person who has provided information to the Society regarding a member or student member which is relevant to the application;

RULE 3 - ACCESS TO HEARINGS AND NON-PUBLICATION ORDERS

MOVED BY

SECONDED BY

That rule 3 be amended by:

3. Deleting subrule 3.04(3) and replacing it with the following:

(3) Unless the proceeding before the tribunal is open to the public as provided by subrule (2), an application for a determination of incapacity shall not be made public by the Society except as required in connection with a proceeding, except as provided for in the Act, and except as provided for in subrule (3.1),

4. Adding the following immediately after subrule 3.04(3):

(3.1) After the member or student member is served with an application, the Society may advise a complainant of the fact of the application.

5. Deleting subrule 3.04.1(3) and replacing it with the following:

(3) Unless the proceeding before the tribunal is open to the public as provided by subrule (2), an application for a determination of professional competence shall not be made public by the Society except as required in connection with a proceeding, except as provided for in the Act, and except as provided for in subrule (3.1).

6. Adding the following immediately after subrule 3.04.1(3):

- (3.1) After the member is served with an application, the Society may advise a complainant of the fact of the application.

APPENDIX 4

BY-LAW 17

Made: January 28, 1999

Amended:

February 19, 1999

May 28, 1999

October 29, 1999

FILING REQUIREMENTS

Notice of fiscal year

1. Every member who engages in the private practice of law in Ontario shall inform the Secretary in writing of the termination date of his or her fiscal year, and shall file with the Secretary written notice of any change in the fiscal year within one month after the change is made.

Requirement to submit annual report

2. (1) Every member shall submit a report to the Society, by March 30 of each year, in respect of the member's practice of law and other related activities during the preceding year.

Member's Annual Report

- (2) The report required under subsection (1) shall be in Form 17A [Member's Annual Report].

Period of default

3. (1) For the purpose of clause 47 (1) (a) of the Act, the period of default for failure to complete or file a report required under section 2 of this By-Law is four months after the day the report is required to be submitted.

Reinstatement of rights and privileges

- (2) If a member's rights and privileges have been suspended under clause 47 (1) (a) of the Act for failure to complete or file a report required under section 2 of this By-Law, as amended on October 29, 1999, for the purpose of subsection 47 (2) of the Act, the member shall complete and file the report in Form 17A in force at the time the member is filing the report.

Same

- (3) If a member's rights and privileges have been suspended under clause 47 (1) (a) of the Act for failure to complete or file a report required under section 2 of this By-Law, as that section read before October 29, 1999, for the purpose of subsection 47 (2) of the Act, the member shall complete and file the report required under section 2 of this By-Law, as amended on October 29, 1999, in Form 17A in force at the time the member is filing the report.

Requirement to submit public accountant's report

4. (1) The Secretary may require any member who is required to submit a report under subsection 2 (2) to submit to the Society, in addition to the report required under that subsection, a report of a public accountant relating to the matters in respect of which the member is required to submit a report to the Society under subsection 2 (2).

Contents of report and time for filing

(2) The Secretary shall specify the matters to be included in the report and the time within which it must be submitted to the Society.

Member's obligation to provide access to files, etc.

- (3) For the purpose of permitting the public accountant to complete the report, the member shall,
- (a) grant to the public accountant full access, without restriction, to all files maintained by the member;
 - (b) produce to the public accountant all financial records and other evidence and documents which the public accountant may require; and
 - (c) provide to the public accountant such explanations as the public accountant may require.

Authority to confirm independently particulars of transactions

(4) For the purpose of permitting the public accountant to complete the report, the public accountant may confirm independently the particulars of any transaction recorded in the files.

Cost

(5) The cost of preparing the report required under subsection (1), including the cost of retaining a public accountant, shall be paid for by the member.

Public accountant's duty of confidentiality

(6) When retaining a public accountant to complete a report required under this section, a member shall ensure that the public accountant is bound not to disclose any information that comes to his or her knowledge as a result of activities undertaken to complete the report, but the public accountant shall not be prohibited from disclosing information to the Society as required under this By-Law.

Period of default

5. (1) For the purpose of clause 47 (1) (a) of the Act, the period of default for failure to file a report of a public accountant in accordance with section 4 of this By-Law is two months after the day the report is required to be submitted.

Reinstatement of rights and privileges

(2) If a member's rights and privileges have been suspended under clause 47 (1) (a) of the Act for failure to file a report of a public accountant in accordance with section 4 of this By-Law, for the purpose of subsection 47 (2) of the Act, the member shall file the report.

Failure to submit public accountant's report: investigation

6. (1) If a member fails to submit the report of a public accountant in accordance with section 4, the Secretary may require an investigation of the member's financial records to be made by a person designated by him or her, who need not be a public accountant, for the purpose of obtaining the information that would have been provided in the report.

Investigation: application of subss. 4 (3) and (4)

(2) Subsections 4 (3) and (4) apply with necessary modifications to the investigation under this section.

Confidentiality

(3) A person designated to investigate a member's financial records under this section shall not disclose any information that comes to his or her knowledge as a result of the investigation except as required in connection with the administration of the Act or the by-laws.

Cost

(3) The cost of the investigation under this section shall be paid for by the member.

Commencement

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

APPENDIX 5

STATISTICAL INFORMATION ON COMPLAINTS AND INVESTIGATIONS

A. Resolution & Compliance ("R & C") Complaints Process Statistics

1. Number of Active Files

	1999	
	November	December
R&C staff	1,474	1,504
Other*	149	111
Total	1,623	1,615

2. Median Caseloads

	1999	
	November	December
R&C staff	211	188
Other	75	56

3. Number of New Files Opened (per month)

	1999		
November	October	September	August
190	138	179	137

4. Number of Files Closed (per month)**

	1999			
November	October	September	August	
177	177	185	165	

* Represents files of two staff lawyers who are working toward closing all or as many of their files as possible prior to their scheduled Jan. 31, 2000 departure dates.

** An additional 603 files were closed during this period as a result of a concentrated review of supervised by the Manager, Advisory and Compliance Services and which involved a number of staff in the review of files inherited from the Complaints Department. This review was completed in mid-October, 1999)

5. File Aging - Active Files By Year (previous reported numbers in brackets)

1999 -Jan.-June 1998	1997	1996	1995	Other
445 (573)	310 (430)	13 (30) 2 (3)	1 (3)	0 (2)

6. File Aging - Active Overdue for Action (previous reported numbers in brackets)

By 90+ Days	By 60-90 Days	By 30-60 Days
490 (431)	165 (196)	162 (189)

B. Investigations Inventory and Staffing Matters

Investigation Cases

The inventory of discipline streamed investigation cases of the former Complaints Department and former Audit & Investigations Department have been reviewed with the purpose of identifying those cases which continue to form part of the inventory of discipline streamed workload and identifying those which are of a nature that can be set aside for review and closure separate from the discipline streamed workload. The charts which follows provides an analysis of the files identified as discipline streamed case workload.

INVENTORY SUMMARY - After Projected Completions

Age	Number of Files	Scheduled for Completion by Feb 29/2000	Residual Current Investigations Files Post Feb 29/2000
Under 6 Months	154	33	121
6 to 12 Months	53	22	31
13 to 24 Months	114	33	81
Over 24 Months	31	18	13
Totals	352	106	246

In addition to these discipline streamed files, over 100 non-discipline streamed files have been identified and are set aside for summary disposition over the next six months. Contract staff will be retained for this purpose.

Investigation Department Staff Analysis

The organization chart provides for twenty nine (29) investigative staff, one manager, and six team leaders, for a total staff of thirty six (36).

Five team leaders have been hired. One additional team leader will join the Law Society in March, 2000.

With respect to the staffing of the twenty nine (29) investigative staff positions, with the departure of staff at the end of January, the department will have a shortfall of five (5) investigative positions. In March, efforts will be taken to fill the investigative counsel position in Ottawa. It is anticipated that the four remaining Toronto based positions will be re-advertised by March following completion of process redesign and a staff skills needs assessment.

Impact of Staffing on Investigation Results

After the departure of the experienced investigation staff at the end of January, the department's experience base will be significantly eroded (42% of the investigative staff will be experienced staff).

The recently recruited investigative staff are receiving extensive training, including direct experience in Law Society investigations. Historically, investigative staff achieve significant proficiency after at least one year of experience conducting Law Society investigations. This factor will have an adverse impact on the timely completion of investigations this year. As the year progresses, the increased experience levels will bring about cycle time improvements.

APPENDIX 6

APPLICATION FORM FOR RESIGNATIONS UNDER BY-LAW 14

(see Report in Convocation file)

Re: Amendments to the Protocol for Complainants

It was moved by Mr. MacKenzie, seconded by Mr. Simpson that the policy on the Protocol for Complainants set out in paragraph 24 on page 9 of the Report be approved.

- “a. A form of protocol should continue to be used to reflect the scope of appropriate communications with complainants at all stages:
- b. Subsections 49.12(2)(a) and (b) of the Act should be interpreted to permit the disclosure of the following information to complainants:
 - i) as needed during an investigation;
 - ii) a staff decision to close a file;
 - iii) a staff decision to refer the matter to the PAC for consideration;
 - iv) a decision of the PAC to close the file; and
 - v) a decision of the PAC to authorize a proceeding and the type of proceeding which has been authorized, whether conduct, capacity or competence;
- c. Amendments should be made to rules 1.02(2), 3.04 and 3.04.1 of the Rules of Practice and Procedure to permit a complainant who referred a matter to the Society which is now at the hearing level to be notified of the fact of a capacity or competence application, without more;
- d. The language of the existing Protocol should be substantively revised to reflect the current state of affairs organizationally within the Society and to ensure that complainants are not notified that an application has been authorized before affected members are notified.”

Carried

Re: Amendments to By-Law 17

It was moved by Mr. MacKenzie, seconded by Mr. Cherniak that the amendments to By-Law 17 (both English and French (separate cover)) be approved as set out on page 11 of the Report.

Carried

THE LAW SOCIETY OF UPPER CANADA

BY-LAW 17
[FILING REQUIREMENTS]

made under the
LAW SOCIETY ACT

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON JANUARY 27, 2000

MOVED BY

SECONDED BY

THAT By-Law 17 [Filing Requirements] made by Convocation on January 28, 1999 and amended by Convocation on February 19, 1999, May 28, 1999 and October 29, 1999 be further amended as follows:

1. Section 2 of the By-Law is amended by adding the following subsections:

Exemption from requirement to submit annual report

(3) The following members may apply to the Society for an exemption from the requirement to submit a report under subsection (1):

1. A member who is over sixty-five years of age and who,
 - i. does not practise law in Ontario,
 - ii. is not an estate trustee, and
 - iii. does not act as an attorney under a power of attorney for property given by a client or former client.
2. A member who is incapacitated within the meaning of the Act.

Exonération du dépôt du rapport annuel

(3) Les membres suivants peuvent soumettre au Barreau une demande d'exonération de dépôt du rapport annuel visé au paragraphe (1) :

1. Les membres âgés de plus de soixante-cinq ans et qui
 - i. n'exercent pas le droit en Ontario,
 - ii. ne pratiquent pas en qualité de fiduciaires d'une succession, et

iii. n'exercent pas les fonctions d'avocat ou d'avocate dans le cadre de la gestion par procuration de biens qui leur sont confiés par un(e) client(e) ou un(e) ancien(ne) client(e).

2. Les membres frappés d'incapacité aux termes de la Loi.

Application by member's representative

(4) The Secretary may permit any person on behalf of a member to make an application under subsection (3).

Demande par un représentant

(4) Le ou la secrétaire peut permettre à toute personne de déposer une demande au nom d'un membre conformément au paragraphe (3).

Application form

(5) An application under subsection (3) shall be in a form provided by the Society.

Formulaire de demande

(5) Toute demande déposée conformément au paragraphe (3) est rédigée selon le formulaire préparé par le Barreau à cet effet.

Documents and explanations

(6) For the purposes of assisting the Secretary to consider an application under subsection (3), the member or the person applying on behalf of the member shall provide to the Secretary such documents and explanations as the Secretary may require.

Documents et explications

(6) Afin de faciliter l'examen par le ou la secrétaire de toute demande déposée conformément au paragraphe (3), les membres, ou toute personne déposant une demande au nom de ces derniers, fournissent à la secrétaire ou au secrétaire les documents et explications nécessaires à l'examen de la demande.

Consideration of application

(7) The Secretary shall consider every application made under subsection (3) and if the Secretary is satisfied that the member is eligible for an exemption under paragraph 1 or 2 of subsection (3), the Secretary shall approve the application.

Examen de la demande

(7) Le ou la secrétaire examine toute demande déposée conformément au paragraphe (3) et, si la ou le secrétaire est d'avis que le membre répond aux conditions d'exonération requises selon l'alinéa 1 ou 2 du paragraphe (3), autorise la demande.

Duration of exemption

(8) A member whose application is approved is exempt from the requirement to submit a report under subsection (1) in respect of the year in which the application is approved and in respect of every year thereafter if the member remains eligible for the exemption throughout the entire year.

Durée de l'exonération

(8) Les membres don't la demande a été autorisée sont exonérés de l'obligation de soumettre un rapport conformément au paragraphe (1) à l'égard de l'année au cours de laquelle la demande a été autorisée, et à l'égard de toute année subséquente, pour autant qu'ils aient qualité pour se prévaloir de l'exonération durant toute l'année en question.

Interpretation: practising law

(9) For the purposes of subsection (3), a member practises law if the member gives any legal advice respecting the laws of Ontario or Canada or provides any legal services.

Interprétation : exercice du droit

(9) Aux termes du paragraphe (3), sont considérés exercer le droit les membres qui prodiguent des conseils à caractère juridique à l'égard des lois et règlements de l'Ontario ou du Canada, ou les membres qui offrent des services à caractère juridique.

REPORT OF THE PROFESSIONAL DEVELOPMENT AND COMPETENCE COMMITTEE

Mr. Cherniak presented the Report of the Professional Development and Competence Committee for approval.

Professional Development & Competence Committee
January 27, 2000

Report to Convocation

Purpose of Report: Decision Making
 Information

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

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TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Professional Development and Competence Committee (“the Committee”) met on January 13, 2000. Committee members in attendance were Earl Cherniak (Vice-Chair), Stephen Bindman, Kim Carpenter-Gunn, Seymour Epstein, Dino DiGiuseppe, Greg Mulligan, Marilyn Pilkington, Judith Potter, Bill Simpson, and Jim Wardlaw. Staff in attendance were Scott Kerr, Janine Miller, Sophia Spurdakos, Ursula Stojanowich, and Paul Truster. Dolly Konzelmann attended a portion of the meeting.

2. The Committee is reporting on the following matters:

Policy - For Decision

- Approval of amendments to the 1997 Protocol for complainants and to the Rules of Practice and Procedure (detailed report by the Professional Regulation Committee)
- Approval of a Specialty in Construction Law

Information

- Voluntary resignation from the Law Society during the course of a practice review
- Process for dealing with requests by Complaints Review Commissioners that members be directed to participate in practice review
- Report on Specialist Certification Matters approved by the Certification Working Group on December 17, 1999 and approved by the Committee on January 13, 2000

POLICY - FOR DECISION

AMENDMENTS TO THE PROTOCOL FOR COMPLAINANTS IN THE LAW SOCIETY’S DISCIPLINE PROCESS AND TO THE RULES OF PRACTICE AND PROCEDURE

1. In November 1997 the Law Society adopted a Protocol for complainants in the discipline process, which sets out a scheme for informing and communicating with complainants. Much of the Protocol was a codification and refinement of processes already in place in the Society’s investigatory and discipline departments.

2. In the fall of 1999, a joint working group of the Professional Regulation Committee (PRC) and the Professional Development and Competence Committee¹ was formed to address issues relating to the Protocol for complainants in light of the amendments to the *Law Society Act* as of February 1, 1999. The issues range from out-of-date language in the Protocol to how the Protocol's provisions can be observed, given the requirement for confidentiality of certain Law Society information related to regulatory processes and reflected in the Rules of Practice and Procedure.
3. A joint meeting of the Committees was held on January 13, 2000 to review the working group's memorandum and proposals for amendments to the Protocol and the Rules of Practice and Procedure. The background information and analysis of the issue and the recommendations of the two Committees are set out in the Professional Regulation Committee's Report to Convocation.

Request to Convocation

4. The Committees request that Convocation consider the proposals set out in the Professional Regulation Committee's Report to Convocation and, if in agreement, approve:
 - a. the policy direction with respect to the content of the Protocol,
 - b. the drafting of amendments to the Protocol as described above, and
 - c. amendments to the Rules of Practice and Procedure as set out in the PRC report.

APPROVAL OF NEW SPECIALTY AREA IN CONSTRUCTION LAW

Background

1. Since 1994 an ad hoc committee made up of 12 lawyers who practice construction law, has been working under the auspices of the Specialist Certification program on a proposal for the establishment of a specialty in construction law. The names of the members of the ad hoc committee are set out in Appendix 1. A number of consultations have been conducted with members of the construction bar to assess interest in the introduction of such a specialty. In the course of the consultations the committee consulted with the CBAO construction law section, the CBA National construction law section, and the Canadian Construction Association and its Toronto and Hamilton counterparts. It wrote to 150 lawyers practising in construction law for their input and sought the input of two of the Toronto Masters who handle construction lien matters. It corresponded with a number of judges to seek input on the need for specialization in construction law. The overwhelming view was that a specialty in construction law would be a positive development.
2. In November 1999 the PD&C Committee authorized the Certification Working Group to do one further consultation with respect to proposed standards for a specialty in construction law. A Notice was placed in the *Ontario Reports* seeking input on the standards and a number of organizations, including CBAO and CDLPA, were asked to provide input.
3. At the January committee meeting, the certification working group provided the Committee with background information on issues related to a specialty in construction law. This information is set out in Appendix 2. In addition, the working group provided the Committee with the proposed standards for certification in construction law. These are set out in Appendix 3.

¹The members of the working group are Todd Ducharme and Bill Simpson, assisted by Lesley Cameron and Jim Varro.

4. The Committee has reviewed the information and the proposed standards for certification and recommends the approval of a specialty in construction law in accordance with the proposed standards set out in Appendix 3. The Committee expresses its thanks to the members of the ad hoc specialty committee who have devoted significant time and expertise to the proposal.

Request to Convocation

5. Convocation is requested to consider the Committee's recommendation for the approval of a new specialty in construction law in accordance with the proposed standards set out in Appendix 3 and, if appropriate, to approve it.

FOR INFORMATION

VOLUNTARY RESIGNATION FROM THE LAW SOCIETY DURING COURSE OF A PRACTICE REVIEW

1. In December Convocation approved amendments to By-law 14, concerning resignation from the Law Society, introduced by the Professional Regulation Committee. Among other provisions, the amendments provided:
 2. *The Secretary shall not consider an application [to resign] made under subsection 1 (1) of this By-law if the applicant is,*
 - (a) *the subject of an audit, investigation, search or seizure by the Society;*
 - (b) *a party to a proceeding under Part II of the Act; or*
 - (c) *a party to a proceeding under section 33 of the Act as that section read before the day that the Law Society Amendment Act, 1998 came into force.*
2. The amendment concerning voluntary resignation was introduced to avoid a situation in which a member, who believes the Law Society will learn something in the course of an investigation that could lead to a conduct proceeding, voluntarily resigns so the Law Society will be precluded from detecting the information or from taking action against the former member. Under the provisions of the *Law Society Act*, the Law Society does not retain authority over former members, except with respect to accepting unclaimed trust funds from such former members.
3. The Professional Development and Competence Committee had been requested to consider whether to recommend that the amended By-law also preclude a member who is required to participate in a practice review from voluntarily resigning before the review is complete.
4. As with the other amendments to By-law 14 the inclusion of practice review would be to address a situation in which a member in practice review, who is concerned that the review will turn up information that must be disclosed by the practice reviewer under Rule 13 or that will result in the authorization of a competence hearing, will resign to avoid such action.
5. The dilemma of taking this approach, however, would be that it may compel a member who simply wishes to resign, for no oblique purpose, to go through a time consuming and largely academic practice review before being entitled to resign. Further, it may be that a member who is contemplating resignation will have already begun to wind down his or her practice in anticipation of resignation. In such a case the practice reviewer will be wasting his or her time since there will be little to review and no point in making recommendations for improvement. Finally, since the purpose of practice review is remedial - to assist lawyers who wish to continue practising - it does not seem practical to use it as a vehicle for refusing to permit lawyers in such circumstances to resign.

6. In most cases a member approved for practice review is already the subject of other Law Society procedures such as a complaints or audit investigation or discipline proceeding, any of which would now preclude his or her voluntary resignation under By-law 14. This would address any concerns that might exist that a member may seek to resign for oblique purposes.
7. The Committee is of the view that it is not necessary to include participation in a practice review in the conditions that would preclude the Secretary from considering a member's application to resign.

COMPLAINTS REVIEW COMMISSIONERS AND REQUEST FOR PRACTICE REVIEW

1. In the past the practice review program received referral from Complaints Review Commissioners (CRCs) who, in the course of their reviews, considered that the member against whom a complaint had been made might benefit from participation in practice review.
2. By-law 20 governs the review of complaints process and sets out the role of CRCs when dealing with complaints. It provides that a Commissioner "shall review every disposition of a complaint referred to him or her... and shall decide whether the Society's disposition of a complaint was appropriate". It also provides that a Commissioner may, before or after deciding whether the Society's disposition of a complaint was appropriate, refer a complaint to the Secretary and direct the Secretary to investigate the complaint further.
3. Prior to the passage of the amendments to the *Law Society Act* CRCs dealt with some complaint reviews by recommending that the member in question be considered for inclusion in what was then a voluntary practice review program. Since the passage of the amendments that make practice review mandatory, CRCs are continuing to make such recommendations although the number of referrals has not been significant. Referrals to practice review by the CRCs raise a number of issues.
4. By-law 24 provides that the Chair or Vice-chair of the Professional Development and Competence Committee shall refer a member to practice review if there are reasonable grounds to believe the member may be failing or may have failed to meet standards of professional competence.
5. In the past, when CRCs made referrals to practice review they did so primarily on the basis of the large number of complaints a member had received. They did not have the benefit of reviewing the kind of background information that the professional standards staff gathered before it sought authorization for a practice review. Staff examined the member profile and then determined whether there were sufficient grounds to bring the matter forward for authorization for practice review.
6. Under the *Law Society Act* a Complaints Resolution Commissioner will be appointed to resolve complaints. This office will replace the role currently played by CRCs. The Complaints Resolution Commissioner role does not appear to include authority to require a practice review because the role is to *resolve* complaints, not refer them away for other Law Society departments to handle.
7. Until such time as the Complaints Resolution Commissioner is appointed, however, the CRCs will continue to play their current role. The Committee was asked to provide guidance on the process that should be followed with respect to CRC requests for practice review.
8. The Committee agreed with the following approach:
 - a) The CRCs will be provided with information on how the process for mandatory practice review operates;

- b) Where a CRC is considering a request for a practice review, the CRC will notify staff and a member profile will be prepared with a staff recommendation on whether the request should go forward to the Chair or Vice-chair of the PD&C Committee.
- c) On the basis of the profile and staff recommendation the CRC would determine whether he or she wishes the request for a practice review to go forward. If the CRC and the staff agree that it should not go forward, the matter is at an end.
- d) If the CRC considers that the request should go forward, but the staff disagrees, the Secretary will make the request to the Chair or Vice-chair of the PD&C Committee, with the reasons for and against the request being set out in the material, and indicating that the request comes from the CRC.
- e) The Chair or Vice-chair will then determine whether he or she is required to direct a practice review in accordance with the *Act* and by-laws.

9. This approach

- a) allows the CRC to have input into the process;
- b) ensures that the Chair or Vice-chair of the PD&C Committee receives full information on the pros and cons of the request;
- c) maintains the Secretary's involvement in the request process so that there is consistency; and
- d) does not appear to require any by-law amendments, a factor that is important considering that the CRC role may soon cease under the authority given to the Complaints Resolution Commissioner.

REPORT ON SPECIALIST CERTIFICATION MATTERS APPROVED BY THE CERTIFICATION WORKING GROUP ON DECEMBER 17, 1999 AND APPROVED IN COMMITTEE ON JANUARY 13, 2000

(i) Report on Specialist Certification Matters Finalized by the Working Group of the Committee on December 17, 1999

1. The Certification Working Group of the Professional Development and Competence Committee is pleased to report final approval of the following lawyers for certification:

Civil Litigation: Eric K. Grossman (of Toronto)
Rhona L. Waxman (of Hamilton)

Criminal Law: Mary E. Pascuzzi (of Sault Ste. Marie)

Immigration Law: Douglas D. Lehrer (of Toronto)

2. The Certification Working Group of the Professional Development and Competence Committee is pleased to report final approval of the following lawyers for recertification for an additional five years:

Civil Litigation: Aubrey E. Golden (of Toronto)
Julian H. Porter (of Toronto)
Donald Posluns (of Toronto)
Michael D. Lipton (of Toronto)
Allan R. O'Donnell (of Toronto)

Criminal Law: John E. Lang (of Kitchener)

3. On the basis of the report of the Certification Working Group the Committee gave final approval to the applications for certification and re-certification.
- (ii) Processing of Applications with Professional Standards Concerns
 1. The working group has recommended a more pro-active approach to the handling of applications for certification and re-certification with professional standards concerns and has committed to reviewing all of the relevant program policies in the nearest future.
 2. In the interim, to prevent undue delays in application processing, the working group will review applicants' internal profiles on a case by case basis, to determine the seriousness of the complaints made against an applicant. It will then decide whether the application ought to go to the specialty committee for technical assessment or whether it needs to be put on hold while the lawyer addresses areas of concern in his or her practice.

APPENDIX 1: Ad Hoc Committee for Specialty in Construction Law

Mr. Stanley Naftolin (Co-Chair)
Goldman, Sloan, Nash & Haber

Mr. J. Stephen Tatrallyay (Co-Chair)
Koskie Minsky

Mr. Robert Beaumont
Osler, Hoskin & Harcourt

Mr. Marc Doucet
Doucet, McBride

Ms. Anna Esposito
Pallett, Valo

Mr. Joseph Gottli
Sullivan, Mahoney

Mr. Lionel Gray
Smith, McLean

Ms. Janine Kovach
Cassels, Brock & Blackwell

Mr. Joel Kuchar
Barrister and Solicitor

Mr. Wayne McLeish
Siskind, Cromarty, Ivey & Dowler

Ms. Anne McNeely
Blake, Cassels & Graydon

Mr. William Swybrous, Q.C.
Barrister and Solicitor

APPENDIX 2: Background Information on Specialization in Construction Law

PRELIMINARY RESPONSES TO BASIC CRITERIA QUESTIONS

1. Provide a detailed definition of the specialty area.

The practice of construction law includes the representation of all actors in the construction industry including workers, trade unions, service and material suppliers, subcontractors, general contractors, project managers, professional consultants, owners, lenders and developers in the negotiation and formation of construction contracts, and the resolution of disputes arising under those contracts including alternative dispute resolution, construction liens, litigation arising under Labour and Material Payment, Performance or Lien Bonds, claims respecting delays, unforeseen soils conditions, extras or any other disputes which may arise as a result of the interpretation or application of construction contracts.

2. Is there a demonstrated public need for the identification of specialists in this field?

Each report which has dealt with the question has recognized that construction law is a specialized area, and that the litigation of disputes therein in particular requires expertise. The Attorney General's Advisory Committee on the Alternative Resolution of Construction Disputes, in its report of June of 1994, recommended, *inter alia*, that the Law Society of Upper Canada establish a specialist designation in construction law so that those in the construction industry could easily identify lawyers with expertise in the area. (Advisory Committee on the Alternative Resolution of Construction Disputes, Too Many Disputes! Too Much Litigation! Dispute Resolution Opportunities for the Construction Industry (Province of Ontario, Ministry of the Attorney General: June 1994) at page 31.

The Civil Justice Review, in its final report, referred to this recommendation favourably and itself recommended that there should be a specialized list for construction lien cases to ensure that they are dealt with quickly by knowledgeable people. (Civil Justice Review Supplemental and Final Report (Province of Ontario, November 1996) pp. 109-111.)

There appears to be a strong distrust of lawyers in the construction industry. The result of this is that contracts are frequently not reviewed by lawyers prior to being entered into even where the amounts involved are in the millions, litigation is not proceeded with in an appropriate fashion or untenable positions are needlessly litigated. By permitting lawyers to hold themselves out as specializing in construction law, the Law Society could aid the industry in identifying lawyers who could more readily assist them and hopefully lessen the time and expense involved in resolving particular issues.

A number of letters from lawyers have been received, both those working only in the field of construction law and those who are general practitioners, attesting to the need for a specialization in construction law. As well a number of letters from contractors' associations and home builders' association have been received, indicating that they believe that there is a need for specialization as well. Attached is a copy of a letter from Masters Sandler and Sischy, two of the Masters who specialize in the trial of construction lien actions in Toronto, in which they give their reasons for supporting a specialization in construction law by the Law Society.

3. Are there identifiable specialists practising in this field? Provide an estimated number. What percentage of practice time on average is devoted to this area of law for both the rural and the urban practitioner?

There are at least 200 lawyers in Ontario who devote a significant portion of their practice to construction law. There are more barristers than solicitors and the vast majority of those involved practice in the private sector. There are at least 75 lawyers in Ontario whose practice is exclusively or almost exclusively in construction litigation. In addition, a number of large construction companies have in-house counsel who also spend by far the majority of their time practising construction law. There are at least a dozen such lawyers and there may be more.

4. Where is this area of law practised in the province? Is it practised only in urban centres? Will the public and the profession have reasonable access to specialization in this area?

Construction projects are located across the province, as are the head offices of construction companies. As a result, there are specialists practising in construction law throughout Ontario, although the concentration is in the Niagara Peninsula, London, Toronto and Ottawa. Two recent province wide surveys, one conducted in May of 1996 and the other in April of 1997, have indicated that lawyers practising in London, St. Catharines, Guelph, Hamilton, Burlington, Brampton, Mississauga, Woodbridge, Vaughan, Newmarket, Barrie, Oshawa, Kingston, Ottawa and Sudbury, in addition to lawyers in Toronto, indicated that a significant portion of their practice was devoted to construction law.

5. Is there an existing section of the CBA/CBA-O or other organization devoted to this specialty area? What size are these sections? Has there been an expressed interest from these sections for certification?

There is an existing construction law section of both the CBA National and the CBA-O. The CBA-O has approximately 400 members and the National Section approximately 1,100. The CBA-O's Construction Law Section strongly supports the initiative for certification.

6. Would specialization in this area of the law be welcomed by those who devote their professional time to that field? What are the opinions, both pro and con, of these lawyers? What percentage of lawyers in this field would participate in becoming certified?

In April and May of 1996, a questionnaire was circulated to approximately 80 practitioners of construction law, roughly evenly divided between those in Toronto and those outside of Toronto, in which the lawyers in question were asked the following questions:

- (a) Do you believe it would help you in your practice to have a certificate designating you as a specialist in construction law?
- (b) Do you believe you could meet criteria similar to those of the Insolvency Section for specialization, in a construction context [the recipients were provided with the information that the Insolvency specialty requires lawyers applying for the specialization to have been called for at least 7 years, and in the past 5 to have devoted at least 50% of their time to their specialty, to have performed 50 of 100 possible functions associated with the practice of insolvency law and to provide three references from insolvency practitioners]?
- (c) If there were a certificate of specialization in construction law and you could meet the criteria would you be interested in applying for same?

The majority of the respondents responded favourably to all three questions and many of them volunteered to serve on a committee to assist in drawing up the final criteria. Approximately 60% of the lawyers from outside of Toronto felt that they could meet the criteria; 90% of the lawyers inside Toronto felt that they could. In view of the differing degree of time devoted to construction law by specialists inside and outside of Toronto, the Committee feels that a percentage of time may not be most appropriate criterion to measure specialization. It may be fairer to lawyers across Ontario to use criteria such as the number of hours devoted to continuing legal education on topics related to construction law, or even to set a more or less objective test involving current topics of construction law which could only be passed by someone having not only a knowledge of the law but a reasonable degree of expertise therein. 90% of the lawyers responding to the survey were interested in applying for the designation, depending on what the criteria were, and what the cost was.

A further survey conducted of the approximately 400 recipients of the CBA-O's Construction Law Section Newsletter in April 1997, elicited some 50 responses, the overwhelming majority of which were in favour of certification of construction lawyers.

7. How would specialization affect different segments of the legal population devoting their time to this area, i.e. young lawyers, sole practitioners, large firm practitioners, generalists, etc.?

There are a number of possible answers to this question. Certainly the existence of a specialization in construction law would enable general practitioners to select experienced counsel to whom they could refer cases involving construction litigation or negotiation of construction contracts.

When in-house counsel are excluded, practitioners of construction law seem roughly divided evenly between large and small firms. We therefore do not believe that specialization would affect these people in any way different from each other.

8. Are there a significant number of lawyers devoting significant enough professional time in this field in Ontario to make implementation of a certification program financially viable?

Between the two surveys, more than 60 lawyers have said they would be interested in applying for specialization certificates. Our surveys were not by any means exhaustive.

9. Are there separate courses in the university faculties of law or in continuing legal education programs for this area? What educational opportunities are available for lawyers in this area both in urban and rural locations?

The University of Toronto offers a course in construction law, taught by Harvey Kirsh of Cassels, Brock & Blackwell. We also understand although we have not been able to confirm that similar courses are offered at the Technical University of Nova Scotia, the University of Calgary and the University of Kentucky. Courses in construction law are commonly offered in engineering and architecture faculties and in community colleges.

The CBA-O Construction Law Section, the Law Society, Insight and the Canadian Institute all offer regular programs in construction law of varying degrees of sophistication. The Law Society has offered programs in November of 1996 and 1997, directed at experienced, sophisticated practitioners. The November 1996 program was very well attended by more than 100 lawyers from around the province. Although attendance at the November 1997 program was somewhat less, the discussion was lively and the participants well informed. Such programs are also available on video-tape and audio-tape. The CBA-O has sponsored one recent program in London in construction law, and the Construction Law Section has named an eastern Ontario liaison in Ottawa in an effort to expand its presence there. Nationally, the CBA also has a construction law section which offers continuing legal education programs periodically. A group of experienced construction law practitioners is also working on establishing a "Canadian College of Construction Lawyers", which as part of its mandate would include a continuing education component.

There are excellent research materials available for the self-education of specialists in particular Macklem & Bristow's book *Construction Builders and Mechanics' Liens in Canada*, Harvey Kirsh's *Construction Lien Case Finder*, Scott & Reynolds on *Surety Bonds* and Goldsmith on *Canadian Building Contracts*. A self-study program in construction law based on these materials could be undertaken by any interested practitioner.

Construction Law has been constituted as a forum of the American Bar Association. The forum has its own publication entitled "The Construction Lawyer".

Canadian publishers on construction law topics include Carswell's Construction Law Reports, the Ontario CBA's "Nuts'N Bolts" and the National CBA Construction Section newsletter "Droit de la Construction/Construction Law". Private publications such as "The Construction Law Letter" and trade publications such as the Toronto Construction Association's newsletter are among the other publications in the area.

APPENDIX 3: Proposed Construction Law Standards for Certification

THE LAW SOCIETY OF UPPER CANADA SPECIALIST CERTIFICATION PROGRAM CONSTRUCTION LAW SPECIALIST STANDARDS FOR CERTIFICATION

- Proposed -

Who May Be Certified As A Construction Law Specialist

1. The Specialist Certification Board ["the Board"] may certify as Construction Law Specialists those applicants who, having met the criteria set forth below, satisfy the Construction Law Specialty Committee and the Board that, by reason of their skill, aptitude and experience, they are fit to be identified to the public as having a special ability to practise in the field of construction law.
2. Applicants shall be required to establish that they have broad and varied experience in the area of construction law. They shall have acquired a thorough knowledge of construction law.

Definition of the Specialty Field of Construction Law

3. The practice of construction law includes the representation of all participants in the construction industry including workers, trade unions, service and material suppliers, subcontractors, general contractors, project managers, professional consultants, owners, lenders and developers in negotiation and formation of construction contracts, and the resolution of disputes arising under those contracts including alternative dispute resolution, construction liens, litigation arising under Labour and Material Payment, Performance or Lien Bonds, claims respecting delays, unforeseen soils conditions, extras or any other disputes which may arise as a result of the interpretation or application of construction contracts.

Practice Experience

4. Applicants are required to have satisfied the following requirements:
 - i. A minimum of seven (7) years in the full-time practice of law in Ontario; and
 - ii. (a) Five (5) years of recent experience in the full-time practice of law in Ontario, two (2) years of which must be immediately preceding the date of application. As a general rule, recent experience will mean falling within the seven (7) years immediately preceding the date application.

- (b) Averaged over those five (5) years, applicants must have devoted at least 1/3 of their professional time to construction law.

For those lawyers seeking certification in a second Specialty area who fall slightly below the 1/3 averaging requirement, the principle of "substantial involvement" will be applied. Substantial involvement may be measured by several standards such as the extent of legal work within the area of Specialty, the number or type of matters handled within a certain period of time, teaching the law of a Specialty field, or demonstrable skills in the second Specialty area, including evidence that the first Specialty area enhances skills in the second Specialty area.

Construction Law Experience

5. Applicants will be required to establish that they have broad and varied experience in construction law matters, special ability, competence and a depth and breadth of experience.
6. As a general rule, during the five (5) years of recent experience preceding the application, as set forth in paragraph 4 above, the applicant
 - i. must have performed tasks in at least six (6) of the following categories, as defined in the list of criteria under Section D of the application form: development, financing, tenders and proposals, design/professional services, procurement and construction, insurance, labour, violations of regulatory requirements, post-construction, security for payment and performance, trust claims, disputes, and liens; and
 - ii. must have performed at least fifty (50) of the tasks set out in the list of criteria in Section D of the application form.

Continuing Legal Education / Professional Development

7. During each of the two (2) years immediately preceding the application for certification, applicants will be expected to have participated in at least twelve (12) hours per year of continuing legal education programs in subjects directly related to construction law, either as a registrant or a participant.

The Board will also consider books and articles published, and courses taught by applicants, and other similar activities which contribute to the professional development of the applicant in the practice of construction law. Where the applicant is a speaker at such programs, the Board will consider allowing a portion of preparation time in connection with this criterion.

References

8. Applicants will submit with their application the names of four to six lawyers (or more)*, who will have personal knowledge of the applicant's work and who would be willing to provide references in confidence to the Construction Law Specialty Committee and the Board with respect to the application. The Specialty Committee and the Board will also be at liberty to make inquiries of their own concerning the application.

A minimum of four replies from references must be Ontario lawyers. After these requirements are met, the Specialty Committee will consider any additional references received, including out-of-province references.

- * Applicants should not include judges, members of tribunals, partners or associates, members of the Specialist Certification Board, the Treasurer of the Law Society, or members of the Construction Law Specialty Committee (for Committee and Board membership, please see the General Information pamphlet.

9. The Board will publish the names of all applicants in the *Ontario Reports*, inviting comments from the legal profession.

Interview

10. All applicants may be required to attend for an interview.

General Provisions

11. The Board reserves the right to request an applicant to re-submit an application to a Specialty Committee other than the Construction Law Specialty Committee, should the Board consider that certification in another Specialty area would be more appropriate, having regard to the nature of the applicant's practice.
12. Applications for certification shall include the applicant's Declaration providing evidence with respect to the matters dealt with herein.
13. The Specialist Certification Program does not discriminate against any lawyers seeking certification on the basis of race, religion, gender, sexual orientation, disability, or age.

Currency of the Certificate

14. Certificates of Specialty shall have currency for a period of five (5) years from their date of issue, after which they shall automatically lapse or must be renewed.

Ethical Standards

15. It shall be required that all applicants adhere to the highest standards of professional conduct.
16. The Specialist Certification Board has adopted the following policy:
 - i. Any applicant who has ever been found guilty of professional misconduct and/or conduct unbecoming may be denied certification for that reason alone. In determining whether to exercise a discretion in favour of such an application, the Board will consider all the circumstances, and, in particular, will consider:
 - (a) the nature of the offence;
 - (b) the date when the offence was committed; and
 - (c) the applicant's conduct since the date of the finding of guilt.
 - ii. where a discipline investigation or complaint is pending at the date when the application is received, or if an investigation is launched or a complaint is received during the determination of the application, the Board may postpone consideration of the application until the discipline matter has been disposed of in its entirety, whether by final order or otherwise.
17. The certified Specialist will be under an obligation to notify the Board if he/she fails to meet the minimum standards at any time during the currency of the Certificate.

Recertification

18. Successful applicants for recertification will meet the following requirements:
 - i. be a member in good standing of the Law Society of Upper Canada;
 - ii. have a satisfactory professional standards record over the currency of the Specialist Certificate (the past five years);

- iii. demonstrate continued substantial involvement in construction law, consistent with the present Specialist Certification Standards;
 - iv. have participated in at least twelve (12) hours per year of continuing legal education or other forms of professional development during the five years of certification;
 - v. comply with the usual peer review requirements; and
 - vi. be subject to the usual application, administrative and annual fees.
19. The Specialist Certification Board reserves the right, at the request of the Construction Law Specialty Committee, to require an applicant for recertification to attend for an interview.
20. The Specialist Certification Board reserves the right to request an applicant for recertification to submit an application to a Specialty Committee other than the Construction Law Specialty Committee, should the Board consider that certification in another Specialty area would be more appropriate, having regard to the nature of the applicant's current practice.

Revocation

21. The Board will retain the power to revoke the Specialist status where warranted.

From Section D of the Application for Certification in Construction Law

CONSTRUCTION LAW EXPERIENCE: During the five years of recent experience defined in Section 4 of the Standards, describe how you meet the requirements of substantial involvement in at least six of the following categories. You are required to demonstrate having performed at least fifty of the tasks enumerated below.

1. DEVELOPMENT

1. Represent either party in negotiating/drafting a property development contract.
2. Represent either party in negotiating/drafting an access easement agreement.
3. Represent either party in negotiating/drafting an access licence agreement.
4. Represent either party in negotiating/drafting a servicing agreement.
5. Advise on permitting issues.
6. Advise on project structure.
7. Represent either party in negotiating/drafting a demolition contract.
8. Represent either party in negotiating/drafting a joint venture agreement.
9. Represent either party in negotiating/drafting a concession agreement.
10. Represent either party in negotiating/drafting a consortium agreement.
11. Represent either party in negotiating/drafting a confidentiality agreement.
12. Advise any Canadian participant on international projects.

2. FINANCING

1. Represent owner/developer in obtaining financing for development.
2. Represent either party in negotiating/drafting a loan agreement and security documents to provide financing for development.
3. Represent either party in negotiating/drafting a construction loan agreement and security documents and registering a construction-financing mortgage.
4. Represent either party on construction financing throughout the construction of a project.
5. Represent a lender's engineer in negotiating/drafting a monitoring agreement.
6. Represent a consultant in negotiating/drafting the consultant's certificate to be delivered to the lenders.
7. Provide an enforceability opinion with respect to construction documents.

8. Represent any party in negotiating/drafting an assignment agreement.

3. TENDERS & PROPOSALS

1. Represent an owner in preparing a request for tenders including the invitation to tenders, instructions to tenders and a form of tender and/or advise an owner, consultant or sub-consultant in regard to the preparation of same.
2. Represent a tenderer in responding to a request for tenders.
3. Represent an owner in preparing a request for qualifications.
4. Represent a party in responding to the request for qualifications.
5. Represent an owner in preparing a request for proposals.
6. Represent a party in responding to a request for proposals.
7. Represent either party in interpreting tender or proposal requirements.
8. Represent either party in a dispute (negotiating, arbitration and/or litigation) about an unsuccessful tender.

4. DESIGN/PROFESSIONAL SERVICES

1. Represent either party in negotiating/drafting an architects agreement.
2. Represent either party in negotiating/drafting an engineers agreement.
3. Represent either party in negotiating/drafting an interior design agreement.
4. Represent either party in negotiating/drafting a project management agreement.
5. Represent either party in negotiating/drafting a sub-consultant agreement.
6. Represent either party in negotiating/drafting a design-build agreement or engineering, procurement and construction contract.
7. Represent either party in negotiating/drafting a program management agreement.
8. Represent either party in interpreting any of the above-noted design/professional services agreement.
9. Advise a party with respect to the application of the *Professional Engineers Act*.
10. Advise a party with respect to the application of the *Architects Act*.
11. Represent an architect or the applicable architects' association in a discipline hearing.
12. Represent an engineer or the applicable engineers' association in a discipline hearing.
13. Advise either party with respect to intellectual property rights related to design drawings.

5. PROCUREMENT AND CONSTRUCTION

1. Represent either party in negotiating/drafting/advising as to the meaning of language in a stipulated price general contract.
2. Represent either party in negotiating/drafting/advising as to the meaning of language in a unit price general contract.
3. Represent either party in negotiating/drafting/advising as to the meaning of language in a cost-plus general contract.
4. Represent either party in negotiating/drafting/advising as to the meaning of language in a material supply agreement.
5. Represent either party in negotiating/drafting/advising as to the meaning of language in an equipment supply agreement.
6. Represent either party in negotiating/drafting/advising as to the meaning of language in an off-site storage agreement.
7. Represent either party in negotiating/drafting/advising as to the meaning of language in a construction management contract.
8. Represent either party in negotiating/preparing/advising as to the meaning of language in a construction subcontract.

9. Advise parties with respect to the application of NAFTA including importation of employees and service representatives.

6. INSURANCE

1. Advise any party with respect to liability insurance.
2. Advise any party with respect to errors and omissions insurance.
3. Advise any party with respect to property insurance.
4. Advise any party with respect to wrap-up insurances.
5. Represent any party in an insurance claim.

7. LABOUR

1. Advise any party on the operation of the *Ontario Occupational Health and Safety Act*.
2. Represent a party in construction industry labour relations issues including: a work jurisdiction dispute between two or more trades, a grievance under a Provincial Collection Agreement, union and non-union construction sites, a sub-contracting dispute.

8. VIOLATIONS OF REGULATORY REQUIREMENTS

1. Represent a person/corporation charged with violation of the Competition Act.
2. Represent a builder charged in violation of municipal by-laws (eg. constructing without building permit).
3. Represent a person/corporation charged with a violation of the Construction Regs./O.H.S.A.
4. Represent a builder/developer charged with a violation of the *Environmental Protection Act*.
5. Represent a builder/developer faced with responsibility for a site cleanup as a result of a negative environmental assessment.

9. POST-CONSTRUCTION

1. Represent either party in negotiating/drafting an extended warranty agreement.
2. Represent either party in negotiating/drafting a maintenance of equipment agreement.
3. Advise any party on the termination of a contract or sub-contract.

10. SECURITY FOR PAYMENT AND PERFORMANCE

1. Represent an indemnitor re a corporation obtaining bonding on a construction project.
2. Represent a construction company obtaining bonding for a project.
3. Represent an owner seeking bonding for a project.
4. Advise on performance bonds.
5. Advise on labour and material payment bonds.
6. Advise on indemnity agreement.
7. Advise on dual obligee riders.
8. Represent a party in negotiating/drafting a performance bond.
9. Represent a party in negotiating/drafting a labour and material payment bond.
10. Represent a party in negotiating/drafting an indemnity agreement.
11. Represent a party in negotiating/drafting a dual obligee rider.
12. Prepare and deliver a notice of claim under a Labour and Material Payment Bond.
13. Represent a claimant in an action to enforce a claim under a Labour and Material Payment Bond.
14. Represent a bonding company in an action to enforce a claim under a Labour and Material Payment Bond.
15. Participate in the trial of an action to enforce a claim under a Labour and Material Payment Bond.

16. Represent an obligee giving a notice of a default under a Performance Bond.
17. Represent the surety in circumstances where notice of the principal's default under a Performance Bond has been given.
18. Represent the principal where notice of default under a Performance Bond has been given.
19. Represent the indemnitor in circumstances either of default under a Performance Bond or of claim(s) under a Labour and Material Payment Bond.
20. Advise on holdback obligations pursuant to the *Construction Lien Act*.
21. Advise either party in negotiating/drafting a parent company guarantee.
22. Advise any party in negotiating/drafting a letter of credit.
23. Represent any party in negotiating/drafting international performance guarantees.

11. TRUST CLAIMS

1. Represent a Plaintiff in a breach of trust action.
2. Represent an individual Defendant in a breach of trust action.
3. Represent a corporate or bank Defendant in a breach of trust action.
4. Participate in the trial of a breach of trust action.
5. Provide assistance to the Court in the determination of the validity and quantum of claims against trust funds under and pursuant to an appointment in that respect by Court Order.
6. Prepare materials and attend a Court motion for directions re trust funds under Section 66 of the *Construction Lien Act*.
7. Prepare materials and attend on a motion for the appointment of a lien trustee pursuant to Section 68 of the *Construction Lien Act*.

12. DISPUTES

1. Represent a Plaintiff in an action for damages for defective construction.
2. Represent a Defendant in an action for damages for defective construction.
3. Represent a Plaintiff or Defendant in an action for delay.
4. Represent a Plaintiff or Defendant in action for breach of contract.
5. Represent a party in a bankruptcy or insolvency.
6. Represent a Plaintiff or Defendant in a warranty claim.
7. Represent a Plaintiff or Defendant in a negligence claim.
8. Represent a claim in an arbitration of a construction dispute.
9. Represent any party in negotiating/drafting a settlement agreement.
10. Represent a party at the mediation or arbitration of a construction dispute.
11. Have acted as mediator or arbitrator of a construction dispute.
12. Advise on the creation of, or represent a party in an appearance before, a Dispute Resolution Board such as CDAB.
13. Advise on or assist in the preparation of a Teaming Agreement, Alliancing Agreement or Partnering Agreement.

13. LIENS

1. Provide Section 19 notice to a landlord of an improvement to be made for a tenant.
2. Respond to a Section 19 notice on behalf of an owner/landlord.
3. Prepare and deliver a request for information under Section 39.
4. Respond to a request for information under Section 39.
5. Prepare and register a Claim for Lien.
6. Prepare and serve a Claim for Lien in circumstances where Lien does not attach to land.
7. Bring a motion to vacate a Claim for Lien on posting security - uncontested (Section 44(1)).

8. Appear on a motion to vacate a claim by posting security - contested (Section 44(2)).
9. Appear on a motion to discharge a Claim for Lien without the posting of security.
10. Attend on a cross-examination on an Affidavit of Verification.
11. Commence an action to enforce a Claim for Lien.
12. Prepare and register a Certificate of Action.
13. Attend on a motion for directions in a Lien action.
14. Attend at a settlement meeting in a Lien action.
15. Obtain a Judgment referring a Lien action to the Master for trial.
16. Represent an "Owner" Defendant in a Lien action.
17. Represent a general contractor Defendant in a Lien action.
18. Represent a subcontractor Defendant in a Lien action.
19. Attend at discoveries to a Lien action.
20. Appear on a motion for the reduction or return of security.
21. Appear on a motion to discharge a Lien for failure to comply with Section 37.
22. Appear as counsel at the trial of a Lien action.
23. Appear as counsel at a reference of a Lien action.
24. Bring a motion to oppose confirmation of a Master's Report to a Lien action.
25. Perfect an appeal from a Judgment in a construction-related action.
26. Appear on an appeal in a construction-related matter.
27. Bring proceedings to enforce a Lien Judgment by the sale of the land.
28. Bring proceedings to enforce a Lien Judgment from the proceeds of a Lien Bond.
29. Bring proceedings to enforce a personal Judgment in a construction-related action.

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

Copy of a letter from Master D. H. Sandler, Ontario Court (General Division) to Mr. Stanley Naftolin, Q.C. dated April 3, 1997 re: Construction Law Certification. (pages 17 - 18)

Re: Approval of a Speciality in Construction Law

It was moved by Mr. Cherniak, seconded by Ms. Pilkington that a new speciality in Construction Law be approved with the proposed standards as set out in Appendix 3, pages 19 to 28 of the Report.

Carried

TECHNOLOGY TASK FORCE REPORT

Mr. Banack presented the Technology Task Force Report.

Report to Convocation

Purpose of Report: Information

Prepared by the Chief Information Officer
(Gord Lalonde 947-3397)

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Technology Task Force has now met twice and scheduled to meet on a monthly basis. A number of issues have surfaced that should be brought to the attention of Convocation.
2. The Technology Task Force has a two-part mandate. First, it has responsibility for creating a "set of expectations" for monitoring the Lawyer's Workbench as decided by Convocation on April 30, 1999. Second, as suggested by the Competence Task Force Report on April 1999, the Technology Task Force, on a regular basis, will address the ongoing technological issues of the profession as they affect: standards of practice, privacy, security and electronic commerce.
3. The Law Society's grant application to The Law Foundation of Ontario for Technology Enhanced Learning envisioned the following technology projects:

▶ courseware development centre	\$37,366
▶ video classrooms	\$432,971
▶ computer lab improvements	\$239,328
▶ wide area communication	
infrastructure improvements	\$166,262
▶ student e-mail systems	\$144,072

Planning for the wide area communications infrastructure is well underway, however, no tangible progress can be made until funds actually flow to the Law Society.

4. The Federation of Law Societies of Canada's Technology Committee, chaired by Abraham Feinstein, Q.C., has undertaken four projects: Public Key Infrastructure (PKI), Electronic Certification, Virtual Libraries, Professional Standards and Technological Infrastructure sharing. PKI and Electronic Certification have already been reported at the Technology Task Force. A copy of the FLSC's Technology Committee is attached as Tab A.
5. Guidelines on Ethics and the New Technology were developed by the Alberta Law Society and have been distributed through the FLSC to all the Law Societies of Canada. The Technology Task Force provided a copy to the Professional Regulation Committee for their review and it is now included at Tab B for your perusal.

6. The PKI group is developing a nationally coordinated Electronic Certification System. It has been identified that certificates, often known as digital signatures, will play an important enabling role in the development of electronic commerce (e-commerce). A strategy paper that is under development outlining the available options has been included at Tab C.
7. Because technology is an enabling infrastructure, it is likely to cross many Committees' boundaries. A table of ongoing projects has been developed, the expected areas of impact have been noted and is attached at Tab D.
8. The features of the Lawyer's Workbench have been presented to the Technology Task Force. A pre-release version of the web site should be available for free inspection early in the new year with the intended purpose of soliciting feedback and comments. Lawyers subscribing to the service will be greeted by a personal screen that will present individualized information such as the name, account balance and secure documents received. The opening page is expected to contain such information as:
 - ▶ **Headline News:** a one line summary to be clicked for more detail
 - ▶ **An Archive of Old Files:** an e-mail gateway that will be richer than normal e-mail.
 - ▶ **Suites of information and applications of interest to different areas of practice:** a suite for the Real Estate Bar with access to Polaris and Writs Search; a Corporate and Commercial suite with access to Ontario Business Connects and PST forms etc.; a Litigation suite is expected to develop from the Integrated Justice project.
9. Within the individualized format of the workbench, it will contain information and articles selected to the member's designated interest. Workbench staff are discussing how to best provide this segmented information with staff from the Great Library who already provide elements of this service to the profession.

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

- (1) Copy of the Federation of Law Societies of Canada Report of the Technology Work Group - August 1999.
(Tab A, pages 1 - 12)
- (2) Copy of the Guidelines on Ethics and the New Technology presented to the Executive Committee - July 9, 1999.
(Tab B, pages 1 - 9)
- (3) Copy of a strategy paper re: Creating a Nationally Coordinated Certifying Authority for the Law Societies of Canada prepared for Gord Lalonde by Sonja Berggren October 1999.
(Tab C)
- (4) Copy of Table entitled Information Systems Planned Projects.
(Tab D)

It was moved by Mr. Banack, seconded by Mr. Feinstein that the Technology Task Force should be given the specific mandate of examining the impact of digital certificates on the practice of law and the role of the Law Society and to investigate and create a set of expectations in respect of the certifying authority and report back to Convocation for consideration.

Carried

REPORT OF THE AD HOC PROCEEDINGS AUTHORIZATION COMMITTEE

Mr. Banack reported that leave had been granted to the Law Society to participate as an intervenor in the Ontario Securities Commission proceedings against a lawyer. A Factum has been filed and the hearing is scheduled in February. Mr. Banack advised that he would report back to Convocation.

REPORT OF THE EQUITY AND ABORIGINAL ISSUES COMMITTEE

Ms. Puccini reported on the first official meeting of the Committee.

Equity and Aboriginal Issues Committee/
Comite Sur L'Equite Et Les Affaires Autochtones

Report to Convocation

Committee Process: The Committee met on Wednesday, January 12, 2000, 4 - 7 p.m. in the Benchers' Reception. The following members were present: H. Puccini (co-chair), H. Ross (co-chair), S. Bindman, S. Opler, L. Braithwaite, m. Crowe, G. Hunter, B. Laskin. The following staff were also present: C. Smith, R. Osborne, G. Yee.

The meeting was chaired by H. Puccini.

As the first official meeting of the Committee, members undertook to:

- 1) Review the Committee mandate as approved by Convocation. The mandate was approved by Convocation on November 26 and are attached;
- 2) Participate in member orientation. This included a review of Convocation policies, (eg., the Transitions Report, Bicentennial Report on Equity Issues in the Legal Profession, the Discrimination/Harassment Counsel, and, Equity and Diversity Public Education Activities);
- 3) Review and discuss reports addressing:
 - (a) the development of the Law Society's Departmental Equity and Diversity Action Plans. These included actions being undertaken by each Law Society Department to integrate equity and diversity initiatives within their day-to-day operations;
 - (b) the Law Society's Workplace Harassment and Discrimination Prevention Policy. This Policy provides principles and procedures for addressing allegations by staff of harassment or discrimination within the workplace; and
 - (c) the Committee's draft workplan. The draft workplan includes those policy matters which Convocation has either approved or is awaiting recommendations on and that fall within the Committee's mandate. Principally, these are the recommendations contained in the reports noted above in Item #2.
- 4) Discuss members interests in Committee activities. Members reviewed matters included in the draft workplan that they were interested in and tabled matters to include in the draft workplan.

- 5) Set-up a schedule of regular Committee meetings for 2000.

As this was the Committee's first meeting, it was decided that it was to soon to bring forward any matters to Convocation at this time. The Committee will be making recommendations on these matters for the February Convocation.

**EQUITY AND ABORIGINAL ISSUES COMMITTEE/COMITE SUR L'EQUITE ET LES
AFFAIRES AUTOCHTONES**

Mandate

16.1 The mandate of the Equity and Aboriginal Issues Committee is,

- a. to develop for Convocation's approval, policy options for the promotion of equity and diversity in the legal profession and for addressing all matters related to Aboriginal peoples and French-speaking peoples; and
- b. to consult with the Treasurer's Equity Advisory Group, Roti io' ta' -kier, AJEFO, women and equity-seeking groups in the development of such policy options.

REPORT FOR INFORMATION

Report of the Admissions Committee

Admissions Committee
January 27, 2000

Report to Convocation

Purpose of Report: **Information**

Prepared by the Policy Secretariat

TABLE OF CONTENTS

I. INFORMATION

41st Bar Admission Course Examination Results 3

TERMS OF REFERENCE/COMMITTEE PROCESS

The Admissions Committee met on January 13, 2000. In attendance were:

Committee members:

Nancy Backhouse (Chair)
Edward Ducharme (Vice-Chair)
Thomas Carey
Gillian Diamond
Stephanie Willson

Staff:

Bob Bernhardt
Mary Floro-White
Ian Lebane
Susan Lieberman
Maria Paez Victor
Charles Smith
Roman Woloszczuk

This report contains an information item on the examination results of the 41st bar admission course.

I. INFORMATION

41ST BAC EXAMINATION RESULTS

- 1. The Committee discussed the following examination results of the 41st bar admission course submitted by the Director of Education:

41ST BAR ADMISSION COURSE
EXAMINATION RESULTS

COURSE (In order of offering)	PASS MARK (English and French)	% PASSING
Civil Litigation	65% (E & F)	94.7
Family Law	60% (E), 57% (F)	90.2
Public Law	60% (E), 58% (F)	92.7
Professional Responsibility	64% (E), 60% (F)	91.0
Real Estate Law	60% (E), 57% (F)	88.8
Estate Planning	58.4% (E & F)	91.2
Criminal Procedure	64.7% (E & F)	95.0
Business Law	56.7% (E & F)	93.2

Overall, 357 students failed at least one examination (30%) and of these 180 (50%) were eligible to pass as a result of the application of the aegrotat criterion.

Approximately 180 students will have to pass at least one supplemental examination in order to pass the Bar Admission Course. Therefore, the overall passing rate for the Bar Admission Course was approximately 85% prior to the writing and marking of supplemental examinations.

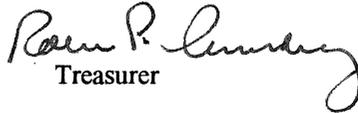
With respect to the new examination appeal process, 189 appeals were submitted. Of this number 43 were not heard as the application of the aegrotat made the determination of the appeal unnecessary. Of the remaining 146 appeals, 22 were from students writing the exams in French. The number of appeals per course varied from a low of 2 in Business (where the examination was multiple choice⁴), to a high of 48 in Professional Responsibility. Of the 146 appeals which were decided, 19 resulted in no change to the grade, 19 resulted in a change of 6 marks or more, and 108 resulted in a change of from 1 to 5 marks. None of the appeals on the multiple choice exams resulted in a failed paper moving to a pass. Overall, 38% of the appeals resulted in a failing paper moving to a pass.

Attendance is no longer mandatory in Phase Three. The recorded attendance varied from a high of 75% for Civil Litigation to a low of approximately 52% in Business Law. The term "recorded attendance" is used since if an instructor fails to record the attendance we record the attendance for that class as zero. As a result, actual attendance may be somewhat higher than these numbers indicate. (Data as of January 12, 2000)

2. The Committee directed the Director of Education to seek the advice of Rodi-oi-ta-kier with respect to the examination results of aboriginal students.

CONVOCATION ROSE AT 4:45 P.M.

Confirmed in Convocation this *18* day of *February*, *2000*


Treasurer