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Jeudi 7 septembre 2006

Standing committee on justice policy

Comité permanent de la justice

Access to Justice Act, 2006

Loi de 2006
sur l'accès à la justice

Chair: Vic Dhillon
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ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON JUSTICE POLICY

COMITÉ PERMANENT DE LA JUSTICE

Thursday 7 September 2006

Jeudi 7 septembre 2006

The committee met at 0905 in room 151.

ACCESS TO JUSTICE ACT, 2006

LOI DE 2006 SUR L'ACCÈS À LA JUSTICE

Consideration of Bill 14, An Act to promote access to justice by amending or repealing various Acts and by enacting the Legislation Act, 2006 / Projet de loi 14, Loi visant à promouvoir l'accès à la justice en modifiant ou abrogeant diverses lois et en édictant la Loi de 2006 sur la législation.

CANADIAN MEDICAL PROTECTIVE ASSOCIATION

The Vice-Chair (Mrs. Maria Van Bommel): Good morning, everyone. I want to call this public hearing of the standing committee on justice policy to order. I want to welcome committee members, the public and presenters. The first order of business is a presentation by the Canadian Medical Protective Association, if they could please come forward.

Good morning, gentlemen, and welcome. You have 30 minutes. If you use up the entire 30 minutes for your presentation, there will be no time for questions or comments from members of the committee, but otherwise, you're welcome to use as much as you need and then we will have further discussion. If you would please just give your names for the record and then proceed.

Dr. Bill Tucker: Good morning. I'm Dr. Bill Tucker. We thank you for the opportunity of presenting our submission, Madam Vice-Chair and members of the committee. I'm a neurosurgeon in charge of the division of neurosurgery at St. Michael's Hospital here in Toronto and I'm the vice-president of the Canadian Medical Protective Association, which we will hereafter refer to as the CMPA.

The CMPA is a not-for-profit mutual defence organization operated for physicians by physicians and it provides professional liability protection to approximately 69,000 Canadian doctors, including 27,000 here in Ontario. The CMPA also compensates patients who have been shown to have been harmed by negligent medical care. As a not-for-profit organization whose modus operandi is to balance, over time, its costs and revenues, the CMPA has nothing to gain financially or otherwise from this bill.

I'm joined by Dr. John Gray on my right, the CEO and executive director of CMPA. Dr. Bill Beilby, the associate executive director, and Mrs. Margaret Ross, general counsel for the CMPA, are also with us and available for questions at the end of the presentation.

We're here to speak to you about the provisions of the bill that deal with periodic payments, or what are commonly called structured settlements in medical liability cases. Specifically, the element of the bill is that which clarifies section 116 of the Courts of Justice Act.

With over 100 years of experience, and as a national organization, we believe we're in a unique position of feeling the effects of medical-liability-related legislation across the various jurisdictions of the country. We have observed how courts have interpreted such legislation and what the positive and negative impacts have been. We know that decisions of Ontario courts have, to a significant degree, veered away from the original intention of the existing provisions of the Courts of Justice Act. Accordingly, we are very pleased that this amendment has been introduced to reaffirm the original legislative purpose: namely, that periodic payments should be preferred as the means of compensating those who are harmed as a result of negligent medical care.

The committee staff has received our written submission, which describes the substantive advantages provided by the proposed legislation. In our brief remarks today, we wish to build on three key themes. Firstly, by eliminating any doubts as to the future compensation flows, structured settlements are beneficial to injured patients. Secondly, by reducing overall costs while providing the same level of compensation to the injured patients, structured settlements enhance the sustainability of the medical liability system. Finally, as medical liability costs form part of the overall health care expenditures, structured settlements enable authorities to free up monies from overhead costs and to make them available for patient care.

Before passing the microphone to Dr. Gray, let me momentarily take off my hat as an elected member of the CMPA council and speak to you as a practising physician and surgeon. Nothing is more traumatic for a doctor than to have a patient injured in the course of medical care. This emotional distress is shared by the patient and by his or her loved ones. This trauma is many times greater

when it has been determined that the injury has occurred as a result of negligence. In these circumstances, a key element of alleviating some of this distress is knowing that, for the remainder of the injured patient's life, there will be a guaranteed compensation flow to enable them to receive the treatment they need. Structured settlements provide that assurance and, if for no other reason, are worthy of your support.

I will now ask the CEO of the CMPA, Dr. John Gray, to speak to these issues in greater detail.

0910

Dr. John Gray: Thank you, Dr. Tucker. Let me preface my remarks by stating that, while I am currently the CEO of the CMPA, I too understand the impact on patients and their families of an adverse medical event. I practiced for 26 years as a family doctor in Peterborough.

The effect of the proposed amendments would be to ensure the consistent use of periodic payment plans, or what are often referred to as "structures," as a means of providing compensation for the cost of future care to those injured through medical negligence. As Dr. Tucker has stated, this would bring significant benefits to the health care system as a whole and to its liability component. Most importantly, these benefits can be achieved while ensuring full compensation to injured patients.

Opponents of structured settlements often suggest that periodic payments shortchange the injured patient. I will highlight for you that this is an absolute falsehood.

Before looking at the benefits they provide, let me offer a quick word on how structures actually work. Traditionally, future care costs awards in a medical malpractice lawsuit have been in the form of a one-time, lump sum payment; but courts and commentators have long recognized that lump sum awards are less than adequate as a means of providing for an injured party's costs of future care.

Structures reflect the realities of patient care by paying out the cost of that care over time rather than as a single, once-and-for-all lump sum payment. This is achieved by purchasing a guaranteed annuity from a Canadian life insurance company which, in turn, pays the injured party the required periodic payments, usually on a monthly basis, and almost always for the rest of his or her natural life. The only exception is if the injured party directs otherwise at the outset.

This guaranteed flow of payments comes at no risk to the patient. The risk is absorbed by the insurance company that issues the annuity. The insurance company in question manages this risk through a comprehensive understanding of life expectancies and by spreading it over many cases.

From a patient's perspective, there are actually two critical risks associated with the lump sum approach, both of which are effectively addressed by structures. There are compelling social policy reasons why a structure is a preferred means of compensating an injured party for future care costs.

The first risk is that lump sum awards are subject to premature dissipation, leaving injured parties reliant on any other savings they may have—or they may actually become dependant on the state at some future time. The danger is particularly acute when, as is often the case, the injured party is a minor or is not competent to manage their affairs. A number of factors can contribute to dissipation, including but not limited to poor investment decisions or the vagaries of financial or equity markets.

The second major risk is that the patient outlives the projected lifespan on which the lump sum payment was based. The lump sum award is calculated by capitalizing the projected costs of future care over a set period of time, usually the court's educated guess as to how long the plaintiff is likely to live. That estimate is inherently highly prone to error. Canada has very good statistics on average life expectancies of whole populations or segments of populations, but courts, actuaries and doctors cannot predict with any degree of certainty how long an individual patient will live. So when someone receives a lump sum for their future care, there is a very good possibility the person will live longer than expected. Even if well-managed, the lump sum eventually proves inadequate to provide for that person's long-term-care needs.

Structured settlements address both of these concerns by making regular and indexed payments for the duration of the person's actual rather than projected life. If the injured person survives much longer than had been predicted at the outset, the additional costs of care are assumed by the insurance company rather than by the injured party.

In a presentation during your spring sitting you heard that structures are inflexible and cannot respond to changes in medical practice. Such a statement is, quite simply, wrong.

While I would hope it would not be the case, let's assume in the worst situation that the procedure or technology does not fall within our publicly funded health care system. In developing the structured settlement amount, courts have full flexibility to take into account such changes and to make provisions for them in determining the cost of future care. In this respect, it's important to remember that the largest differentiation between periodic and lump sum payments is not the calculation of the cost of future care but rather how efficiently and effectively those needed funds are provided.

Let me now shift the perspective away from the patient and focus for a few minutes on the sustainability of the health care liability system. Why is maintaining an effective liability system important? Firstly, it ensures that compensation is available to patients who have been injured as a result of negligence; and secondly, it enables health care providers to practise, knowing that their patients would be compensated and that they are not personally exposed to financial ruin.

In international circles, it is widely recognized that Canada's tort-based medical liability system is one of the most effective in the world. We should not, however, take this system for granted. We only have to look south of the border to see where spiralling medical liability costs have led to the withdrawal or collapse of several

medical liability insurers. The result has been that injured patients have been left without access to compensation and, in many cases, physicians have exited high-risk specialties because they cannot afford the insurance premiums. While we tend to look to the US situation, there are regrettably many other international examples where uncontrolled costs have created crisis situations.

There is therefore a pressing need to contain costs and to ensure the stability of a medical liability system which allows physicians to practise without fear that a lawsuit will lead to financial ruin, while also providing a secure source of compensation for their patients injured by negligent medical care.

The CMPA, in partnership with the Ontario Medical Association and the Ministry of Health and Long-Term Care, has been engaged in a process to seek ways of containing medical liability costs. We have pursued these efforts through various discussion groups involving the plaintiffs' bar, the defence bar and the judiciary. What has clearly emerged from these discussions is that reducing medical liability costs does not have to be at the expense of deserving plaintiffs. Structured settlements can substantially lower system costs while still providing full compensation to those injured from negligent care. They provide the same benefit to an injured party at a substantially lower cost to the system, and I will very quickly examine how this occurs.

Insurance companies are highly skilled at risk analysis and have the opportunity to spread their risk associated with a particular case over many thousands of cases in a manner that an individual person simply cannot. As a result, the cost of purchasing a structure annuity that pays out a given stream of income is often lower than the cost of providing that exact same income stream through a lump sum payment using traditional methods. The result is a direct savings to the medical liability system without any resulting loss to the injured party.

Some might argue that insurance companies operate to make a profit and hence add costs to the structured settlement, and this is true. It's also true that they operate in a highly competitive and global market that tends to control those costs. We should also not lose sight of the fact that there are similar costs with lump sum payments. As the lump sum is intended to be invested to provide a stream of income over a long period of time, professional advice is generally required, leading to management fees, which in turn are paid by the medical liability system. With a structure, the life insurer guarantees payment of the required stream of income to the injured party, and no outside professional help, and therefore no management fee, is necessary.

A highly significant inefficiency inherent in a lump sum award is what is known as income tax "gross-up." While the lump sum award is tax-free in the hands of the injured party, the income derived from the return on the investment is taxable. Taxation on the income derived from the lump sum payment has the effect of depleting the money intended to be available to meet the injured party's needs. Therefore, the courts have required defendants to "gross up" the lump sum payments to offset the plaintiff's resulting income tax liability. The defendant must, in effect, pay the plaintiff's taxes up front.

0920

These gross-up awards can be significant. In a typical case, they can add tens or hundreds of thousands and, in some of our cases, millions of dollars to the award for future care costs. Yet this gross-up does not provide any benefit to the injured party; it merely flows through the injured party to the federal government coffers in the form of tax revenue.

These additional costs are again borne by the medical liability system, but they are entirely avoidable through the use of a structure. The Canada Revenue Agency has ruled that periodic payments received as part of a structure are tax-free in the hands of the recipient. Therefore, there's no requirement to gross up the award to offset any income tax liability. This can and will produce significant, tangible savings to the medical liability system without any resulting loss to the injured party. Rather than having to compensate the plaintiff for his or her income tax liability, a structure eliminates that tax liability altogether.

So we can see that the use of lump sum payments generates a great deal of overhead costs. In our written submission, we have identified the savings that are achievable through the mandatory use of structures, but I'd like to highlight some of those numbers for you. I'd first ask you to note that our calculations are based on those cases in which CMPA member physicians alone are involved. However, there are many additional cases involving other health care providers, clinics and hospitals in which savings would also accrue. We've also adopted conservative assumptions, so what I am providing represents the very low end of the potential savings.

If we compare a situation in which there's no use of structures for future cost of care with the situation in which structures are used as outlined in the bill, the annual savings in Ontario would be approximately $2.7 million. But it's our experience that when injured persons adopt a periodic payment approach, they also structure the loss of future income component of the settlement. Under such circumstances, the cost reduction grows to approximately $5.1 million annually. Given the backlog of cases still moving through the legal system, there would also be very significant one-time savings, which are also spelled out in the submission.

Ultimately, the cost of the medical liability system is borne by the health care system as a whole. In Ontario, as throughout Canada, a portion of a physician's medical liability protection costs are paid for by the provincial health care budgets. These costs were negotiated by the Ontario Medical Association in lieu of increases in fees for clinical services. The Ontario government and independent agencies accept that this forms an element of physician compensation. Thus, every dollar that the province can save in the medical liability system is a dollar that's already in the MOHLTC budget that can be spent on the delivery of direct patient care.

As I have just described, these potential savings of a minimum of $2.7 million, and potentially much more, each year do not represent reduced compensation to patients. They are solely unnecessary overhead costs, largely in the form of tax payments that, through a circuitous route flow, from the Ontario health care budget to Revenue Canada through tax gross-ups.

I would reiterate that this is not mythical money or phony paper transactions. These are funds currently in the health care allocation that we believe could and should be used to improve patient care in the province. The mandatory application of structured settlements achieves this goal.

The courts have frequently commented on the deficiencies of lump sum awards and the merits of periodic payments but have ruled that only the legislative branch could effect such a reform of the common law. Indeed, other provinces have heeded this call and introduced legislation similar to that before you. In Ontario, there have been successive attempts to make them mandatory in a variety of contexts. Unfortunately, the wording of those legislative provisions was interpreted by the courts as limiting their ability to apply the benefits of a structure fully and consistently. It's our hope that the suggested new wording of all of the provisions relating to structured settlements will serve to appropriately guide the courts and remedy the problems.

Let me close by saying that, in conjunction with the Ministry of Health and Long-Term Care and many others, we have fought hard for the proposed provisions because we believe they're beneficial for patients, the medical liability system and health care in this province. They are sound social policy and make financial sense.

We applaud the introduction of these provisions. We hope that you'll recommend their swift passage.

Madam Vice-Chair, thank you again for the opportunity to present CMPA's comments on the provisions in Bill 14 to amend section 116 of the Courts of Justice Act. Dr. Tucker and I, along with our two colleagues, would be pleased to answer your questions.

The Vice-Chair: Thank you very much, Dr. Tucker and Dr. Gray. We have three minutes for each side and we start the rotation with the official opposition, Ms. Elliott, please.

Mrs. Christine Elliott (Whitby–Ajax): Thank you very much for your excellent presentation. I'm certainly familiar from my own past legal practice with respect to structured settlements and how helpful they are, particularly in situations where you may have a person who's been injured who was not mentally competent or was a child, for example. Even though they have litigation guardians, it's always a good idea, because they're so young, to have that future guaranteed income stream.

But with respect the amendments that are proposed, it's suggested that there be periodic payments awarded unless it would be unjust to the plaintiff to do so. Could you give me some idea of what you think would be a circumstance that would justify a lump sum payment instead of a periodic payment? Would there be really very many at all?

Dr. Gray: I think all of the risks that we talk about, premature disposition of the funds with a lump sum, are taken away by the structures. It's hard to conceive, quite honestly, of situations in which a lump sum would be clearly, on its merits, superior to the structured payment. There have been suggestions about the inflexibility, the lack of ability to transfer the funds, but in reality the bill talks about the future health care/medical care costs and that these funds are expected to be used for those types of payments. Indeed, the structure is designed to ensure that those payments will continue in the manner in which the courts intended for the actual lifetime of the plaintiff rather than trying to guess, as is often the case, at a point in time how long that person will live.

Mrs. Elliott: Thank you very much.

The Vice-Chair: Mr. Kormos?

Mr. Peter Kormos (Niagara Centre): Thank you, gentlemen. You're not suggesting that courts can't provide structured settlements in their awards now, are you?

Dr. Gray: They cannot order them against the wishes of one or the other parties at the present time.

Mr. Kormos: Well, if it were in the best interests of both parties, which is what you're suggesting, why then would either party object? Irrational respondents or defendants or plaintiffs?

Dr. Gray: I can't speculate on the motives of why people would object. I have seen arguments put forward that would suggest that the periodic payment approach would be superior. What we've tried to suggest today is that in fact those arguments can be countered with equally credible and, in my view, much stronger arguments that the benefits of structures far outweigh the benefits of periodic payments. In the midst of a court action and a negotiated settlement or, ultimately, a court decision, people's ability to see through all of those rational arguments is often impaired in the heat of those legal environments.

Mr. Kormos: I'm troubled by creating legislation that fetters judges' discretion, and I appreciate the application for lump sum provision. Why shouldn't the legislation read "may" instead of "shall"? Wouldn't that address all of the concerns?

Dr. Gray: I guess the best way I can try to answer that question is to say that the courts themselves have said, "We want our discretion fettered." Through Justice Coulter Osborne during his inquiry in Ontario and the Chief Justice of the Supreme Court of Canada, both prior to appointment to the bench and since, have stated that the courts would prefer not to have that discretion but that the Legislature must in fact take that discretion and, to make it in clear language, take that discretion away. Otherwise, their discretion is fettered.

Mr. Kormos: But in fact they do have discretion by virtue of subsection (8), don't they?

Dr. Gray: But as I say, these eminent members of the bench have themselves said that they believe that lump

sum payments are not the preferred method, that the method that should be used is structures, but unless they're ordered to do so or unless the legislation makes it clear that they must do so, they cannot—

Mr. Kormos: I hear you, but subsection (8) creates discretion.

0930

Dr. Gray: Only in extremely unusual cases where it's contrary to the interests.

Mr. Kormos: It says, where "the plaintiff satisfies the court that a periodic payment award is unjust." But your interpretation of that language is different from mine. Thank you kindly.

The Vice-Chair: The government.

Mr. Ted McMeekin (Ancaster–Dundas–Flamborough–Aldershot): Gentlemen, I appreciate your presentation as well. My spouse is a practising family physician. I suppose if Mr. Chudleigh were here, he might suggest I have a conflict of interest. But notwithstanding that—

Mr. Kormos: I'd suggest you're very fortunate to be married to a physician.

Mr. McMeekin: Listen, all kidding aside, I'm very fortunate to be married to the young lady I'm married to, I can assure you of that. And I can attest experientially to the escalating costs of medical liability insurance. It is a real difficulty. That, of course, has to be juxtaposed to the mitigating negative spiral around settlements to injured people in all kinds of situations, which I think ought to concern everybody in this room.

I just wanted to suggest that I found your presentation not only interesting but instructive. I will commit, Madam Chair, to personally ensuring that the finance minister sees this as well. I think it's properly something that he needs to look at and perhaps consider addressing.

The Vice-Chair: Thank you very much. Thank you, gentlemen.

HEALTHCARE INSURANCE RECIPROCAL OF CANADA

The Vice-Chair: If we could have the Healthcare Insurance Reciprocal of Canada come forward, please. Good morning, gentlemen. You have 30 minutes for your presentation. If you use up the entire time for your presentation, then there will be no opportunity for comment or questions by members of the committee. If you would please state your name before you start, and then we will go ahead.

Mr. Michael Boyce: Thank you, Madam Vice-Chair. I am Michael Boyce. I am the vice-president of claims for the Healthcare Insurance Reciprocal of Canada. To my right is Brian Main, the vice-president of insurance operations for HIROC. We have come to speak to you about a very specific section of Bill 14. Could I ask the committee members if you've seen my presentation? I see Mr. Kormos has a copy. Everybody has it? Okay, then let's get going.

Let me apologize in advance. This is the first time I have ever attempted to speak to a committee, so I hope and pray that you'll give me a little bit of discretion. I will try not to insult anybody and I'll try to tell the truth.

Mr. Kormos: You're ahead of most of us.

Mr. Boyce: Thank you, sir.

Mr. McMeekin: I just assumed you were going tell us the truth.

Mr. Boyce: First, I thought I'd tell you why we're here, and that involves telling you what HIROC is and why this is important to us. Then I intend to comment a little bit about structured settlements in general, although the CMPA's presentation and their handout, which they were kind enough to give to me, seem rather instructive on that. I'll talk a little bit about the advantages to structure in the hands of both the successful plaintiff and defendant to an action, and society as a whole, and then close with an encouragement to you folks to at least pass the portion of Bill 14 which amends section 116 of the Courts of Justice Act.

HIROC was founded in 1987 as a result of the liability crisis in medical malpractice in Canada. Back then, our hospitals were experiencing doubling and trebling of insurance premium rates because of some judgments which severely increased the settlement values of cases and, as well, potentially increased the liability of defendants for certain types of actions. We are a not-for-profit reciprocal, which means that we're not an insurance company, although we are an insurer under the Ontario legislation. We are completely owned by our not-for-profit health care subscribers. While we originally started out in Ontario because that's where the liability crisis was, we have expanded over the years, and we are now in probably a majority of Canada. Our hospitals and health care providers cover about 19 million Canadians in total. We insure all the midwives in Ontario. We insure, for example, every hospital in Toronto. We have about 90% of the critical care beds in Ontario, and our penetration is even greater in many of the other provinces.

We collected $115 million in premiums—thanks to Brian—this year. That's the good news. The bad news is, of course, it was collected from the not-for-profit health care subscribers who are members of HIROC, and those are the hospitals, for all intents and purposes, that you people provide funding for. More than 85% of our premium comes from Ontario, and we also, in addition to the hospitals, insure the employees of the hospitals—so all the nurses, all the technicians; even the odd board chairman and CEO of the hospital come under our purview.

We have a few advantages over a traditional insurance company, and that's why we spread across Canada so quickly. One is that our subscribers get back all of the unused premium and our investment income. So if we can't spend it, we give it back to the subscribers. This has the net result of being terrifically efficient for the subscribers. To date, and since 1987 when we were founded, we've returned about $75 million to our subscribers. That's money that goes right back into the health care system. Our channels of distribution, because

we are a not-for-profit organization and don't pay taxes on income to the federal government, are terrifically efficient, and our not-for-profit status, I think, helps us an awful lot.

We have a couple of functions. We were originally started out just to defend claims made against our subscribers, but we decided to branch out very early on in our existence, and a very significant part of what we do now is related to risk management activities.

One of the more recent ones that we have done is to provide very significant funding for the MORE^{OB} program, which is a program to improve the birthing facilities in the various hospitals. This is something which was conceived by the Society of Obstetricians and Gynecologists of Canada. It's a computerized training-learning experience, which involves not just the nurses, but also the physicians and the organizational structure of the hospital. It has received rave reviews from the people who have tried it, and it has very recently been adopted holus-bolus by the provinces of British Columbia and Alberta for use of all their hospitals. It has not been adopted by the Ontario ministry yet, but since we effectively reach about 90% of the critical care beds, they may figure that we're doing some of the work for them.

Finally, our job is also to further our vision, and our vision is to partner with other entities to provide the safest health care system in Canada. That's why we provided significant funding to the SOGC and to our hospitals, to enable them to take the MORE^{OB} program. It's why we invest so much time and effort in the risk management activities, and it's also the reason I'm here today, because I see a slight opportunity for us to maybe improve the provision of health care services, because one of the ways that we can provide a safe health care environment is to provide more money to the health care system.

We give back the money that we don't spend already, so that's pretty nice. But we also have an obligation to make sure that we're efficient in how we operate and to assist our subscribers in being efficient in how they operate. The thought struck us that it might be a really good thing to look at the legal system that we practise health care in, to make sure that it's as efficient as possible in the system that it provides.

So we've examined a lot of things. We've examined the cost of the legal adjudication of claims. We've examined the cost of our overheads, our legal overheads, and other types. Finally, we took a look at the cost of providing settlement funds to worthy plaintiffs or claimants. We decided that the most relevant way of determining what our real cost is, is to look at the net present value of it. Oddly enough, that net present value seems to be exactly what structured settlements involve.

0940

We looked at what a compensation system is intended to do. The first and principal aim of a compensation system is to fairly compensate someone who has been injured through the fault of others. A secondary aim is to not overcompensate the claimant. A third aim is to take all reasonable steps to ensure that the safety of the funds provided for compensation is maintained. Finally, the obligation, we feel, of a fair compensation system is to be efficient.

I may not get agreement from everybody here, because I know there are some lawyers here, but the primary aim of the tort system is not to provide for the care and feeding of lawyers; it is to provide for the fair compensation of justified plaintiffs and the fair defence of justified defendants, and hopefully to make things go smoothly and as quickly and painlessly as possible.

Our experience—and our experience is now coming up on 20 years of medical malpractice—is that in addition to the settlement costs we pay to the plaintiff, the plaintiff's solicitor also gets an additional 10% to 15% as costs. We know as well that the successful plaintiff lawyers generally work on a contingency fee system, so they get an additional sum of monies for their work from their own client.

We're coming now to my points about the common objections to structures, and there are basically five. One of them is that you can't change a structure once you set it up. The second one is that the complexity and litigation created by arguments over and impositions of a structure will result in greater legal expense. The third one is that it goes against over 200 years of common law. The fourth is that there is an inability to pay for new and revolutionary treatments if they do arise, because you've already set up the structure system. And fifth—possibly not too major an objection—is you may find that the insurer who issues the structure may go bankrupt and be unable to make payments.

All of these do have some validity as objections, but when you take a look at them one by one you can see that the way structures are set up, as proposed by the amendments to the Courts of Justice Act, these objections are pretty much overcome quite well.

First of all, the objection that you can't change it once you set it up—well, that's pretty much the system with any settlement at present, whether it's a lump sum payment or a structured settlement. I did have the opportunity to watch Mr. Howe from the Ontario Trial Lawyers Association make his presentation here. He's a very good speaker, far better than I am. He mentioned that once a structure agreement was set at $2,000 a month, that was it—there was no provision for inflation and/or other increases. That's not really correct under the provisions of the proposed amendment, because it specifically allows for inflation to be calculated into the structured settlement.

There is an argument that complexity in litigation is created and will result in greater legal expense. I can handle that a couple of ways. My thoughts are that because most plaintiff solicitors are compensated on a percentage basis of the ultimate settlement, whether they spent an hour or whether they spend 100 hours on a case doesn't really matter too much.

My second, and the real observation here, is that complexity already exists. At the mediations I've

attended, at the trials I've attended, at the pretrials I've attended, I've listened to hours of discussion about what the right and what the wrong way of calculating dollars and calculating lifestyles and lifespans is. Structure, here, has an advantage, because you can get a quote on a structure—a certain amount of money will buy you a structure of, say, $1,000 a month for life. You put all of this argument out to the market and you get the insurance companies who are providing the structures to give you the quote, and that's the value of the structure—that's how much the structure is going to cost.

We can argue about the expected lifespan from here to eternity, if we want, in the pretrial and in the trial sections of the court, but the end result is going to be that if you want to purchase a structure, you have to enter into a contract with the life insurance companies which provide the structures, and they're not bound by the provisions of the court to assume that the plaintiff is going to live for 60 years or 65 years. They're going to put the medical information out to their specialists, who are going to come up with a fairly conservative estimate, and by "conservative" we mean a long-lived estimate. They're going to charge a price to ensure that they can make enough of a profit on these structures to carry on business. They do make a profit, because if they didn't, they wouldn't offer these, but the analysis that you can perform shows that the profit they make is less to HIROC, to the health care system, than is the cost of the lump sum payments with gross-ups. In essence, having the structure actually reduces the legal arguments.

I've heard that it also tosses out 200 years of common law, and that's kind of an interesting observation. I think that we have to assume that the financial system in Ontario was not quite as advanced 200 years ago as it is now. It didn't permit contingency fees, it didn't permit class actions, and these are all things that the government has quite rightly decided should be overseen and should be approved.

The reason you're here is to modify, codify and institute new law, not just accept what the courts have said. Later on, I have included the relevant extract from the Supreme Court of Canada decision, Andrews v. Grand & Toy, and it mentions this latter point in particular.

The inability to pay for new treatments if they become available is not prevented under the amendments that are proposed. The judge hearing a case can clearly make provision for this if he or she so desires in the form of an additional sum that could be set aside. I think that those areas are pretty well covered.

Finally, the risk that an insurer can go bankrupt can be dealt with in several ways. When we purchase a structure in our settlements, we always have it insured by a second insurer who undertakes that if the first insurer who's providing the structure should go bankrupt, the second insurer will take over the payments, so in effect it's a guarantee of the ability to meet payments. The judges we have dealt with are very happy with this concept because it does provide additional certainty that the required payments will be met and the judge then doesn't have much of a problem in approving a structured set-up. It has an additional advantage of allowing an organization like HIROC to take the structure off its books.

So there are several advantages of structures. You've heard the CMPA presentation—very impressive and I don't think I can improve on it. In summary, it allows for a much more accurate matching of costs and expenses. Accountants like that; I like that. It increases the safety and security of funds because they are going to be there when they're needed. There is not the risk that a lump sum will have been dissipated in either rather poor investments or by rather poor decision-making early on in the process of spending it. The structure does lead to very significant cost reductions. As you heard in the final portion of the CMPA address, it does effectively end the provincial transfer payments to the federal government in the form of gross-up, which I think is not a bad thing for you folks to aim for. The competitive market and the government supervision of the suppliers does tend to ensure that lower costs, commensurate with safety of funds, is going to be realized. You'll see a reduction in your total legal costs. This is me; I'm the guy who signs the cheques for the lawyers, who's telling you that I fully expect to see structured settlements leading to a reduction in legal costs, not to an escalation of legal costs. We believe it's fair to plaintiffs and defendants alike.

What kinds of savings can be expected? CMPA has published data and you've heard it today, suggesting that imposition of this would result in savings of just under $3 million annually from their budget. We don't experience the same types of claims as CMPA does. Generally, those claims with structure components for us tend to involve newborns, and there are other provisions in the Income Tax Act which reduce the need for lump sum payments up to the age of 19 years. But in the cases the CMPA is concerned with primarily, these are adult plaintiffs who have been injured. We don't see too many of those in the hospitals, because the doctors hold the scalpel. As a result, our suggestions and our research indicate that our savings would be about a third of the CMPA's savings of just under $1 million a year. That is a fast and dirty estimate.

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Finally, because Andrews v. Grand & Toy has been mentioned several times in the presentations, I included a copy of the relevant extract from Mr. Justice Dickson in this and I took the opportunity to emphasize the portions which I think are of interest to you. Those portions are the following: "... both dictate that the appropriate body to act must be the Legislature rather than the courts. Until such time as the Legislature acts, the courts must proceed on established principles to award damages which compensate accident victims with justice and humanity for the losses they may suffer."

My suggestion is that structured settlements also compensate accident victims with justice and humanity for the losses they suffer. In view of the cost considerations, it is our recommendation that the provisions of Bill 14 as they relate to section 116 of the Courts of

Justice Act be passed by the Ontario provincial Parliament.

Madam Vice-Chair, I thank you very much for the opportunity and I'm open to questions.

The Vice-Chair: Thank you very much, gentlemen. We have about four minutes for each side. Mr. Kormos, would you start, please?

Mr. Kormos: Thank you, gentlemen. I understand the argument. I appreciate your submission.

Mr. Boyce: Thank you, sir.

The Vice-Chair: The government? Mr. Balkissoon.

Mr. Bas Balkissoon (Scarborough–Rouge River): Thank you for your presentation. I just have a couple of questions. In terms of statistics, can you provide us with your particular plan right now? What is your success rate in the courts, given your structured plan versus a lump sum?

Mr. Boyce: Absolutely, and this is a point which I guess has not been stressed yet. The Ontario justice system is actually very efficient, because only a very small percentage of cases that begin actually make it to the trial stage. That means that most cases are either abandoned or settled well prior to trial. What this means in terms of the provision of structures is that at present it is very difficult to secure a structure on a settlement without the threat of going to trial. This, I think, is one of the principal reasons why it makes so much sense to slightly modify the Courts of Justice Act, as section 116 does, to make it the presumption that structures will be offered, as opposed to that lump sum payments shall be made.

We don't take most of our cases to trial. When we go to trial, our success rate at trials in anything other than Small Claims Court cases is 100%. We expect that to change, but the reason it's 100% is that we believe in making prompt, fair settlements where settlements are warranted. Our experience is that basically maybe far less than 2% of our cases go to trial. I'd say less than 1% of our cases go to trial.

Mr. Balkissoon: My last question is, in terms of structures, if the person has suffered the consequences of malpractice or whatever, are there clauses in the structure that have a payout at the end if that person passes away early and they've got young children left or a spouse who has not been working? Is there a lump sum or a continuing payment to, say, age 19 or as long as the spouse is alive, some type of beneficiary?

Mr. Boyce: There can be provisions. I would point out that the amendment makes some specifications as to what can and cannot be awarded. I think a lump sum payment at the end might not meet with the approval of the courts. If it doesn't, then the court would be quite free to make a payment or to find that a lump sum payment for that type of matter is justified. You can purchase structures which are tied in not just to the life of the claimant but also to the life of the spouse and, if you wish, to the life of the children. It's a very good point, because you want to make sure that the interests of the plaintiff are properly protected. I believe that this type of structure as contemplated by the legislation is quite capable of meeting those concerns.

Mr. Balkissoon: Thank you very much.

The Vice-Chair: Ms. Elliott.

Mrs. Elliott: Thank you. As I indicated in my comments that you may have heard with the previous presentation, I do know the value of structured settlements in many situations. If it's mandatory, my concern is with respect to flexibility. If a person's circumstances change, perhaps several years after the structure is established, and perhaps they want to buy a house and equip it with an elevator and make it wheelchair accessible—and all of those changes, as you know, are extremely expensive—how would a structure be able to deal with that, or would they, if it only provides for periodic payments?

Mr. Boyce: There are two answers. The first is, you probably can set up a structure for that if you wish because you could have the structure change the value it pays in 10 or 15 years as the needs of the patient change. Many of the settlements that we have will have one annuity that goes for 10 years and then another annuity will start up at a different rate of payment simply because the needs of the plaintiff have changed and we have to recognize that. So you can set up a structure to do that. I think the best response is, though, that a good plaintiff counsel will have recognized these needs in future for his or her client and will have made this a condition precedent to any successful resolution, that this be recognized either by a payment or by a provision in the annuity, possibly by the lump sum payment that you had contemplated at the end of some structures.

The Vice-Chair: Thank you very much, gentlemen.

PROFESSIONAL AND INDUSTRY ASSOCIATIONS REPRESENTING THE ONTARIO CONSTRUCTION SECTOR

The Vice-Chair: If the Professional and Industry Associations Representing the Ontario Construction Sector could please come forward. Good morning, gentlemen, and thank you for coming in. You have 30 minutes for your presentation. You can use the entire 30 minutes or you can leave time for questions and comments by members of the standing committee. Before you start, if you would please introduce yourselves for the record.

Mr. Charles Simco: My name is Charles Simco. I'm counsel to the Ontario Association of Architects. With me are, on my right, David Frame, who is president of the Council of Ontario Construction Associations and, on my left, Tim Hutzul, who is attending on behalf of Ontario's general contractors and is an in-house counsel at Aecon construction.

The Vice-Chair: Thank you. If you would proceed, please.

Mr. Simco: We appreciate the opportunity to make these submissions to your committee today with respect to Bill 14. Our submissions are made on behalf of the Ontario construction sector. When the issue of Bill 14 arose, a number of stakeholder groups involved in the construction sector came together to consider the proposed amendments and to forge a consensus position. Our written submission, which I understand you have before you, has been filed and is the outcome of that process.

Our group includes the design consultants of Ontario through their respective professional associations, Ontario construction associations from across the province, Ontario general contractors, the Ontario surety industry and other organizations connected with the construction sector.

As I mentioned, we filed our written submissions but they are 17 pages long, and I will attempt to summarize the key points and then welcome any questions or comments which will help clarify our position for you.

Our position with regard to Bill 14 may be summarized under three points: First, the construction sector places a high priority on maintaining an ultimate 15-year limitation period under the 2002 Limitations Act which cannot be varied or excluded by agreement for unknown claims. So that is the first of our three concerns. Secondly, we support the reinstatement of tolling agreements to enable parties to suspend the two-year and 15-year limitation periods for known claims. Thirdly, we do not oppose an amendment of the 2002 Limitations Act which would allow parties who are not consumers the right to vary, by agreement, the two-year discoverability period.

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Having given you that condensed version, what is the practical effect of these three points?

First, our position is that the 15-year ultimate limitation period under the 2002 act should be preserved. So we keep it. Second, parties can however agree to extend or suspend a known claim—in other words, a claim which is discovered before the 15-year expiry date. Thirdly, nothing can allow the 15-year period, in our submission, to be extended unless it is for a known claim and the parties have entered into a tolling agreement. So if you don't know about the claim before the 15-year period is up, it expires. It's gone. If you know about the claim before the 15-year period is up and you're concerned about your right of action running out, then you can enter into a tolling agreement, which is really an unusual expression for a suspension agreement. It keeps the limitation period open for an agreed-upon period on agreed-upon terms so that, in effect, the 15 years is now stretched out, as the parties have agreed. Fourthly, the practical effect of those three issues is that the two-year limitation or discoverability period under the 2002 act could be varied by agreement, provided that you are not a consumer. Under the current legislation, of course, the two-year period cannot be varied, which has led to some of the proposed amendments. So under our proposal, we would submit that the two-year period would be allowed to be extended by agreement. We're differentiating the two-year from the 15-year, because we emphasize that the 15-year period should not be allowed to be extended except for known claims, whereas the two-year period could be varied, up or down, whether the claim is known or not, as long as it doesn't surpass the 15-year ultimate limitation for it. That 15-year period is like a ceiling, and nothing can go above that unless the tolling agreement kicks in.

How do we rationalize our position and how did we get to this consensus in the construction sector?

First, some background: Prior to the 2002 act, litigants had to contend with what amounted to indefinite limitation periods. For example, it was not unusual for an architect or an engineer or a construction company to be met with a claim 20 or 30 years after a project was completed. This state of affairs created real hardship for defendants in the construction sector, who would be caught off guard by such claims, usually in circumstances where they did not have insurance coverage or adequate coverage for this old claim. They likely had lost or disposed of their records and documents related to the project, witnesses were no longer accessible and memories had faded in any event. This would be the circumstance that a defendant or defendants would find themselves in when there was a problem with a building, say 20 or 30 years after it was completed. Under the pre-2002 legislation, there was the ability to launch these claims, and then there would be a major legal proceeding to determine whether the claim should be allowed to go ahead. This would result in heavy legal costs for the parties and would use up a lot of court time, each side trying to either advance or prevent the advancement of the claim.

But the root of the problem was the uncertainty fostered by an indefinite claims period under the pre-2002 legislation. If people are allowed to do something, they'll go ahead and do it and try to pursue their interest, but the 2002 act recognized that this was not an acceptable state of affairs. It corrected the problem created by the indefinite claims period by establishing a 15-year ultimate limitation period. The construction industry and others could order their affairs regarding insurance coverage, documents retention etc. with certainly that liabilities related to a project or a transaction would come to a clear end after 15 years.

The notion of being allowed, however, to contract out of the 15-year limit under the 2002 act was, in fact, first raised in the period leading up to its passage. The construction sector was consulted at that time regarding the possibility of inserting a contracting-out provision in the 2002 act. At that time, the construction sector stated emphatically, "No, that should not be allowed." Why should that not be allowed? That is basically for two reasons: Contracting out would lead once again to indefinite limitation periods. As in the pre-2002 act situation, there would be no clear end to liability, so you

could then once again have the potential for 20- or 30-year claims.

Secondly, the construction sector would be unable to avoid the contracting-out option due to what I refer to as an inequality of bargaining power. What does that mean? Well, the way the industry operates is that owners who invite tender bids for public buildings, institutional buildings, schools, hospitals, public infrastructure or private concerns have the ability in their tender documents—invitations for tender or RFPs—to embed or impose contract terms and conditions on contractors bidding for work. It's presented to the industry as a package: "If you want to bid on this project, we welcome your bid, but here's the contract." If contracting out of the 15-year period were allowed, then your contract, which you're now submitting your bid on, would include an extended limitation period. It's just the way the system operates. In a competitive environment, the bidders are under pressure to submit qualified bids. They can't tinker with the owner's standard terms and conditions, otherwise their bid will be rejected.

This is a very key element behind the concerns of the construction sector regarding the notion of being allowed to contract out of the 15-year period. It is really a problem for the industry if that were to be permitted.

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The ultimate 15-year limitation period which could not be varied by agreement eliminated that problem. That was the response under the 2002 act to that problem after consultation with the construction sector. Changing the status quo under Bill 14 would be highly regressive for the construction sector. Therefore, a lot of thought has been given to what would make sense, what would provide some added flexibility to the 2002 act to enable everyone to work with it. What we were then led to was to allow a suspension or extension of the 15-year period for known claims if the parties agree.

What is the distinction between "known" and "unknown"? I know you've heard me use—and I'm trying to emphasize the significance of "known" and "unknown," and I keep saying that the 15-year period could be extended for known claims. Well, in the case of a known claim, it means that within that 15-year period something has collapsed, something has leaked, something has burned down; there has been an occurrence which has led to a claim related to a construction project. At that point, this whole business of inequality of bargaining power is no longer a problem, because you've got two parties: one a plaintiff-owner, the other a defendant-contractor etc., who can decide how they're going to order the resolution of this dispute, and they're doing so on a level playing field. So they can agree to extend the period on terms, or if they can't agree, then the owner has the ability to commence its action within the 15-year period. But the ultimate ceiling is that, barring any agreement to extend, at the 15-year period, the claim is dead; it can't drag on and on and on.

We have gone through a consultative process with other parties who we understand have an interest in amendments to the 2002 act. In fact, we were informed as a group many months ago of some other interested parties who wanted to support the notion of being allowed to contract out of the limitation periods. We have met with a number of these parties. We have spoken with them. We have exchanged views. We believe that the outcome of that process has led to certainly not a formal consensus but to something approaching a common understanding of how these issues might be addressed, with one side perhaps at the beginning wanting complete flexibility to contract out of the limitation periods, and with our group at the outset wishing to maintain the status quo.

We travelled along a path of achieving what we regard to be something approaching a consensus—that is what I have already described to you, and it is set out in our written submissions—and that is that the 15-year period ought to be maintained, but it can be extended for known claims. The two-year period, which under the 2002 act cannot be varied by agreement, we have come to recognize, should be subject to greater flexibility. We thought that this was a primary issue for some of these other groups who were concerned about the two-year period sort of hemming them into a short limitation arrangement.

What we came to in terms of our internal discussions and our exchanges with these other interested groups was that we were prepared to accept that the two-year period should be opened up to greater flexibility, recognizing, however, as stated in Bill 14, that it should not include consumers. It should be opened up to everyone except consumers, and I believe that was the direction of Bill 14.

We have also reviewed the legislative approach taken by other provinces, and what we learned was that two other provinces have recast their much older limitations legislation, similar to Ontario's major revision in 2002. They include Alberta and Saskatchewan.

It's interesting to actually see what they've done because it sort of shows that these issues have already been considered in other forums, in other jurisdictions.

Alberta adopted a shorter ultimate limitation period in its legislation. It was a 10-year period. Alberta allowed parties to agree to extend it. There was not an ultimate limitation period in Alberta.

Saskatchewan, however, legislated a 15-year ultimate limitation period and prohibited any extension of it by agreement. Even the tolling agreement that we are referring to here would be a distinction from the Saskatchewan model, which says 15 years and that's it, and you can't agree to go beyond that. But it did authorize agreements to extend the two-year discoverability period under the Saskatchewan legislation. That is similar to where we have arrived in terms of our submission. They distinguish, as we have come to distinguish, between the two-year period and the 15-year period. Our model is a little more flexible on the 15-year period than Saskatchewan but less than Alberta.

We submit that the Saskatchewan act is basically the correct approach, as it fairly balances the interests of

plaintiffs and defendants and again provides certainty to how long a claim can survive. Fifteen years, they say, should be long enough for someone to figure out if they have a claim or not, and then, in the public interest, in fairness to defendants, the time is up after that.

A few words about the 15-year period: It should be noted that it was enshrined in the 2002 act following an exhaustive consultative process by the drafters of that legislation, with—according to the debates in the assembly at that time—consultation of over 100 organizations in different sectors, including the construction sector. Fifteen years was considered to strike the proper balance between plaintiffs and defendants, and we submit that it ought to be maintained. There's no reason to change that period. It's long enough, again, for a party to fairly determine whether or not it should proceed with a claim. As stated several times already, the tolling agreement would in fact create the possibility of further extending the 15-year period by agreement.

We have attempted to distill our submissions into proposed language which is set out starting at page 3 of our submissions. At the risk of appearing presumptuous, we thought it would, in a very clear way, demonstrate what we regard to be the practical application of our position in actual legislative language.

Subsection 11(2) on page 4 of our written submission—it's the underlined portion—addresses the proposed reinstatement of tolling agreements, and so it makes reference to parties being able to enter into agreements as set out in that section. If there are any questions regarding any of this, please don't hesitate, but I won't start reading the sections to you.

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Subsection 22(3), at the bottom of page 4, addresses the proposed amendment to allow parties who are not consumers to vary the two-year limitation period.

Subsection 22(4), on page 5 of the brief, addresses the proposed amendment to prohibit any contracting out of the 15-year period.

That is, in essence, our submission to you this morning. Thank you for listening. If you have any questions of any of us, we certainly welcome them.

The Vice-Chair: Thank you very much. We have eight minutes left for questions and comments, starting with the government.

Mr. David Zimmer (Willowdale): Thank you very much. I've had a chance to go over your submissions. Thank you for taking the time to organize your thoughts so constructively. We'll consider them very carefully.

Mr. Simco: Thank you very much.

Mr. McMeekin: I was curious about your juxtaposition of the 15-year/two-year. Was that seen as a pragmatic, moving-forward kind of compromise?

Mr. Simco: It was an effort to understand what other parties were actually getting at when they said that they were not in favour of the current regime. We understood that the two-year period was really their sore spot. The 15-year period wasn't presenting a problem for them but the two-year period was. In that respect, it's a bit of a compromise. We would have preferred to have retained the two-year period but we were, again, attempting to achieve a consensus.

Mr. McMeekin: So your suggestion is to extend that period with respect to a defined claim.

Mr. Simco: The idea would be to maintain the two-year period but enable parties to contract out of it. So the act would remain the same except that there would be a provision which says you can extend it up to 15 years.

Mr. McMeekin: I like that thrust. Thanks.

Mrs. Elliott: I also think that the distinction between the known and unknown claims is a very sensible way to go, and also your clarification, for persons acting "for business purposes"—switching that to consumers with a known definition is also very helpful, so thank you very much for that.

The Vice-Chair: Mr. Kormos.

Mr. Kormos: I remember well the day that the Limitations Act passed in the Legislature. It was an interesting course of events. Architects down where I come from were very supportive of the Limitations Act that passed.

Mr. Simco: Absolutely.

Mr. Kormos: I'm from small-town Ontario. Ms. Drent, will you please give us a little one-pager on tolling agreements?

Ms. Margaret Drent: Certainly.

Mr. Kormos: I never heard of them before in my life; I really haven't. But then again, I'm not particularly well-travelled or well-read so you've got to understand. A sheltered life, I suppose.

The problem is, your interest in wanting to be able to contract out of the two-year is to be able to be competitive in the course of tendering/bidding on jobs, right?

Mr. Simco: Yes.

Mr. Kormos: Let me put on, in this perverse moment, a right-wing, hyper-capitalist hat and say—

Mr. Zimmer: That's a change.

Mr. Kormos: Well, as I say, it is a perverse moment. Here you are, arguing for the right to contract out of the two-year—and I understand how that's a little more benign in its impact, right?

Mr. Simco: Yes.

Mr. Kormos: You want to be able to contract out of the two-year to be able to have competitive advantage, and here in this free enterprise world, you want to tell other people they can't contract out of the 15-year. It seems to me that if you've got two mature parties/entrepreneurs who presumably know what they're doing—but, for the life of me, I read the financial pages and I'm insistent that so many have no idea what they're doing. But you don't want them to be able to have competitive advantages by contracting out. Do you understand how I have—and I understand the difference between the 15-year and the two-year.

Mr. Simco: Yes.

Mr. Kormos: Now, the two-year is somewhat more benign, but here you are, entrepreneurs, free enterprisers; you don't necessarily want the protection of the state to be binding when it comes to the two-year, because you

want to be competitive, but boy, you want the state to be there and bind parties to 15 years, because you don't want to compete at that point. Is there a response to that modest dilemma on my part?

Mr. Simco: Yes. First of all, I caught your reference to tolling agreements, and when I first heard the expression, I thought it had something to do with a highway.

Mr. Kormos: Well, the Burlington Skyway tollbooths were shut down years ago. I remember them.

Mr. Simco: But you can just put the word "suspension" in place of "tolling." It's a suspension agreement and that's pretty much it. But with respect to your point, my view—and I'm a litigation lawyer and I can tell you that at some point people have to understand that they've got to give it up in terms of being able to launch a claim, because it becomes counterproductive. The point we were trying to make in our submissions is that after 15 years, entrepreneurs or non-entrepreneurs, it becomes an exercise in futility for a court to try to figure out what happened 15 years ago, for witnesses who have since died or disappeared to be able to testify. It really becomes a matter of justice and access to justice.

Mr. Kormos: You get no quarrel from me in that regard. I understand that argument.

Mr. Simco: Right, but how do we respond to an entrepreneur who's saying, "Well, I can do it for the two-year; why can't I do it for the 15-year?" The answer to that is that in the general public interest, it is recognized that after 15 years, barring the arising of a claim, you've lost your right. However, having said that, in the case of the construction sector, let me tell you that at key junctures, like at the end of a warranty period or approaching the end of a limitation period, it is certainly open to the parties—and many take advantage of this—to hire an engineer or an inspector to go on-site and say, "We need your opinion as to whether there is any evidence of a problem with our project, because if there is, we have to commence our action now." In other words, you see, the onus shifts. The onus shifts to the party with the potential claim to figure out whether they are going to proceed or whether they have a claim to proceed with—it requires some initiative on their part—as opposed to someone sitting back and 30 years later noticing some bubbling somewhere and then probing into it and starting an action after everyone has gone.

I think the answer to your comment is that it is open to the entrepreneur to take control of the situation and make a decision as to whether they're going to invest in a potential claim or not. I don't know if that has answered your question.

Mr. Kormos: Just very briefly, if your argument is on behalf of the integrity of the judicial system or the capacity of the judicial system to handle these sorts of claims, what if that same contract provided that any dispute was going to be resolved by way of private arbitration? There's no longer a public interest, right?

Mr. Simco: Right.

Mr. Kormos: The parties themselves will set up the forum. They'll bear the cost. You won't have overworked judges burdened with these cases where evidence is obscure. What about a case where a person wants to very privately agree not to submit to the 15-year limitation period but who, furthermore, will agree that any dispute is to be resolved in private arbitration? There will be no recourse to the public court. Wouldn't that address your concern, which I share, about how the court system handles 15-year-old-plus claims?

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Mr. Tim Hutzul: If I can address that as well, our proposal would allow parties for known claims to go beyond the 15-year period, but the problem, even in your solution with private arbitration, is the tremendous cost to people in terms of human capital, storage, litigation costs, insurance costs for maintaining the records and much of the construction work that's done in the province of Ontario. I represent one of the largest construction employers in the country, but much of the work that's done even through us is done through small sub-trades, so asking those types of companies to carry these types of records and insurance and other costs past the 15-year period makes it very uncompetitive. There are problems already in this province with the huge infrastructure deficit and Alberta acting as a magnet, drawing people away from the construction industry in Ontario.

I can tell you from personal experience, we've had a couple of claims that were almost 30 years and 50 years in duration. Obviously, you can appreciate that the people are long gone. At that point it also, in my view, calls the administration of justice into dispute, because it comes down to a record-keeping process and whoever has the box in storage. Our company has a huge amount of storage costs for boxes and boxes of things, going back 15, 20, 25 years. It's not in the interest of anybody in the province to have that happening.

The Vice-Chair: Thank you very much, gentlemen. The time has expired.

Mr. Kormos: Chair, I'm wondering if Ms. Drent from Legislative research or her counterparts could get for us any written explanation via the ministry as to what drove this amendment, because we haven't heard yet, insofar as I'm aware, from advocates for the amendment. Similarly—and Mr. Zimmer may help in this regard—if we could get somebody from the ministry—policy people—to specifically address the rationale, the raison d'être, behind these amendments: Where it comes from, who it's serving and whether indeed it is simply an expression of unhampered Wild West free enterprise.

The Vice-Chair: Thank you, Mr. Kormos, and thank you also, gentlemen, for coming in this morning.

CANADIAN BANKERS ASSOCIATION

The Vice-Chair: Could the Canadian Bankers Association please come forward. Good morning, gentlemen. You have 30 minutes for your presentation. If you use up the entire 30 minutes, there will be no opportunity

for questions and comments from members of the standing committee. Before you start, could you please introduce yourselves for the record?

Mr. Warren Law: Thank you. I'm Warren Law and my colleague is Lawry Mitchell, and I'll be referring to both of us in our opening remarks.

The Vice-Chair: Please go ahead.

Mr. Law: Madam Chair, I'd like to thank you and the members of this committee for giving the Canadian Bankers Association the opportunity to appear before the committee on Bill 14. As I said, my name is Warren Law. I am the senior vice-president, corporate operations, and general counsel of the CBA, and with me today is Lawry Mitchell, who is senior counsel with RBC Financial Group. Representing the banking industry as we do, we appreciate having the opportunity to put forward the views of Canada's banks on the issues raised by Bill 14.

Our concerns regarding the bill are specific to the proposed amendments to the Law Society Act in schedule C. While we understand and agree with the intent of the amendments, which is to provide for the regulation of paralegals, we believe that the drafting of the bill could have unintended consequences. In this regard, we believe that the bill needs to be amended to provide clarity with respect to what entails the provision of legal services.

As the bill is currently drafted, a person who is not a licensee would be prohibited from providing legal services except to the extent provided by the bylaws of the Law Society of Upper Canada. The scope of what constitutes the provision of legal services as set out in the bill is very broad and could capture services done by bank staff and agents of the bank. We submit that the activities currently done by bank staff should not be considered to be providing legal services for the purposes of this bill, and that the bill should be amended to ensure that this is the case.

Secondly, we believe that the government, not the law society, should determine the exemptions from the licensing requirement.

The bill sets out the following list of activities that would fall under the rubric of providing legal services: giving a person advice with respect to legal interests, rights or responsibilities of the person or of another person; selecting, drafting, completing or revising certain documentation; representing a person in a proceeding before an adjudicative body; and negotiating the legal interests, rights or responsibilities of a person.

This bill covers a very broad group of activities that a bank would carry on. This could have a negative impact on the banking industry, as the functions listed are often performed by bank staff who are not always lawyers or paralegals.

Let's look at some examples, if you'd like to. Firstly, giving advice: An employee of a bank may explain the terms and conditions of an agreement to a client, although such advice is not held out to be legal in nature. For example, for a consumer entering into a security agreement related to personal property, branch staff will typically explain the person's responsibilities under the agreement, such as the necessity to advise the bank if the person moves to another province. Furthermore, this provision is so broadly drafted as to theoretically encompass information provided to customers by a call centre of a bank.

Secondly, bank staff often select, draft, complete or revise documentation. Standard documentation is often used by banks. Such documentation would have to be selected or may require certain information to be added by bank staff. For example, mortgage-related documents, guarantee agreements, loan agreements for unsecured credit lines and security agreements are often completed by bank staff. Interim financing on real property may require a standard letter of undertaking or a caveat to be signed. Bank staff may select the standard form of power of attorney for a customer and may input specific bank account information. Banks often provide corporate clients with a standard board resolution for banking matters. Employees in the collections department prepare proofs of claim and notices of objection in bankruptcy matters. Compliance staff often prepare documentation that will be used before an adjudicative body. All of this would be covered by the new bill.

Thirdly, with respect to representing a person in front of an adjudicative body, branch managers often represent their bank in Small Claims Court. This wouldn't be possible under the new legislation unless the branch manager was a "licensee."

Lastly, with respect to negotiating the legal interests, rights and responsibilities of a person, numerous employees of a bank outside of its legal department will enter into contractual negotiations with various parties, including clients and service providers.

The bill, as currently worded, would have a negative impact, I believe, on the consumer and commercial clients at banks, as well as the bank's internal operations, as licensees under this bill would need to be employed or retained to perform these functions, resulting in increased costs and delays.

How can we fix the problem? A review of other provincial statutes provides examples of how this provision could be modified to deal with the concerns that we're raising.

The Alberta Legal Profession Act provides for an exemption for "a person in respect of the preparation by the person of a document for the person's own use or to which the person is a party" and for "an officer or employee of a corporation, partnership or unincorporated body in respect of the preparation of a document for the use of the corporation, partnership or unincorporated body or to which it is a party."

The Nova Scotia Legal Profession Act specifically does not prohibit "any incorporated loan or trust company carrying on business within the province from doing anything that its act of incorporation empowers it to do."

We're making the following recommendations: The definition of the provision of legal services should exclude the preparation of documents for one's own purposes; and secondly, an exemption for persons, and employees and agents of organizations, for any activities which they are empowered or permitted by a government body or act to perform should be provided.

May I say that legislation designed to ensure the integrity of the paralegal profession should not interfere with the internal operations of financial institutions. We strongly believe that the bill needs to be amended to ensure that certain activities that are routinely performed by employees and agents of financial institutions do not fall under the rubric of the provision of legal services. Unless clarity on this point is provided, consumers will be faced with increased costs and delays with no offsetting benefit with respect to consumer protection, as banks are already highly regulated and subject to comprehensive consumer protection regimes.

In closing, we're delighted to have shared with you our views on this bill and possible amendments which will make this bill a more focused and effective piece of legislation. We thank you for providing the CBA with this opportunity to put forward our position and to propose possible solutions to deal with our concerns, and we'd certainly be pleased to take any questions that you might now have.

The Vice-Chair: Thank you, gentlemen. We have 22 minutes for questions and comments, starting with Ms. Elliott.

1040

Mrs. Elliott: I certainly understand the recommendations that you're making and they largely make sense to me, because there are a lot of internal actions that are taken by bank personnel that wouldn't necessarily be considered to be legal work in and of itself. The one thing that does trouble me, though, over and above dealing with internal paperwork is the issue of documents that are to be registered with third party organizations, like real estate documents and, to a somewhat lesser extent, PPSR registrations. I think that is something that perhaps could get caught in some of the issues regarding provision of legal services. We had a discussion about this with a previous presenter, particularly in connection with the mortgage fraud issue.

I'm just wondering how you would propose to deal with all of those issues in order to make sure that they are handled by proper personnel within the organization?

Mr. Law: Perhaps I could start with a response and then I'll turn it over to Lawry, if you have any comments to make. From my standpoint, from a broad industry-level standpoint, I think it comes down to a question of education and training. The one thing that hopefully Lawry will expand on is the fact that the banks make great efforts to make sure that their branch staff are suitably trained to address these kinds of issues. The issue of mortgage fraud, for example, is high on the list of priorities of the banks these days, for obvious reasons. So I think education and training helps. Of all industries, banks are leaders in this respect, to make sure that the people who deal with the public are suitably trained to carry out the functions that they have.

Another point that you've got to take into consideration is that there is a very extensive consumer protection regime in place to protect consumers. I'm thinking, for example, of the Financial Consumer Agency of Canada. It's specifically there to protect consumers of banks. I think with that taken into consideration there should be comfort about the fact that branch staff should have the right to be able to complete this documentation and not have to worry about the fact that they're licensees under this new legislation.

Mr. Lawry Mitchell: I guess I'd just add to that in terms of some of the third party service providers that banks may engage to provide certain parts of those functions. We're under rules around outsourcing and that kind of thing in terms of when we do employ third parties to do things that ordinarily have been done or could be done internally, and there are all kinds of rules that we have to follow on that in terms of oversight and the ability to do audits from time to time to make sure that they're meeting the standards that we would meet if we were doing it on our own.

Mrs. Elliott: So there's a certain degree of internal control issues there too, I guess, that you have to deal with, especially when you're dealing with, for example, title insurance companies and that sort of thing?

Mr. Mitchell: Exactly.

The Vice-Chair: Mr. Kormos.

Mr. Kormos: Thank you, gentlemen. This is a red-letter day: I'm agreeing with the submission made by the Canadian Bankers Association on Bill 14. But no, this is a recurrent problem.

Mr. Zimmer: It's all going down in Hansard.

Mr. Law: Mr. Kormos, you may or may not remember this, but this is the second time in 2006 that I've appeared before a legislative committee and you've agreed with the position of the bankers. I'm doing well here.

Mr. Kormos: Yes. This is a recurrent theme because of the difficulty in drafting the description of what constitutes legal services. I understand what the drafters wanted to do—I think everybody does—but it creates huge problems. There's the paragraph (b) exemption by bylaw. Inevitably, there are going to be people omitted, just because of human nature, in the bylaw that exempts people. I'm wondering if research could help. As you're a federally regulated industry—and you too might address this—does that interfere in any way or address the extent to which you can be regulated by—because this is a regulatory regime that's being imposed on people doing this. Do you think there are any issues in that regard?

Mr. Law: Just to expand on what you've said, under the Constitution Act of 1867, the federal government has exclusive jurisdiction over banks and banking. Arguably, I suppose you could take the position that the branch staff or other personnel of a bank, when they're completing this documentation, are in the process of doing banking.

So you might very well have a constitutional issue here too.

Mr. Kormos: But it would be as simple as the banks arguing that they're not subject to this regulatory regime?

Mr. Law: We could take that position, yes.

Mr. Mitchell: If I could speak on RBC's perspective, I think we're at the point where we're assuming that maybe this is just a bit of oversight or an unintended consequence of it. If the legislation were there and continued to read as it reads, we would then have to pursue things in more detail, like what exactly is advice? Does it really constitute advice when you explain what the particular term means in very objective ways? So there would be more detail to get into, and I suppose there would be an argument around whether or not this effectively is regulating banking by regulating the day-to-day activities of what bankers would do in face-to-face meetings and sessions with customers.

Other than recognizing that that is an issue, it's certainly not something that any of us has looked into in detail, because at this point our intention is to bring forward our concerns and hope that they're addressed.

Mr. Law: The easy answer would be to make the requested amendments and then we don't have to worry about this bill.

Mr. Kormos: I'll repeat my call on Mr. Zimmer to use his influence as the parliamentary assistant to come up with some sort of proposal as to how this is going to be addressed, as compared to merely utilizing subsection or paragraph (b) with the bylaw of the law society, because I'm not sure that that's going to be adequate.

Gentlemen, as suggested by Mrs. Elliott, I suggest we'll be seeing you next when we have some discussions around the Land Titles Act and whether or not banks, as mortgagees, should be able to rely upon a forged mortgage.

Mr. Law: I always look forward to any discussion with you, Mr. Kormos.

Mr. Kormos: Thank you kindly. Take care.

The Vice-Chair: Mr. Zimmer.

Mr. Zimmer On page 4 of your submission under "Recommendations," the first bullet:

"We make the following recommendations:

"—the definition of the provision of legal services should exclude the preparation of documents for one's own purposes." Let me just focus on "one's own purposes." That's a pretty hard kind of document to define, a document "for one's own purposes," because the fact of the matter is that for the most part, they have an effect on a second party. I'm thinking of branch offices assisting customers in filling out a loan document, a security document. It's being filled out for the bank's purposes to secure a financial interest but it also has an effect on the other party to the document, the recipient of the loan document. I just use that as an example. How would you more closely define this concept of "documents for one's own purposes" in the context of protecting the rights of the other party to the document?

Mr. Mitchell: I guess I would look at it a bit differently. If that is considered within a broader definition of providing legal services, I think to some extent that may be a bit misleading to consumers in particular. There's a lot of training and education that is provided to bankers and account managers who are dealing face to face with the public on some of these things. While it's important that we be able to provide value to our clients, answer their questions and provide advice to them in the broader of sense of, "What obligation am I taking on here?" in an objective description, to go beyond that and suggest that that's legal services—"legal services" usually implies some kind of role where you're maybe advising somebody in terms of obligations with another party. If we were considering that the provision of legal advice, it puts everybody in a bit of an awkward position because, at the end of the day, notwithstanding our interest in making sure that our clients are in the right products and understand the obligations they're taking on, these documents are in fact prepared for our purposes, with our interests in mind.

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A good example of that would be in situations where the nature of the arrangement is such that it's important that a person receive independent legal advice in some situations with guarantees, where the guarantor who has come forward has no obvious connection to or benefit from the loan. They will be required to get independent legal advice from a lawyer who's clearly acting for them. Branch staff could conceivably go through that guarantee and give them an idea of what's involved with that, but we're very careful in these cases to make it clear that the advice we provide at the branch level is more informational only. I think to characterize that in any way as this being a person who is licensed to provide legal services in itself could be misleading.

Mr. Zimmer: Let me give a more concrete example. I'm just trying to get my head around your suggested recommendation here. Sometimes I see in the paper that there are, for lack of a better word, mortgage sales that a financial institution, a bank or otherwise, advertises and the advertisement goes something like, "Come and see us and we can redo your mortgage or renew your mortgage. Transfer it our institution. We do all the paperwork and so forth and there's no cost to you." Of course, when someone is rearranging a mortgage and so on, there are big legal consequences for the borrower. So in this proposed amendment, how do you protect the borrower? Clearly, the institution is doing the mortgage documents to secure their interest and yet there are significant obligations on the part of the borrower. In that case, would that be the preparation of a document for one's own purpose or not?

Mr. Mitchell: The mortgage area is covered more directly with some of my colleagues, so I'll answer to the best of my ability. My understanding is that on those things, the mortgage documents are prepared by lawyers in the same manner of lawyers acting for the bank and for

the borrower in preparing and registering mortgage documents.

Mr. Law: I don't think we're suggesting that the protections given to the borrower in that situation would be reduced as a result of what we're proposing. I think it's still very important for the borrower to get independent legal advice or legal advice from a qualified lawyer; no question about it. I think our concern is, though, that when you apply the definition under Bill 14, it's going to capture the work of actually preparing the documentation, filling in the blanks, the dates and stuff like that, and I cannot believe that Mr. Heins at the law society wants to have jurisdiction over that kind of stuff.

Mr. Zimmer: Maybe actually tackling some language that would cover that preparation of documents for one's own purposes would be a helpful exercise.

Mr. Law: Yes. That's why we pointed you to the ways in which two other provinces have addressed the issue. You've got specific legislative wording there.

Mr. Zimmer: All right. Thank you very much.

The Vice-Chair: Thank you, gentlemen, for coming today.

SOCIETY OF ENERGY PROFESSIONALS

The Vice-Chair: If the Society of Energy Professionals could come forward, please.

Mr. Kormos: Madam Chair, while these people are seating themselves—again to legislative research—I'm concerned that we're getting drawn into a sort of mindset of regulating anything and everybody who prepares legal documents instead of focusing on paralegals, and we know what we're talking about when we're talking about paralegals. I'm wondering if legislative research could, with the assistance of the library and others, find out whether there have been concerns expressed about the conduct of bank officials—because I don't think this has been an area of problem—the conduct of any of these other numbers of personnel who in fact do legal services as defined currently in the legislation; if she could perhaps give us an overview of whether or not this has been the subject matter of concern, of problem, of complaint, because I don't think it has. I think we're getting drawn, as I say, into looking at this from this broad, big net perspective instead of focusing where we should be focusing, and that is on paralegals.

Mr. McMeekin: Could I just add to that, because I think my colleague Mr. Kormos is on to something? I would appreciate, as part of that review and narrative back to us, any reference to what other legislation—the Bank Act, for example—might supersede something we're doing, could potentially supersede or provide the kinds of controls that we, on a good day, are claiming we want to see in place in this bill.

Also, the other interest that I have is around consumer protection, liability protection if something goes wrong in, say, a banking setting. I heard the gentleman say there are all kinds of protections there. I'd like to know a little bit more about what those protections are.

The Vice-Chair: Good morning, gentlemen, and welcome. We have 30 minutes for your presentation. If you don't use up the entire 30 minutes, there's an opportunity for standing committee members to ask questions or make comments on the presentation. Before you start, please introduce yourselves for the record.

Mr. Blaine Donais: My name is Blaine Donais, and I'm a society staff officer. With me is Brian Robinson, the society communications officer.

Interruption.

The Vice-Chair: We'll give you the opportunity to take care of that.

Mr. Donais: Sorry about that.

The Vice-Chair: If you would proceed, please.

Mr. Donais: The Society of Energy Professionals represents 7,000 engineers, professionals and supervisors in the province of Ontario, in both the provincial and federal jurisdictions. From our interpretation of the legislation, we estimate that about 400 of our representatives and staff might be covered under the Access to Justice Act.

I wanted to say right off at the start that the society does support the regulation of paralegals. In fact, in the workplace environment, unregulated paralegals tend to run rampant and have caused all kinds of concerns for both labour organizations and employers, especially within the human rights paradigm. Now some of that is being taken care of.

But our concern really relates to the interplay between the definition of "legal services" in the act and how that will affect the work that we do as a collective bargaining agent and how we see the work is being done for employers in a workplace setting. Our concerns can really be set out in two general categories. The first is that the regulation of non-fee-for-service providers of what the act considers to be legal services will fundamentally undermine the delicate balance in the collective bargaining relationship. The second concern is that if there is going to be an exemption for those people working in the workplace setting, that exemption should not come from the Law Society of Upper Canada, but should come from the government itself for a variety of reasons.

Mr. Kormos said it was a red-letter day with regard to his agreement with the Canadian Bankers Association. I think you'll find that collective bargaining agents all around the province would find themselves in the same position today, probably for the first time, being in full agreement with the Canadian Bankers Association about the nature of the act and how it interferes with the work that is done by both employers and unions in a collective bargaining environment.

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It sounds like you've heard many times in many different settings from many different groups this concern about the definition for "legal services" and how that has an impact on them. Our understanding is that over the last 10 years or so, there has been a lot of discussion about the regulation of paralegals and that it wasn't until

very recently in the act itself, in the bill itself, that there was a change from the term "paralegal" to "person who is authorized to provide legal services," and that's where we found a serious problem for union representatives and for employers. Normally, employers speak for themselves, but we find ourselves in the position today where in a sense—because of the nature of the collective bargaining relationship—we're forced to speak on behalf of employers in addition to ourselves.

The areas in the definition that give us concern include subsection (5) in general, which casts a very, very broad net over legal services. It says:

"For the purposes of this act, a person provides legal services if the person engages in conduct that involves the application of legal principles and legal judgment with regard to the circumstances or objectives of a person."

Subsection (6) sets out a number of specific circumstances—for example, giving advice with regard to legal interests, rights or responsibilities; selecting, drafting or revising documents that may affect the legal interests, rights or responsibilities of a person; representing a person in a proceeding before an adjudicative body; and negotiating the legal interests, rights or responsibilities of a person.

I could probably spend the better part of a day going through the litany of examples where not just full-time paid union staff people but also part-time union representatives would be covered under this definition. Any union representative who takes on a grievance for a member is in fact negotiating that member's legal interests under a collective agreement. A collective agreement is a legally binding contract between the employer and the employee that sets out rights for the members in that agreement.

In our case, where we come up with the number of 400 out of 7,000 members, every union representative would be covered by this act. These are people who have been doing their jobs quite nicely for the last 60 or 70 years without the benefit of the law society coming and regulating them. The proposal under the act seems to be that they would be covered.

The question arises, why not? Why not regulate union representatives? Why not regulate management actors, HR people, supervisors making decisions about collective agreement rights? The whole nature of collective bargaining is that it sets out collective rights for people. Sometimes in bargaining collective rights there are individuals whose entitlements aren't maximized, and there's often a balance that has to be struck between different groups in a collective bargaining relationship.

For example, when the union is negotiating with the employer about the difference between a selection process for a vacancy on a seniority basis or on a best-qualified standard, there are going to be two competing groups of interests there among their members. Our concern about this is that if those people negotiating these collective agreements and resolving these grievances are also going to be held to some sort of standard by the law society or by a regulator on an individual basis and are going to fear that they're going to have to answer to some other body, aside from the labour relations board, they won't make decisions that are necessarily in the best interests of the collective.

This gets into the nature of not just collective bargaining but grievance settlement. Often with grievance settlements, some people are going to be happy and some people are going to be unhappy. If a union representative has to face the Law Society of Upper Canada by settling a grievance that's going to make some people happy and some people unhappy, that's going to affect the decisions that are being made. On the other end of this, the same can be said for employers. Employers are in the position here where, in essence, they are negotiating regarding the legal interests of employees. Perhaps many of these members would be covered under the act as well: HR professionals, senior managers and so on.

In essence, our concern is that the legislation itself is far too broad with regard to the provision of legal services, that there is no need to regulate union representatives and management representatives in that sense. We do understand that the Law Society of Upper Canada has agreed with unions and employers that this group would be exempted, or that's what their thinking is at present. That's all fine and good, but our concern about this is that when you actually dig into the proposals about how paralegals are going to be represented, there are some very significant concerns with the law society regulating these groups, concerns with relegating the decision to the law society about whether they should be exempted or not.

The first one is the more general one that's been set out already for you by Wayne Samuelson of the OFL, which is that the business of regulating paralegals should not be the business of the law society, of deciding who is going to be regulated and who isn't. That should be up to the government. As he said, they have some transparency and accountability to the public. Frankly, I have to say, as a member of the law society, that I don't think that the law society has that same accountability and transparency to the public.

Regarding the decision about whether certain people would be exempted or not, there are some very good reasons for the law society to actually include union representatives and management representatives. The regulation of paralegals is going to be a very onerous financial undertaking by the law society. They've recognized that in their task force report and, frankly, I think they're shooting low on the costs that they think this will incur.

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The union representatives and management representatives make up a very large potential pool from which to draw resources. Our estimates are that about 60,000 people in Ontario could be covered as union or management representatives under this legislation, and that is a lot of dues from which to fund a system that was meant to cover maybe a much smaller portion of people in this

business. Perhaps not now, but five years, 10 years down the road when the costs of this start to come to bear, there will be a temptation to start including, as the law society has said, non-fee-for-service providers of legal services because that will increase their funding base.

In addition to that, and with due respect to the law society, this is a group of very intelligent people who do not in general have a strong appreciation for the delicate balance that goes on in a collective bargaining setting in the workplace, so there is likely another temptation there when certain disgruntled employees come to them and say, "Why are these people not being regulated?" that they do start looking at regulating.

Just as a corollary to that is that union representatives especially are already fairly highly regulated. Their duty of fair representation under the Ontario Labour Relations Act requires them to act in a manner that's not arbitrary, discriminatory or in bad faith. In addition to that, there are standards under human rights legislation with regard to their treatment of their own members. And in addition to that, unions are democratic organizations and are also subject to their own membership if they're acting in a manner that's not in the best interests of their membership. There's enough regulation there already, and I think that the 80 or so years of labour legislation in the province has been very successful in regulating them.

The solution we're proposing is a modification of what's already been proposed by the Ontario Federation of Labour. Of course, this solution doesn't go anywhere near covering the whole problem with the act and the definition. I think the Canadian Bankers Association has made that clear. But with regard specifically to union and management representatives, we propose an exemption saying, "This act does not apply to trade unions, their representatives, officers or agents when acting for members and/or employees in a bargaining unit, for which the union has bargaining rights with respect to employment-related proceedings to which the person is or may become a party."

We would encourage you to further amend that to include management actors as well. We're not doing that in their best interests, we're doing it in our own because we do not want management actors to feel constrained by the act in making collective bargaining decisions. That will have as much an impact on the collective bargaining relationship as if union representatives were.

Did you have anything?

Mr. Brian Robinson: No.

Mr. Donais: Okay. Those are our submissions. Thank you.

The Vice-Chair: Thank you very much. We have 12 minutes for questions and comments. Mr. Kormos, if you would start the rotation, please.

Mr. Kormos: Thank you kindly for coming. In terms of understanding your comments in referencing them, the HR professionals were here just yesterday, for instance, so you're bang on in terms of who has interest in this regard.

I suppose the problem is that we may well have lost sight of our target here. I really believe that. We got caught up in the language of the bill, and one of the problems is that the law society hasn't been particularly helpful to date.

I reference the Hansard of April 26, 2006, when I questioned a spokesperson presenting on behalf of the law society about, for instance, mediators helping parties to a mediation prepare minutes of settlement. The response I got from the spokesperson for the law society was, "If you have a mediator who's not a lawyer regulated by the law society and not regulated by any other body, who's serving as a mediator preparing documents, such as minutes of settlement in a dispute resolution process to which two lay people are privy, perhaps the answer to the question is, they should be regulated ... such as the law society...."

That caused me and a whole lot of other folks great concern. I'm not sure that's what the law society really means. I don't know, but that's what they've said.

The exercise isn't about regulating mediators, shop stewards, members of negotiating teams or human resource personnel; it's not even about regulating jail-house lawyers, and they're a dime a dozen. Go into any coffee shop and there'll be people offering up free legal advice, right? It's not even necessarily about ensuring competence, because the law society hasn't been able to ensure competence in the legal profession. They won't be able to ensure competence in the paralegal business and nobody should expect them to. They can hope that they will but it's not going to happen.

I really appreciate your comments. You're expanding this, because everybody who comes here adds a little more to the almost absurdity of this hyper-broad definition. I'll bet you dollars to doughnuts that nobody in convocation or in the law society would have, while drafting the bylaw exempting people, thought about shop stewards or people on negotiating teams—volunteers on negotiating teams who engage in collective bargaining. I'll bet you dollars to doughnuts that not one of them would have thought of those people, and not through any fault of their own.

Mr. Zimmer.

Mr. Zimmer: I'm listening.

Mr. Kormos: Justice Cory defined paralegals in his paper, in his report. Let's get around to focusing on paralegals. Let's start with the target and then talk about how there might be loopholes we can close—do you understand what I'm saying?—rather than cutting the choke off a shotgun so you've got a spray of pellets that's a mile wide, and what the heck, in the course of doing that, we may have regulated some paralegals too. It just seems to me to be ass-backwards, as we say down where I come from in Niagara. My apologies to the propriety of the distinguished members of this committee.

I appreciate your comments very much.

Mr. Donais: Thank you.

Mr. Kormos: I think they're bang on. I hope we can get something done. It's up to the government, at the end

of the day, and the sooner the better. You've got more important things to do.

Mr. Donais: If I could just add one thing to what you're saying. One of the answers has been that union representatives are not covered under the act because they're not paid, but that's not true, because what union representatives get is paid release time. They could very well be covered under the act. Just like mediators in this circumstance, they could be in the position where they are in fact helping to draft documents for "lay people"—they're lay people themselves in a sense—so they would be covered. A member of the law society representative has provided the opinion that perhaps mediators should be covered if that's the case. That leads us once again to this temptation that I was talking about.

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The Vice-Chair: Thank you. Government.

Mr. Zimmer: Let me pose this as an observation. You, as a number of other organizations, have generally left us with the following thoughts:

"(1) We see the need for paralegal regulation in various circumstances.

"(2) We say"—and each of the groups gives us a set of reasons—"that it ought not to apply to us," and have, on the face of it, very compelling reasons. And we've heard from other organizations—my colleagues will correct me if I'm wrong—for instance some of the title insurance companies, where they've actually received correspondence from the law society saying, "Look, if this legislation becomes law, it's not our intention to include you in the paralegal regulation."

Mr. McMeekin: The Building Trades Workers' Services Association; WSIB, same.

Mr. Zimmer: Yes. My point is that a number of organizations that have expressed the same concerns you have also say, "Notwithstanding that we get correspondence or a formal stated intention from the law society that it's not the intention to define your group in the definition of 'legal services,' we're reluctant to rely on that."

The law society is made up of—especially the benchers and the group that will be doing this regulation, which is a separate committee from the benchers—five paralegals, five lawyers, three laypersons, and the chair will be a paralegal. I'm concerned why organizations such as yours and some of the others seem so reluctant to accept the law society's clear statement on this issue.

Mr. Donais: If you actually look at how that committee is going to be structured, and take a good, hard, honest look at it, you will see that the law society, and nobody else, holds all the cards. They will make the decision.

I have to be careful of what I say here. I'm a member of the law society, and a proud member of the law society. I think they're fundamentally a good organization, but I have to temper that with the fact that I'm one of perhaps 300 or 400 members of the law society in a field of thousands and thousands of lawyers who have no idea about how the collective bargaining relationship works.

The reluctance that you're hearing from these folks comes from the fact that what the act does is that it regulates the decision to the law society, not just to exempt but also to change their mind. They can say now, up front, "These people are going to be exempted," but if somebody like Mr. Kormos here comes up with a scenario where, for example, mediators might be in a position where they should be regulated, and somebody starts thinking about that and says, "Yes, maybe they should be," and going back to the law society and getting them to change their mind about mediators, they can do the same about collective bargaining representatives. And they're doing it in a vacuum, because they don't have, necessarily, a clear understanding about the very delicate balance that is represented in a collective bargaining setting and about the need to deal with rights on a collective basis.

The Access to Justice Act enshrines to a certain extent the primacy of individual rights, and it does so by requiring people to be held to a certain standard, yet to be defined, about how those rights are going to be prosecuted. The collective bargaining relationship deals with collective rights and with a balance of many different competing interests. Our concern, which is probably not special or anything, is that the law society as a group will not have a complete grasp of the nature of the relationship, and for all the other reasons that we talked about concerning temptations to regulate and so on, they may change their mind.

Mr. Zimmer: But presumably the committee would be charged with looking after the paralegals. So that's the five paralegals, the five lawyers, the three public reps and the chair, who is a paralegal. You know, before they decided to include a group in a definition—they're all persons of good faith and solid credentials. Presumably they would do their homework by looking into the facts and taking the best possible advice and, after all of that due consideration, take a decision to exclude or include and then communicate that to the group, perhaps your group, not to include you. I have some difficulty understanding why you wouldn't accept that considered statement then and take that at face value, "No, we do not want to include your group," after they've fully considered the best possible advice and all of that stuff.

Mr. Donais: Sure. Perhaps there are two answers to that. The first one is that it's our understanding that it won't be that committee making that decision. What the committee will be doing is, they will be regulating afterwards. They will be in charge of dealing with the consequences of the decision to exempt or not to exempt. Now if we're wrong about that, then we're back to the same concerns. Who is the law society accountable to? We know whom the government is accountable to, and we recognize the government as the competent body to regulate paralegals. We're not quite so sure about this other group. The law society is lawyers; they are not paralegals. I understand that they would include some

paralegals—some have said token paralegals—in their decisions.

Mr. Zimmer: But would you agree—

The Vice-Chair: Mr. Zimmer, I have to move on.

Mr. Zimmer: Oh. Can I just put one observation on the record?

The Vice-Chair: With Ms. Elliott's permission.

Mr. Zimmer: Thirty seconds. Sorry. Would you agree, though, that the responsibility of the law society is to regulate lawyers in the public interest? It's the Ontario Bar Association, for instance, that's to deal with lawyers in the interests of the lawyers.

Mr. Donais: I think there's a very fine line. There are obviously—that's a tough question for me to answer.

Mr. Zimmer: I didn't mean to open it up.

The Vice-Chair: Ms. Elliott of the official opposition also has an opportunity to ask a question and make comments. So I think we'll go to her at this point.

Mrs. Elliott: Thank you. I have just a few brief comments, Chair.

First, I'd like to thank you for your comments. Your presentation, along with those of other groups that find themselves in a similar situation, wondering whether they will or will not be caught with this legislation, is really very helpful, to me anyway, in terms of looking at the whole issue and the problem, as Mr. Kormos has indicated, in painting with a really broad brush and then exempting. I would agree that the better way, in my view, to approach it would be to define more precisely what it is that you're talking about and to precisely define what "paralegal" means so that you stay on target and work with that definition. Otherwise, you do run the risk of keeping some groups in that shouldn't be in and not regulating groups that perhaps should be regulated. So thank you very much for your contribution to that. It was very helpful.

1130

Mr. Donais: If I could just add, on that point, our proposal is actually to have a very restrictive or a very clear definition of paralegals. Our fallback position is that if you're going to end up with this much broader definition, we would like to see a carve-out for union and management actors. Our first priority would be to have a definition of paralegals that actually covered what you meant it to cover in the first place.

The Vice-Chair: Thank you very much. Certainly, your presentation has led to a very fulsome discussion here.

Mr. Donais: Thank you.

McKECHNIE AND ASSOCIATES

The Vice-Chair: If I could have McKechnie and Associates come forward please. Good morning.

Mr. Greg McKechnie: Good morning.

The Vice-Chair: You have 30 minutes to make your presentation. If you use up the entire 30 minutes, there will be no opportunity for questions or comments from members of the standing committee. If you could introduce yourself for the record and then start your presentation.

Mr. McKechnie: My name is Gregory Frederick McKechnie. I'm the president and chief executive officer of McKechnie and Associates, located at 110 West Beaver Creek, Unit 6. I'm also currently a student at Seneca College in the court and tribunal agent program.

In reference to the timing, I should probably only take about five to 10 minutes. I have only a few short questions but I would like, before I start, to thank everybody for this opportunity. I think it's a truly great sign that we live in a democratic society when individuals who are going to be affected have the right to come forth and speak and make inquiries on these matters. I would like to thank everybody sincerely.

As I have mentioned, I am a Seneca student. I incorporated McKechnie and Associates on April 12, 2005, and shortly afterwards got wind of the Access to Justice Act. I knew that it was something coming along in advance.

The question I have, and it's a question that's very well recognized by quite a few of my colleagues at school and at work, is, what college programs are going to be recognized? There is a real fear among the young paralegal community, people who are getting the legal assistant diploma, getting the court and tribunal agent program and the court and tribunal administration program, that everybody is going to occupy two years of their time and spend quite a bit of money and then turn around and have to go back to school. Has there been any further thought put into that, whether the legal assistant program will be recognized?

Mr. Zimmer: Perhaps I can help here. We do have a list of five questions that you wanted to pose today. Perhaps you could put those questions on the record and I can undertake to have someone from the AG's office meet and provide answers directly to them.

Mr. Kormos: These questions are important to all of us.

Mr. Zimmer: Yes, yes.

Mr. McKechnie: Yes. That was my first question: Will the court and tribunal agent be recognized as valid education? I understand that Linda Pasternak and Wanda Forsythe will be meeting with you next week. I'd imagine you're all familiar with them. They've been most helpful. I was very lucky; I left Seneca on good terms a few years ago. I was able to get rushed back into the program. But there still is really a fear, and even Wanda and Linda have said, "We cannot guarantee 100% that this diploma will be recognized as one that's valid."

The Vice-Chair: Just proceed along, Mr. McKechnie.

Mr. Zimmer: If you want to lay out the five questions, I'll see what we can do to get answers—and my colleagues.

Mr. McKechnie: Okay. Will there be a grace period for those individuals who are practising in the profession who have had to go back to school? I know I'm not alone in this journey. I've started a company, I have a mortgage, I have quite a few responsibilities and it's already been very tough to go back to school full-time. As a

student, I've had to accelerate through summer courses and pretty much work the equivalent of what would be 75 hours a week. It would be a real tragedy and heartache if I myself and many other people, including two individuals in McKechnie and Associates, were not able to be licensed when the bill receives royal assent.

Also, will there be a grace period for the paralegals awaiting pardons? This is another real issue that's come up at Seneca. Nobody had this fear in the past. However, everybody's rushing to get pardons and it's taking 18 to 24 months. Will there be a grace period for that time for people to receive that?

Also, another question that I asked of the Attorney General's office many times but have not been given an answer to is, approximately how long after the bill is given royal assent will it be fully put in place? Will we have to retain insurance to take the test in good faith?

Also, I asked this before: Will the legal assistant diploma from community colleges be recognized to meet the educational requirements?

Those are all the questions I have today.

The Vice-Chair: Thank you, Mr. McKechnie. I will give panel members an opportunity to ask further questions of you or make comments, starting with the government.

Mr. Zimmer: I'll undertake to see what kind of answers we can provide and share those with my colleagues. With respect to your first question—will Seneca College meet the educational requirements?—I don't have an answer for that right now. I'll get an answer for you. I can tell you that I'm the MPP for Willowdale. Seneca College is in Willowdale. It's the largest community college in Ontario, Canada and North America. I do whatever I can to advance the interests of Seneca College.

The Vice-Chair: The official opposition.

Mrs. Elliott: I'd just like to thank you, Mr. McKechnie, for raising the questions you have. They're important, and we need to have answers to them. And thank you, Mr. Zimmer, for undertaking to seek the answers for us.

The Vice-Chair: The third party.

Mr. Kormos: Thank you, Mr. McKechnie. These are important and legitimate questions. I suppose one of the problems is that, if the bill passes in its current form, it's the law society that's going to determine what the educational requirements are. That's part of the problem for some of us, because although we don't expect in a legislative structure to deal with the minutiae—we understand the role of, let's say, regulation—it's pretty difficult for some of us when we're dealing with the bill when we know so little, because there's so little in the bill about, for instance, the educational requirements. There's nothing in the bill about grandparenting in terms of accommodating people who have been practising as paralegals, some very capably, for a good chunk of time. And that includes people who are practising as paralegals who may be halfway through an educational program, right?

Mr. McKechnie: Yes. I was, essentially, when I got wind of this, forced back in. I rushed to Seneca. I was very lucky I was in good standing with my teachers. I graduated in 2002, and they were most accommodating. If that had not been the case, when this bill passes, I don't know where myself or two of my employees would be at this time. I think that's one issue. I think there's really been a lot looked at for the ethical codes and everything and a lot of the other information, but speaking on behalf of the young paralegalling community, that's a real valid fear, because it seems to be the one thing that's been overlooked. To us, it seems like the most fundamental building block for any professional, let alone one like this great paralegal profession that we practise in.

Mr. Kormos: I'm a little bit familiar with the Seneca program. I'm more familiar with the legal assistant program, because that's a program at Niagara College, down where I come from, one of the province's great community colleges, which is also the first school that ever let me graduate. That's true. So I'm eternally grateful to them. It took community college before I got to graduate from anything.

So I'm familiar with the legal assistant diploma, which, as somebody like a few others here who have practised law and had people work in our offices, I consider an entirely appropriate educational background; or doing paralegal work, again, depending upon the type of work you're doing, where you're doing it, who you're doing it for or with.

These are the problems. The criminal record, though—jeez, are there a whole lot of people with criminal records taking the course? Are we talking about old pot charges from when people were kids or are we talking about laundering money for organized crime, notwithstanding that it's a sting, in that you're a former distinguished member of the community?

Mr. McKechnie: When I say that, I don't mean at school. This really came to my attention the other day. We had our first class of third semester, and after the teacher said that, a lot of people went up to speak to Linda Pasternak about that. But there is a concern amongst even some of the more established paralegals, somebody 30, 40, 50 years of age who is practising. That is a fear they have. Once again, that really goes back to the fact that a lot of people feel that there is—I wouldn't say rights being overlooked but certain things that have been really overlooked with the paralegals. There are some things that are very cut and dried.

The law society will be the governing body. I myself think that's a great idea. I don't think there's a better body to govern paralegals than the law society. That's probably the one thing you will never hear myself or any of my associates at McKechnie and Associates complain about. But just looking at what the education really looks like or looking at the whole body—and we've had myself and quite a few other people at my office combing through it, because they obviously have valid fears as well—although it's extremely well put together, it looks

like the younger paralegal group has once again just been left out and other people who have certain concerns have been really put aside.

Mr. Kormos: You know, Mr. Zimmer, Mr. McKechnie makes an incredibly valid point. The law society members, the lawyer side of the new law society structure, are going to be elected by region. The statute doesn't tell us, the bill doesn't tell us, how the two paralegal members—they're not called paralegal in the bill—are going to be chosen. The law society is going to decide that by bylaw.

Presuming that the bill passes—and I hope it passes in a much-improved form, and it's a newly regulated profession—I think education for the paralegal profession is in its infancy. Not that schools haven't had legal assistant programs and other types of programs, but the newly standardized programs will be in their infancy. Why hasn't the government given some consideration to ensuring that there is "either" or "and/or" student representation and young paralegal representation? You see, Mr. McKechnie, who is a young paralegal—I presume that's what you're doing at McKechnie and Associates—

Mr. McKechnie: Yes, a young entrepreneurial paralegal.

Mr. Kormos: —newly incorporated, is a different type of entity than POINTTS, which I understand will be here. I have a huge regard for POINTTS. It's long-standing. It grew from a one-person operation into a major, very effective paralegal system. Why isn't there specific consideration for young paralegals and student paralegals? Somebody could say that the argument could be made with respect to law students. However, law schools are not in their infancy and the programs in law schools are decades old. Look at you and me. They're decades and decades and decades old. Is that not worthy of some consideration, some opportunities, some avenue for input from young paralegals, newly established paralegals and from students in these programs?

I appreciate that. What I hope you would do, Mr. McKechnie, is write to the Attorney General—copy Mr. Zimmer—proposing that, if you agree.

Mr. McKechnie: I will do so. I've written the Attorney General several times to no avail. I will in the future.

Mr. Kormos: No, no, he doesn't open his mail. He has an entourage. Mr. Zimmer has one too. It's not quite as big as the Attorney General's. Honestly, I think your appearance here is very valid and very valuable and I'm confident that if you make reference in the opening line of your letter to the fact that you attended at the committee on such-and-such date, Mr. Zimmer will read your letter for sure.

Mr. McKechnie: Thank you for your input.

The Vice-Chair: Thank you very much, Mr. McKechnie. We certainly appreciate your bringing yet another perspective to the standing committee.

We will now recess until 1 p.m.

The committee recessed from 1143 to 1303.

The Vice-Chair: I'm going to call this session to order. We are here for the afternoon.

IDEALOGIC SEARCHOUSE (1996) INC. NATIONAL PUBLIC RECORDS RESEARCH ASSOCIATION INC.

The Vice-Chair: Our first presenter is Jim Sturdy of the Idealogic Searchouse—

Mr. James Sturdy: Search house.

The Vice-Chair: Oh, of course. The extra "H" is missing; right? Please seat yourself there. You have 30 minutes for your presentation. If you do not use up the entire 30 minutes, then there is opportunity for the members of the committee to ask questions or make comments about your presentation. Before you start, if you would please identify yourself for the record and then we will proceed with your presentation.

Mr. Sturdy: Good afternoon. My name is Jim Sturdy. I am presenting on behalf of two organizations. I'm the past president of the National Public Records Research Association and I'm the president of my company, Idealogic Searchouse (1996) Inc. I'm presenting on behalf of these two organizations. Idealogic Searchouse is a member of the National Public Records Research Association. I'll refer to that as NPRRA. The reason that I'm here in respect of NPRRA is to express our concern over particular sections of Bill 14. In particular—I think you have my handout—it's outlined in schedule C, subsection 2(10), "Provision of legal services." If you drift down through that part of it, you'll come to the section where it outlines what legal service is.

Our members in the NPRRA and my company do a tremendous amount of this work. We form entities, we file documents, we create registrations, many of these things, and we've been doing these in excess of 30 years. Our concern is that we're now looking like we're coming under the purview of another organization to regulate us. To put it in a nutshell, we do quite well on our own. We really don't feel that somebody needs to regulate us.

This brings up an interesting point in terms of this because our members, the majority of NPRRA members, are in the United States. We have five members in Ontario, one in Manitoba, one in the United Kingdom and about 145 to 150 in the United States. This act highlights a problem from the fact that if one of our members in Ontario affects the work that is outlined in (6) under subsection 2(10) in the provision of legal services, a member doing it in Ontario comes under the regulation of this regulatory body, but a member doing exactly the same work in Sacramento, California, wouldn't.

As an example, you can imagine doing a registration under the Personal Property Security Act. Ontario maintains a website, you dial into that website and you can effect that registration. You can effect that registration from anywhere in the world. But if our members effect that registration in Ontario, they come into this act providing legal services and have additional hoops to

jump through. But if they effect the same registration over the Internet from Sacramento, California, they don't appear to. So there seems to be a problem in this legislation in that area because it seems to hamstring or cause additional grief for Ontario members.

Having said that, the NPRRA's policy in the United States has always been, "We don't want to tell government how to run their business. The government does quite well running its own business." We're more than happy to communicate, talk to, share views, work with, and we would be more than happy to work with you in any way we can so that it doesn't impede our members.

If I could switch to Idealogic Searchouse (1996) Inc.—that's my company. I'm president of it. I started one of its predecessors in 1980. We register and file documents. We do a lot of the scope of what's in subclauses vi and vii of subsection 2(10). We create documents. We filed those documents. We register those documents. I believe, when you look at that definition, that I am affecting somebody's right in a personal or real property.

I have difficulty with this legislation because we've been doing this for 20 years. We seem to have done it quite well. We haven't been sued. We carry insurance. We work for banks, lawyers and US financial institutions and we haven't messed up yet. I'm not sure I understand, as a businessman, why I need this regulation. In terms of my company, what it will mean for me is that if this legislation goes through in the way it's written, it's going to move at least three of my jobs out of Ontario. I'm not going to stop doing what I do. I just need to move beyond the reach of Ontario. The work we do with Ontario, where we register companies via the Internet, incorporate companies via the Interne and register PPSAs, we'll just do offshore. So we'll be moving jobs out of Ontario, likely into the state of Nevada, and doing the same work there. That's essentially the meat of my position.

The second, smaller point is that I'm the CEO of my company. We're small. My payroll is probably slightly under $250,000 a year. Half of what we do we export to the United States. We do these services, and there are times when you go to court. You have to sue people in Small Claims Court for collections. You have to appear in front of places to say that our business does this or that. I feel that some of the other parts of vi and vii of that 2(10) prevent me from advocating or representing my company in any other tribunal or body or whatever. I think there has to be a re-examination of that because it's literally saying that the major, sole shareholder of a corporation can't stand in front of a body and advocate on behalf of that corporation.

That is essentially the bulk of my comments, and I'm open to questions.

1310

The Vice-Chair: Thank you very much. First, I apologize for mispronouncing the name of your company.

Mr. Sturdy: It's okay.

The Vice-Chair: We have 20 minutes for questions and comments. I believe that Mrs. Elliott has the lead on this rotation.

Mrs. Elliott: Thank you very much for your comments, Mr. Sturdy. You may or may not know that the issues you've raised have been raised by a number of presenters who have come before this committee with respect to the scope of this legislation and who will be caught by it and who won't be caught by it, and a lot of organizations have presented on that.

But I think a really important perspective that you're bringing to the table is the financial one, from the position of entrepreneurs. That's a consideration that those of us who are in the opposition feel is very important that the Attorney General listen to with respect to this legislation. Certainly we do not want to be driving business out of Ontario; rather, we want to encourage it. So I thank you for bringing those comments forward, and we will certainly be urging some changes along the lines of what you've suggested.

Mr. Sturdy: Thank you.

Mr. Kormos: Thank you, sir. I understand, as everybody does by now, your comments because it's been a source of grief from the get-go, the minute this bill was tabled. The overly broad definition of what constitutes legal services without clarifying it so that—we're talking about regulating paralegals here. We know what paralegals are, and we know what the problem is. Paralegals themselves believe they should be regulated.

Shop stewards in unions and the members of union negotiating teams are not paralegals. There's no need to regulate them. Human resources professionals are not paralegals. There's no need to regulate them. The incredibly hardworking staff at my credit union and bank are not paralegals, notwithstanding that they have me sign promissory notes—trust me, they do—and all sorts of legal documents. We don't have to regulate them. Our plea is with the government to sit down and resolve this now so we can clear the air.

My fear, because the theme is a "trust us" theme—I don't know. That hasn't cut it in my books since the days of Richard Nixon, if not before. There's just no such thing as "Trust us." The world's three greatest lies: "Your cheque is in the mail"; "Your money cheerfully refunded"; and "Hi, I'm from the government. I'm here to help you."

In terms of the bill and the whole regime having legitimacy out there with the public and with paralegals, people have to have confidence not only in the process but in the content. I hear you, and I just hope that we can get some of the smart people who work in the ministry—and they are very capable—to sit down and work on doing some drafting and taking a look at those amendments.

I've really got to get a better handle on what you do. You do corporate searches? Give us a for example.

Mr. Sturdy: For an example, your credit union lends me money to buy a car. They will register under the Personal Property Security Act their chattel mortgage on

the vehicle. They would phone us, and we would do that registration. They would just say, "Okay, it's Jim Sturdy, he lives here, and it's this vehicle, this serial number. Register it, send us back the verification statement, and we're done."

Mr. Kormos: And if I'm a lawyer doing a transaction of chattels, for instance, and I want to find out whether there is a lien, I'd have you do that work for me too?

Mr. Sturdy: You could call us to do it, you could do it yourself, or you could use any number of other people. And we do that.

Mr. Kormos: See, this is the whole—it's not very much of a secret, but the people who do the heavy lifting in most law offices are the support staff, the paralegals, the law clerks, whether it's real estate deals, whether it's transactions involving the sale of chattels, a whole lot of that type of solicitors' work especially, and even in terms of barristers' work. These are people who are working directly for lawyers. Surely they don't warrant regulation, because it's the lawyer who is picking up the responsebility at the end of the day in any event; right?

Mr. Sturdy: On that side, you're reflecting, I think, rule of procedures 501(c) or something: If you're doing it under a lawyer, then the liability walks with the lawyer. A lot of what I do—I'm outside of that world. Bank of America has retained one of my customers in New York to get a PPSA registered in Ontario.

Mr. Kormos: But if Bank of America does something inappropriately, relying upon that, they're the ones who end up paying. They can go looking to you after, but they're the ones who end up—

Mr. Sturdy: They're going to pay out first, and they're going to come after me and say, "You made a mistake," and we come to terms.

Mr. Kormos: Interesting stuff. Thank you kindly. I appreciate your coming here.

Mr. Balkissoon: I just want to thank you for taking the time to come here. Certainly your concerns and input are valid, and we will take due consideration. Thanks very much.

Mr. Sturdy: You're welcome.

The Vice-Chair: Thank you very much for taking the time to be here today.

Mr. Sturdy: It's my pleasure and my honour.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175

The Vice-Chair: Could the United Food and Commercial Workers, Local 175, please come forward.

Mr. Kormos: Chair, while this presenter is being seated perhaps I can speak, through you, to legislative research.

The Vice-Chair: Yes.

Mr. Kormos: Mr. Fenson has very promptly provided us with a number of documents related to the federal regulation of immigration consultants. Page 5 of that report to us, which is the explanatory note that accompanied the federal regulation, says, "The proposed regulations"—the one that's here—"allow CIC and IRB to deal only with members in good standing of CSIC or of a provincial and territorial law society." I think what we have to know then is—in terms of what spokespeople not on the part of CSIC but on the part of immigration consultants told us yesterday—does this mean that once paralegals are regulated, if in fact they're regulated by the law society, they then, by virtue of that, will acquire status before the immigration review board, for instance, without being members of CSIC? It's an interesting thing, isn't it? Thank you.

The Vice-Chair: We'll get further clarification on that.

Mr. Kormos: I appreciate it.

The Vice-Chair: Georgina Watts?

Ms. Georgina Watts: Good afternoon.

The Vice-Chair: Good afternoon. You have 30 minutes for your presentation. You can use the entire 30 minutes for your own presentation or whatever remains of that time can be an opportunity for members of the standing committee to ask questions or make comment about your presentation. If you would introduce yourself for the record and then just proceed with your brief.

Ms. Watts: Thank you, Madam Chair. I don't think I'll need the full half-hour. I have relatively brief submissions to make.

My name is Georgina Watts. I'm senior legal counsel to the United Food and Commercial Workers International Union, Locals 175 and 633. Our particular local union is very large for a local union. We have approximately 50,000 members, and they are working in virtually every type of workplace all across Ontario. We have offices in Ottawa, Kitchener, Thunder Bay and Toronto, and all spots in between.

We employ somewhere around 50 people in the capacity of a union representative, and those people do various tasks. Some are service representatives who go to workplaces and provide assistance to the members in their workplaces, processing grievances primarily. They would process those grievances through discussions with employers through the various stages of the grievance procedure. If a resolution isn't reached, those matters are referred to arbitration, and union representatives would attend those arbitrations. At our particular local, it is legal counsel who present and conduct those hearings, but the union representatives are in attendance and in fact giving instruction to the counsel. You don't have to be a lawyer to appear at a labour arbitration; in fact, I think the system was devised so that it wouldn't become too legalistic. Somewhere a lawyer got involved and since then, for the last 20 or 30 years anyway, it has been almost exclusively the realm of legal counsel. That's one type of union rep.

There are also reps whom we employ who do primarily WSIB work, where they would represent our members through the various stages and appeals of that process. We also have representatives who work exclusively in occupational health and safety matters:

seeking orders, appealing orders, appealing failings to make orders and that sort of matter. That's generally the type of union reps we have at our organization. At smaller locals and unions, those roles may not be so distinct. One union rep might do all of those tasks, for example.

1320

I have been asked on behalf of our organization to make a brief presentation to your committee today. I certainly don't have any authority to speak on behalf of the labour movement, but I think I raise a concern on behalf of all unions that there is a fear that this bill will serve to hamper the union movement and cause expense for the union movement and time and effort that we feel is better spent on the membership and on pursuing the membership's goals.

The act as it is now drafted does not specifically exclude union representatives. The rather broad definition of a paralegal as someone who provides legal services, if you will, could certainly include a union representative. We certainly deal, and our union representatives certainly deal, with the legal rights of members. They often enter into binding settlements and legal documents and affect the economic and social lives of our members. So our concern is that at present the act is written to leave those—whatever exclusions might result, that would be defined by the law society. The law society, in essence, would create a list of the people who would not be covered by that rather broad definition. I understand that the law society's position at this point is that union representatives should be excluded, and we are certainly in agreement with that. What my union would ask your committee to do is to amend the bill to specifically exclude union representatives from the provisions of the act; not to leave it up to the Law Society of Upper Canada to put that group on a list excluding it, but to specifically articulate in the provisions of the act that union reps are not to be considered paralegals for the purposes of this act.

I would like to give you at this point a few reasons why we think that's very important. I'm not suggesting to you that there hasn't ever been a substandard union representative or someone who has not given good service to a member. What I would suggest to you is that we have an excellent system in place right now to help members who are aggrieved or who feel that they haven't received proper representation by their union.

Under the provisions of the Labour Relations Act in Ontario—we do have some members in our union, for example, who are federally regulated or regulated under the provisions of other acts, but the vast majority of employees in Ontario are regulated under the provisions of the Ontario Labour Relations Act. Under that act, and it's true that under every labour relations code in the country, there is a provision that deals with duty of fair representation. In our particular act, the Ontario act, that's section 74. An aggrieved member can file an application under section 74 by simply filling out a form and sending that form to the Labour Relations Board, and they simply have to articulate why they think their union didn't represent them or how their union didn't represent them. I know from vast experience in dealing with the labour board that the labour board bends over backwards to get to the root of the issue. Sometimes members have language barriers. Sometimes members can't articulate their complaint in a clear fashion. So what the labour board does is assign an officer to those complaints, a very experienced labour relations officer in most instances, and that labour relations officer meets with the parties and helps the aggrieved member articulate their concern and helps to seek some redress. Many of those applications are resolved at that point in the procedure. If they're not resolved at that point, the matter is referred to the Ontario Labour Relations Board, in front of a vice-chair.

The labour board has developed a particular procedure for dealing with these matters, because these people are not usually represented by counsel. Again, the labour board bends over backwards to ensure that those people have a fair opportunity to have their beef heard by the labour board and to come up with some agreed-upon resolution that can resolve it. If they can't resolve it, they'll issue an order. Now, sometimes that order is, "The union didn't violate their duty. Thank you very much." But sometimes that order directs the union to do certain things or to not do certain things in order to try and address the issue.

Let me give you a very common example. An aggrieved person's grievance reaches stage 3 of the grievance procedure and the union decides not to send it to hearing, not to send it to arbitration, for whatever reason. It could be cost, it could be, "I don't think there's much merit to the grievance," "I don't believe the griever," whatever the situation might be.

Under our particular constitution and bylaws of our local, we have an appeal process. If I don't like the decision that the director made, I can appeal to a group of my peers. A committee is struck and you get to go in front of that committee and say, "Well, I think I should be able to go to hearing." Often the committee agrees with you and off it goes to hearing.

If it doesn't go to hearing, often that aggrieved person will apply under section 74 to the Ontario Labour Relations Board. In some circumstances—obviously not ever involving my union; I'm joking—the labour board will say, "You know what? You're right. That matter should have gone to arbitration." This is where the labour board has the expertise and, more importantly, the jurisdiction to fashion remedies that can actually solve the problem. For example, if the labour board determines that that matter should have gone to hearing—"You're a 30-year employee. You paid dues for 30 years. You've been accused of theft. I think you've got a good case"—as the vice-chair of the labour board—and they do this. They will make the union take that matter to arbitration. Even if the time limits for referral under the collective agreement or the Labour Relations Act have expired, the labour board can and does say, "I'm going to override

those time limits. I don't care what the act says and I don't care what your collective agreement says." The labour board is going to say, "I want that thing sent to hearing." They might also say, for example, "I'm going to have the union pay for outside counsel of the griever's choice."

All sorts of different remedies can be fashioned, remedies that are far outside the realm of expertise or jurisdiction that the law society could ever have in these matters. All the law society is going to be able to do is sanction someone, or require training, like they do with lawyers. When a lawyer doesn't live up to the standard, they can make them take a course, they can disbar them, they can punish them or they can sanction them. But the labour board can fashion and does fashion remedies that actually fix the problem.

With all due respect, two years after, if my complaint about my paralegal or my union rep or whoever it might be were to wind its way through the law society and that union rep would then be sanctioned, that leaves me, the aggrieved member, with nothing. I don't care whether that union representative got a slap on the wrist or a fine. The point is, my grievance went nowhere and I have no meaningful remedy. But if I go down to the labour board 21 days from the day I sent that application—I shouldn't say that; it's not guaranteed. The practice of the labour board is that very soon after sending my application in, I have a Labour Relations Board meeting with an experienced labour relations officer who helps me work through my problem. If that doesn't do the trick, I get to go in front of a vice-chair—again, a very experienced person with knowledge of labour relations. If that doesn't work, I get a decision and perhaps a remedy that's actually going to solve my problem. That section 74 has for many years been the standard to which union representatives have to aspire, and they have to meet that standard. The labour board has developed a large amount of jurisprudence in the area and a great deal of expertise and knowledge and the ability to balance all the different interests.

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Labour relations is a very specialized field, and, frankly, the law society does not have the expertise nor the power of jurisdiction to balance all the interests at play. For every one of those aggrieved employees who goes down to the labour board, there is an employer whose rights may also be affected, who becomes a party to that application. Let's say that we went to a paralegal-like system, where the aggrieved employee would then complain to the law society. In those circumstances, where is the employer left? I'm not going around defending employers' rights—they're pretty good at doing that themselves—but the reality is that the labour board has the expertise to balance all of those interests and fashion a remedy that makes sense, that can actually address the problem and fix the problem for the aggrieved employee. The reality is that the vast majority of those complaints are settled, and they're settled by the parties sitting down across from each other with an expert mediator, a labour relations officer, who works through the problem, and usually there's some solution that can be worked out. That's the nature of labour relations. It's a lot better to settle labour relations problems than it is to litigate them.

We have ongoing relationships that need to be maintained, unlike, perhaps, a paralegal who represents a person in an immigration matter. That would be the end of their relationship. I have an ongoing relationship with my members. Once they file a section 74 complaint, they're still my member and I still owe them the same duty of fair representation that I owe all the membership.

The labour board has been doing this in Ontario and at the federal level for 50, 60 years. They have developed a large body of jurisprudence, a stable of expert vice-chairs and labour relations officers. I would suggest to you that there isn't an administrative tribunal in the country that has the expertise, the body of jurisprudence or the history that that administrative tribunal has. There isn't a better group of people to resolve labour relations issues than that group of people. With all due respect to my brothers and sisters at the Law Society of Upper Canada, they do not have that expertise and frankly don't know anything much about resolving labour relations problems. In our union's respectful submission, those issues should be left to the labour board. We would look to you to specifically exclude the union representatives and their role. When you read the draft act that your committee is working on and crafting, it's clear that the harm that the act tries to address is not the harm of, let's say, a poor union rep, a union representative who is providing poor service. That is not what that act is aimed at, in our respectful submission.

One other concern I'd raise with you is duplicity of hearings. Section 74 isn't going anywhere. The Labour Relations Act isn't going to change, I wouldn't imagine. It hasn't changed very much in many, many years. There will still be section 74 complaints. At the same time, are we going to be running parallel complaints against union reps? There is a duty of fair representation built into the Labour Relations Act which has resulted in the development of this professional, if you will, called a union rep, and it's a rather unique job and you can't go to school for it. You have to come down at our office to learn how to do it. In our respectful submission, that union rep has to meet a standard that provides a great deal of protection to union members.

There is also a certain amount of competition between the unions in terms of going after membership, and we sell ourselves on the basis of, "Hey, we've got a whole legal staff, and we've got WSIB people who are really skilled and do really well." That competition also raises the bar in terms of our level of representation. But if, for example, someone at some other union were to fall below that standard, we feel that section 74 and the parallel provisions under the other labour relations acts that we deal with provide excellent protection to members, and the labour board has the expertise and jurisdiction to really fix a problem when it arises.

That's all we had to say in terms of our formal submission, but we'd be happy to take any questions.

The Vice-Chair: Thank you very much. We have 12 minutes, and I believe the third party has the lead in this rotation.

Mr. Kormos: Thank you kindly.

Ms. Watts: Thank you, brother.

Mr. Kormos: You might be interested to know that the Society of Energy Professionals was here this morning with very similar observations and comments, not inappropriately, about the bill. I know there are others coming forward from the house of labour.

Over a long time, I've had a whole lot of experience with trade union advocates. In the old days, some of them didn't have high school diplomas and sometimes maybe their English was a little fractured and their diction was not always the Queen's English, but they could kick the snot out of any labour rep in front of an arbitration and knew labour law up and down. I tell you, I'd have put my job or future in their hands any day of the week. Well, it's true. I'm sorry, friends.

In any event, it's a strange bill. It basically says everybody practises law, because there almost isn't anybody in the world who doesn't do something in the list of things that constitute legal services. We made reference this morning to the jailhouse lawyers. There's somebody in a Tim Hortons right now, somewhere in Ontario, counselling somebody, rightly or wrongly, about their rights vis à vis a matrimonial dispute, vis à vis a Highway Traffic Act charge, a criminal charge or a property dispute with their neighbour—mark my words—and that person is practising law. So everybody in the world is practising law; that's hyperbolic, but what the heck.

But then you've got to go to this subsection (5), the exemption: "A person who is not a licensee may practise law ... if and to the extent permitted by the bylaws." That seems to me, from a legal drafting point of view, to be an incredibly cumbersome thing to do. You see, the problem is—because, look, the folks down at the law society, I know some of them a little bit and they're pretty decent people; I have regard for them—I don't think even the law society has got it figured out yet.

I want to take you back, and I mentioned it earlier today, to when this committee first began sitting—April 26. Mediators—you know, folks who help people resolve disputes, like family disputes, without using litigation—are concerned that they'll be deemed to be practising law and they'll have to be regulated by the law society if they help people draft minutes of settlement.

Ms. Watts: Labour relations officers at the board, under the Employment Standards Act—

Mr. Kormos: Exactly. So I put to the law society and their spokespeople, "What about mediators drafting minutes of settlement?" What was the response? Hansard, April 26: "If you have a mediator who's not a lawyer regulated by the law society and not regulated by any other body"—and I interject, mediators aren't—"who's serving as a mediator preparing documents, such as minutes of settlement in a dispute resolution process to which two lay people are privy, perhaps the answer to the question is, they should be regulated ... they should be recognized by a body such as the law society, so the public is adequately protected."

Now, I found that troubling.

Ms. Watts: I can't make any submissions on behalf of anybody other then union reps, because that's all I know and that's all—

Mr. Kormos: But the only time I had an opportunity was on this one, on mediators. I would have put union reps to him if I had had a chance.

Ms. Watts: But if I was asking that question of them, the point from the law society person was that maybe they should be regulated. I guess my point to you is, we already are and have been for many, many, many years. Whether or not a mediator or an immigration person or someone else should or should not be regulated is a matter for MPPs to decide and the legislature to vote on, but whether or not union reps should be regulated, I guess my point is they are and they always have been.

Mr. Kormos: The problem is, we're not going to get to vote on any of it, because the bill doesn't indicate who is and isn't going to be a paralegal. The bill doesn't indicate what the scope of practice is. The bill doesn't indicate what the standards are. That's the problem. We don't get to vote on anything here.

Ms. Watts: Yeah, and I certainly share your concern with respect to the limited question of union representatives, because the bill as written now leaves it in the hands of the law society to decide, and frankly, I don't think the law society has the expertise to say whether or not union reps need some further level of regulation.

Mr. Kormos: Thank you kindly. I'll not belabour the point with you. I appreciate your coming here today.

Ms. Watts: Thank you very much.

Mr. McMeekin: Yes, sister, thanks for coming out and sharing with us today. I found much of what you said consistent with what some of our other presenters have shared. A number of union leaders involved in injured workers' claims, WSIB, very focused, limited but a highly competent level of expertise. So we hear what you are saying. I think there's a general sense of concurrence here, and we'll certainly be looking at this when we get to stages of clarifying language, potential amendments etc.

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Ms. Watts: Thank you very much.

The Vice-Chair: Ms. Elliott?

Mrs. Elliott: Ms. Watts, the issues that you raised, obviously from the comments that you've heard from all of us, are comments that we've heard from other presenters and are certainly quite valid. We recognize the point you're making, that you are already regulated and don't need further regulation. So certainly we will be taking those comments forward. They are of significance, and we will be considering them very carefully. Thank you very much for being here today.

Ms. Watts: Thank you, Mrs. Elliott. I guess I should clarify what our concern is. Our concern is that somehow there would be some test or standard for union reps and we would then have to spend money on training and spend time sending them off to pass tests. We have union reps, as Mr. Kormos pointed out, who may not be the most articulate people in the world but do a very, very fine job, do a great job. It may be that they don't do so well in the classroom setting of law school or paralegal school, but they do a terrific job on the picket line or across the negotiating table. So I think maybe we weren't exactly who you were aiming at when you put this draft together, and I hope you can see your way clear to specifically exclude our folks from it.

The Vice-Chair: Thank you, Ms. Watts, for coming in.

Ms. Watts: Thank you very much. Take care.

STEPHEN PERRY

The Vice-Chair: If Stephen Perry of Perry Partners could come forward, please. Welcome, Mr. Perry. I think you've been here for a while, so you know that you have 30 minutes and that if you don't use the entire 30 minutes, that's an opportunity for members of the committee to ask you questions or make comments about your presentation. So, for the record, would you identify yourself and then proceed with your presentation.

Mr. Stephen Perry: Thank you, Chair, and thank you, committee members, for inviting me. My name is Stephen Perry. I am here in a personal capacity as a small business owner in Ontario and as a registered patent agent. I've been in this business for 25 years. I have my own firm which I established just a little over a year ago, and we've grown from four people initially up to eight. I was with one of the larger intellectual property firms downtown before striking out on my own. I am also a member of the Intellectual Property Institute of Canada, which will be presenting separately to you next Wednesday, I believe. But these are my own thoughts.

I suppose I should begin by asking the question, what is a registered patent agent? From 9 to 5—well, usually longer than that—day to day, my job is to draft patent applications and advocate for innovators before the patent offices in Canada and the United States and through foreign counsel in other countries. My firm's two biggest clients are Ontario companies: Mitel Networks in Ottawa, which makes PBX equipment, and Research in Motion in Waterloo. These Ontario innovators, of course, are a driving force behind establishing Ontario as a leading technology sector. We could get into great debates about the relative merits of patents or otherwise in terms of monopoly rights and the like, but I think that can probably be saved for another day. The issue here for me is how Bill 14 would affect my practice as a registered patent agent.

A patent agent can be a lawyer, and I'm not sure of the statistics now—quite possibly our president, Cynthia Rowden, will be able to speak to that next week—but I suspect it's about 50%. So probably half of the registered patent agents in Canada are lawyers, but one need not be a lawyer. I am not a lawyer. Typically, a patent agent has an advanced degree in science or engineering. In my office I've got a Ph.D. microbiologist, a master's in engineering and a lawyer.

In order to qualify to write the examinations, a patent agent must undergo fairly intensive training under the personal supervision of a registered patent agent and then, having completed that, must pass a series of examinations on patent law and practice that are administered by Industry Canada and set jointly by industry and the Intellectual Property Institute of Canada. The exams are notoriously rigorous. The pass rate I think hovers at about 20%. So this is a profession that people really dedicate themselves to. It's not something you just pick up; it's something you really have to dedicate yourself to. People work for many, many years to qualify and, in fact, some people don't qualify. One of my former partners is a highly respected Intellectual Property lawyer who wrote the exams many times but never passed. Fortunately for him, he's also a very good litigator and has a successful career in patent litigation.

What do we do? We, quite clearly, provide legal services. We draft patent specifications and file them with the patent offices. We draft documents that are ancillary to patent applications, including assignments, licences, powers of attorney. We are regularly asked by our clients to provide opinions on patentability, on validity of patents or infringement and the like.

That brings me to Bill 14. Bill 14 is very long. I think it's in excess of 200 pages and has several schedules. Echoing, I think, the sentiments of many of the presenters before me, my concerns are with schedule C. What is the issue? The issue is stated, certainly by the law society and in the government's introduction of the bill, as protecting the public interest by regulating unlicensed paralegals. As we've already heard today, that word isn't even used in the bill. The word "paralegals" just doesn't come up.

The law society, in one of its notices, indicated that the issue is expanding their public interest regulatory mandate. So what's the problem? It goes too far. Not only will the law society be responsible for regulating paralegals—which was their intention—but they will also be, as we know, responsible for regulating any person who provides "legal services" in Ontario. The legal services, as you all know, are set forth in subsection 2(10), which adds a new subsection to section 1 of the Law Society Act. I'm not going to bore you with this, because I suspect you've heard this many, many times in the last couple of days.

Under the terms of the act, if anyone does provide legal services without an appropriate licence, they could be subject to fines of as much as $50,000 per offence—that's a lot of money—even if that person who provides legal services does so within the scope of his or her practice in a regulated profession such as mine.

I found it very interesting that one of the subsections that schedule C proposes to add to the Law Society Act is the one that states that the prohibition section "applies to a person, even if the person is acting as agent under the authority of an act of the Legislature or an act of Parliament." There's a problem. That language has been found constitutionally inoperative by the Supreme Court of Canada in a decision that was appealed out of BC. In that case, the Supreme Court acknowledged what is very well known, and that is that the provinces do have legislative authority to regulate the practice of law under the Constitution. However, where there is a conflict between federal and provincial statutes and rules or regulations, the federal legislation will prevail according to the paramountcy doctrine, which safeguards control by Parliament over the administrative tribunals it creates.

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Interestingly, or helpfully for me and my colleagues, the Supreme Court did specifically mention patent agents at paragraph 58: "Many federal tribunals allow representation by counsel other than barristers or solicitors," including patent agents before the patent office. "All of these non-lawyer roles involve some aspect of the traditional practice of law. Representation by non-lawyers is consistent with the purpose of such administrative bodies, which is to facilitate access to and decrease the formality of these bodies as well as to acknowledge the expertise of other classes of people."

So are registered patent agents regulated, which was the problem posed by the legislation and echoed by the Law Society of Upper Canada? Yes, we are federally regulated by the Commissioner of Patents under the auspices of Industry Canada by section 15 of the Patent Act. As I mentioned before, there are stringent entry requirements that require each candidate to demonstrate a good knowledge of Canadian patent law and practice by passing the qualifying exams. The commissioner does have disciplinary power under section 16 of the Patent Act. So we are regulated now. Will we continue to be regulated? Yes. Industry Canada and our institute have collaborated on a proposed federal registration to create a college for self-regulation of patent agents. All of this stuff is available on the institute website, and I suspect you'll be hearing more about it next week in any event.

Now here's a nice little catch: The proposed legislation is based on recommendations that were made in 1999 at the request of the institute by Gavin MacKenzie, who is the current treasurer of the Law Society of Upper Canada. I have to tell you that he's been awfully quiet these days in response to our institute's requests for clarification. The draft legislation does include provisions for a code of ethics, discipline and governance, all of the things you would expect in a self-regulating environment.

If registered patent agents are already regulated by the Commissioner of Patents and will continue to be regulated by the college, then why do we need to be further regulated? Well, we don't.

What is the issue? I asked that question before, "What is the issue?" If you'll permit me, I'm here in an individual capacity and not speaking on behalf of my institute, so I'm permitted a few histrionics and hyperbole, I hope.

The real issue, I believe, is protectionism. Non-lawyer patent agents are competing with non-patent agent lawyers for the same clients and to provide the same legal services. Personally, I believe there is a fear within some members of the law society that Canada will follow the lead of countries such as the United Kingdom, Germany and Japan, which have opened up the courts to non-lawyer patent agents properly qualified in litigation in order to advocate patent disputes, because it's a very specialized area of law.

By the way, this is not meant to be an exercise in lawyer-bashing. I'm married to a lawyer. Many of my best friends are lawyers. Indeed, the president of our institute, who will be speaking to you next week, is a lawyer. I understand that many honourable members of this committee are also lawyers. So this is not about lawyer-bashing.

I've been trying to get my head around the problem with this definition of "legal services," and it occurred to me that there may be a useful or helpful analogy if you look at health services. You've got all sorts of competent, qualified and regulated people who provide health services in Ontario. You've got physicians and surgeons who are regulated by the College of Physicians and Surgeons of Ontario. There are midwives who have a college, optometrists who have a college, naturopathic doctors and so on and so forth. All of these people provide health services. So I fail to understand why there shouldn't be a similar sort of arrangement in connection with legal services in Ontario. Barristers and solicitors practising law are regulated by the law society; patent agents are regulated by the commissioner; trademark agents also—my friend does patents and trademarks; I personally do trademarks, but the institute will be speaking on behalf of both—real estate brokers; we heard about labour representatives; all sorts of people are regulated, but in the day-to-day provision of their services, they deal to some extent in the traditional practice of law.

So what is the solution? Well, the solution proposed, as we all know, is an exemption under the bylaws. I don't think that works. For one thing, it gives absolute discretion to the law society as to who they will decide to exempt and who they won't. There is absolutely no public process. This is the public process, but once it gets into the bylaws, the public is out of it. In any event, it would not cure this constitutional inoperability that the Supreme Court of Canada has already found to exist in connection with similar legislation in BC. So there is a solution that I think you've heard many times over, and that is to include a specific exemption within the act.

I'm not sure if you have the handout that I had prepared, but the first option in the handout is—I'm kind of pre-empting my colleagues a little bit here, stealing

their thunder, but this is, I believe, what they will be presenting next week. I'm getting the sense, having heard a little bit today and having looked at the submissions, that there are an awful lot of people who are looking for specific exemptions. I don't really know anything about the legislative drafting process and whether having great, long lists represents any challenges in that respect, but I'm sure the real estate brokers are looking for it. We've heard that union reps would like it, insolvency and restructuring professionals. So it occurred to me that there may be an alternative.

These are the sections of the bill as they read now. The first section is the prohibition, the second section is the exemption and then the third section, the one I drew your attention to, which specifically directs this legislation at "agents." I'm wondering if some very simple amendments could be made by including as exemptions subsection (5), which is the law society bylaw exemption, and subsection (8). But if you take subsection (8) and just turn it on its head, borrow the language that begins subsection (5)—"A person who is not a licensee may practise law or provide legal services in Ontario"—and then continue on, "if the person is acting under the authority of an act of the Legislature or an act of Parliament."

Thank you very much. To the extent that there is time left, I'd be happy to take questions. I hope that this is an opportunity for the committee to ensure that Bill 14 lives up to its name to promote access to justice and not to interfere with access to legal services that are provided by highly qualified, regulated professionals.

I'm also quite happy to answer questions from any budding inventors within the committee. You might as well ask now, because if the bill passes into law in its current state, you won't be able to ask me later, because I'll get sued for up to 50,000 bucks a question. Thank you.

The Vice-Chair: Thank you, Mr. Perry. We have 13 minutes for questions and comments. The government has the lead.

Mr. Shafiq Qaadri (Etobicoke North): First of all, thank you, Mr. Perry, for your expertise in the realm of registered patent agency. As one of my colleagues was remarking, I think we're often treated to a number of inventions at committee hearings. So we thank you for your expertise, particularly with regard to Mitel and Research in Motion.

A couple of questions: You've referred specifically to the training, the exams and some of the hurdles that your agents have to go through. Can you tell us a little bit more about that training? What exactly is the time frame? Is it a year out of law school, for example? What is it?

Mr. Perry: It has evolved over time. When I wrote the exams back in the mid-1980s, a lawyer in Ontario could write the exams at any time, whereas a person without a law degree, such as myself, was required to undergo a two-year apprenticeship under the direct supervision of the patent agent. That has changed. The regulations, as they stand now, require all persons, lawyers and non-lawyers, to be personally trained under a registered patent agent for a period of at least 12 months.

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The institute has also provided a course that's been quite well received that has some fairly senior members of the profession doing online training and paper setting and evaluation as a lead-up to the examinations, and that has worked quite well. So our institute is motivated to try and do something about the pass rate because it's astonishingly low, but they are very rigorous exams.

Mr. Qaadri: So a 12-month apprenticeship under a registered agent; what does the pre-apprenticeship training involve?

Mr. Perry: That's a very good point. Again, when I wrote, you had to either be a lawyer or an engineer or have a degree in sciences, but that has all been abolished. So there has been a willingness to open the gates a little bit and allow people with other specialties to be able to train and write. But as a practical matter, it's very difficult to service the needs of high-technology clients without a fairly substantial technology background.

Mr. Qaadri: Having a look briefly through your proposals, option 1 and option 2, I presume you can see the difficulty of instituting option 1 yourself with regard to—

Mr. Perry: It occurred to me it might be a problem.

Mr. Qaadri: —specific exemptions?

Mr. Perry: Yes. I figured I wasn't the only one who would be making that recommendation. So, yes, I see it's a problem.

Mr. Qaadri: With regard to option 2, the very last paragraph, do you not see how that essentially undoes the entire intent of Bill 14 by essentially opening up the practice of law or legal matters to everyone in the province?

Mr. Perry: I don't think it does if there are acts of Legislature or acts of Parliament that permit representation before specific tribunals other than the courts in a way that recognizes the special expertise of certain people and reduces the formality of court proceedings and the like. As I said before, I chose that wording to be consistent with what I believe the decision was under the Supreme Court.

Mr. Qaadri: All right. Once again on behalf of the government side, I'd like to thank you for your presence and your expert testimony.

Mr. Perry: You're welcome.

The Vice-Chair: Ms. Elliott.

Mrs. Elliott: Mr. Perry, you're clearly aware that the issues you've raised have been raised by a number of other organizations, but I for one certainly appreciate your perspective, particularly with respect to the constitutionality issue and the problems inherent in re-regulating a federally regulated body. So thank you very much for that, and I appreciate it.

Mr. Perry: You're welcome.

Mr. Kormos: Thank you, Mr. Perry. You're referring to subsection 26.1(8) as it will be in the act if the bill passes. I have no idea what that means: "This section applies to a person, even if the person is acting as agent under the authority of an act of the Legislature or an act

of Parliament." I have no idea. "Agent" isn't defined that I can find in schedule C.

Mr. Perry: It's a very interesting choice of words because the issue before the Supreme Court—I didn't give you all the background—was an immigration agent or consultant. I'm not overly prone to conspiracy theories but—

Mr. Kormos: Oh, what the hell.

Mr. Perry: What the heck.

Mr. Kormos: I spent the 1960s living them.

Mr. Perry: But I have to wonder whether that language was chosen—it's very specific language.

Mr. Kormos: Do you remember the 1960s, Mr. McMeekin?

Mr. McMeekin: I do.

Mr. Kormos: I don't. Go ahead, Mr. Perry.

Interjection.

Mr. Kormos: The problem is, the immigration consultants were here yesterday and a fellow spoke to them the very first day of the hearings, a dissident immigration consultant, and then the whole issue came up that if they're federally regulated, does that then deprive the province of the jurisdiction to similarly regulate them through the law society? Research is working on that as we speak, but interestingly in the CSIC, in the immigration consultant, the regulation federally says that you can appear before the Immigration Review Board if you are a member of CSIC or if you are a member of a law society of a province.

It's interesting, and that's what I've asked research to take a look at for us. Does that mean that a paralegal who is regulated by the law society would then automatically become entitled to appear before IRB—which I'm not saying is a bad thing?

Mr. Perry: Quite possibly.

Mr. Kormos: The federal regulation in the immigration case opens the door, or includes, provincial regulatory bodies in the screening bodies. Your scenario doesn't appear to have that same situation. There's nothing suggesting that in the Patent Act. It says licensed patent agent or somebody who is an a, b or c. Yours is a little bit of a different scenario, and it then calls out for—and I'm asking Ms. Drent to take on yet more work, as she can give us a little bit of insight into that.

What's remarkable about this bill is that if you take a look again at "Provision of legal services," appearing before an adjudicative body, representing a person before an adjudicative body: I appreciate that there are federally constituted adjudicative bodies and there are provincially constituted adjudicative bodies, but it also includes arbitrations, private arbitrations. What the hell is the province doing, telling parties to a private arbitration whom they can and can't have appearing with them or for them? It's none of our business. It's what private arbitrations are all about: the parties to the arbitration. You can have monkeys acting for you at an arbitration—well, there are probably some parties to arbitrations who thought they did. You can have monkeys acting for you if you want. It's between the parties. I find the "best-laid plans of mice and men" once again—I understand the intent. So do you. Let's focus on the paralegals. Let's focus on the problem. Let's focus on the myriad of professionals about whom there's no public concern.

I ask Ms. Drent as well to get us some sense of how many complaints have been made about human resources personnel, mediators and all of those other professionals who would be caught by this net. Throw patent agents in there too. Let's see whether the Ministry of the Attorney General has been inundated with complaints about patent agents.

Mr. Perry: No, it would be the Commissioner of Patents, and he has exercised that authority. It was even last year that he took action against a rogue patent agent. There are very, very few instances of that but we are regulated. There is discipline in place.

Mr. Kormos: The lawyers have got you beat to all get-out, then. There'll be far more investigations. I appreciate your comments. This is very different. The problem is that if the government doesn't let us, we're not going to have an opportunity to have people from the Ministry of the Attorney General come back to this committee to respond to these concerns. We're going to be asked, 102 voting MPPs, to vote on this bill with all of these concerns having been raised without an opportunity, unless the government lets us, here in committee, have the Ministry of the Attorney General come back here and answer some of these concerns.

I don't think that's a healthy way to pass laws. I don't think so at all. I'm hopeful that we're going to let the law society come back here. They opened the hearings, not inappropriately.

I have no doubt in saying that I am sure Mr. MacKenzie will be more than pleased to respond to any and all issues raised, but I want to hear what he's got to say before we take this into the House for third reading and are told to vote on it. That's irresponsible. There's not a member in this Assembly who should be willing to even touch this bill until it's been thoroughly investigated, analyzed, criticized, critiqued, and that criticisms have been met, either with explanation or with proper amendments.

What are any of us doing, either in opposition or in government, for that matter, at the point when somebody from the government is going to move to send this bill back to the House? What are any of us doing, doing that, unless and until we've gone through it with the proverbial fine-toothed comb? It's going to have huge impact.

And don't think they're going to come back and tinker with it a year or two years from now. It ain't gonna happen. It doesn't happen that way.

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The Vice-Chair: Thank you, Mr. Perry, for your very interesting presentation.

JUDI SIMMS

The Vice-Chair: We are now about 20 minutes ahead of schedule, so our next presenter hasn't arrived yet, but we do have another presenter who is available. I'm going to ask Judi Simms to come forward, please. Welcome, Ms. Simms. I just want to inform you that you have 30 minutes for your presentation—oh, just a moment; it should be 20 minutes. I'm sorry. If you don't use the entire 20 minutes, then there is opportunity for members of the committee to ask questions or make comments about it. So if you could please identify yourself for the record and then just start your presentation.

Ms. Judi Simms: Good afternoon. My name is Judi Simms. The gentleman before me spoke so eloquently that I feel I'm going to risk being redundant; however, I'm here to say my bit and I'm going to do that.

Before I do that, there's a question that I wanted to ask you. The gentleman here stated that there aren't many complaints—actually, Mr. Kormos stated that most of these people who have spoken here today, most of these agencies, haven't had any complaints, or there is no record of complaints against them from the law society. What I want to ask you is, how many actual complaints are there about paralegals in front of the law society? That's the question that I would like the answer to, because I would venture to say that if this question is investigated, it would probably be found that there aren't all that many complaints registered with the law society against paralegals.

Having put that question forth, I'd like to get into the body of my speech. I have introduced myself. I have a long speech written out there. Hopefully it won't put anybody to sleep. I know it's getting late in the day.

I'll restate my name. My name is Judi Simms. I am a paralegal, immigration consultant and qualified mediator. I have been in this industry since 1995, at which time I completed a certificate program with Ontario Paralegal. I hold three university degrees: an honours B.A. in English and history, a master's degree in English, and a bachelor of education degree. I have also completed and have obtained two certificates in mediation from the University of Windsor law school, and I am a full member of CSIC, the Canadian Society of Immigration Consultants, having successfully met all their requirements for full membership. I have been a full member of the Paralegal Society of Canada since 1995 and have carried errors and omissions insurance since it became available to paralegals in 1997.

Today I come to you in my capacity as the president of the Paralegal Society of Canada and an executive director of the joint boards of the Paralegal Society of Ontario, the Paralegal Society of Canada and the Association of Legal Document Agents. The Paralegal Society of Canada, which I will refer to as the PSC, is registered as a federal corporation, with the Paralegal Society of Ontario, which I will refer to as the PSO, as its provincial counterpart. These organizations function as a unified body and represent the interests of paralegals in Ontario seeking self-regulation and also offer consumer protection to the public at large. For the purposes of this discussion, however, I will refer only to those activities carried forth by the PSO, as this would be the organization that would be responsible for paralegal regulation in Ontario.

Let me be clear: Paralegals are committed to some form of professional regulation. Our opposition to this bill is not to avoid regulation, but to avoid the wrong type of regulation. The journey towards regulation for paralegals has been very difficult, but much has been accomplished, and I would like to share with you now the steps that have been taken towards self-regulation by paralegals in the past decade.

The PSO was formed to protect the interests of paralegals as a unified body as well as to protect the interests of consumers who use the services of paralegals. To this end, several steps have been taken to ensure that the organization is able to fulfill its mandate.

In 1997, the society began to require as a criterion for membership that every practitioner belonging to the society carry errors and omissions insurance. Every member among our ranks is today insured by the Encon Group Inc. Many paralegals have separate bank accounts which function as trust accounts, and some of us are bonded.

We have in place a code of conduct and a committee for investigation of complaints, and consumers are able to access us via our hotline and website. We have a complaint review and adjudication panel as well as modes of enforcement in place. These measures have been taken in order to ensure ethical business practices from our practitioners and to inspire public confidence.

We offer educational courses to our members consisting of twice-yearly seminars on relevant and timely legal topics, demonstrating our commitment to high standards of competency, education and professional development. Our efforts complement the many community colleges and even universities that offer certificates or bachelor of arts programs in paralegal studies.

We have prepared a white paper on licensing and self-governance outlining our plan for affordable self-regulation for our industry. Please remember, the Ianni report in 1990, the Cory report in 2000, and the report commissioned by paralegal organizations in 2004 by Professor Zemans have each concluded that paralegals should not be regulated by the law society.

So why is it that there are paralegals here at these hearings who will talk to you about the advantages of regulation by the law society? I believe it is simply battle fatigue. We have fought for so long for recognition and the right to practise that some of us are willing to settle for regulation by the law society in order to have some measure of stability in our business lives. We live from day to day with the threat of prosecution hanging over our heads for performing services that the public has demonstrated for the last 30 years that it wants and desperately needs. We are all tired of this uncertainty, and because a minority among us could survive and earn a living under the law society regulation as proposed by

Bill 14, some have decided to give up and have accepted the lesser of two evils: the certainty of bad regulation versus the uncertainty of the status quo.

The problem with Bill 14 is that it does not serve the public well and it does not ensure affordable and comprehensive access to justice.

Paralegals are essential to affordable access to justice in Ontario. Some of us are fully employed in meeting the needs of low-income people in such areas as family law, landlord and tenant tribunals, workmen's compensation claims and Small Claims Court, as well as other tribunals. Today, in the interests of time, I will address the situation in Ontario as it relates to family law.

One respected Family Court judge has noted that in 80% of family law cases, litigants appear without legal representation. A PSO-commissioned study, of which you have already heard, has shown that 46% of those in Family Court—nearly one in two persons—have no legal representation. Many of these are women and children, low-income families and new Canadians. Even though paralegals have been instrumental in assisting women and children in many family law cases, Bill 14 appears designed to further impede the ability of paralegals to practise and provide much-needed services in this sector of the law that touches so many Ontarians.

Despite the epidemic of non-representation in our family courts, there has been a move by family courts to exclude paralegals from practising in family law. This makes very little sense. If paralegals remain barred from practising in the area of their expertise, a large segment of the public, many of whom are women and children of low-income families and ethnic Canadians, will continue to be deprived of any form of representation in the family courts.

There are many paralegals within our organization who have dealt exclusively in family law, with 10 to 15 years or more of training and experience in the field. Properly trained paralegals answerable to their own regulatory body should not be barred from practising in the family courts. Training requirements should be determined by the regulating body and not arbitrarily by the courts, as has been the case in recent practice.

Most paralegal firms are small businesses comprised of one or two practitioners. Because the practice is small, the practitioners are more accessible to the public and the public at large feels more comfortable dealing with a paralegal. In many cases, paralegals working within an ethnic community speak the language of the people in that community. As such, they provide a comfortable environment and affordable services to community members seeking assistance in legal matters.

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Paralegals meet a vital public need that lawyers to date have failed to address. A lawyer is unable to provide many of the services that low-income and ethnic Ontarians require at anything close to an affordable rate; without a paralegal in the picture, the access to justice for low-income and ethnic Ontarians is denied.

Should the law society become the regulator of paralegals, all legal fees will have to increase. The position of the law society is that paralegals will be assessed a high annual licensing fee to pay the cost of regulation. This will drive many paralegals out of business as they will not be able to afford the exorbitant fees the law society intends to levy. The fair way to pay the cost of regulation is to pass the cost on to the consumer, either by a surcharge on all files, or a tariff as a percentage taxed onto each fee account. In this way, the consumer, who reaps the benefit of paralegal regulation, pays the cost. The PSO recommendation of a tariff rather than an annual licensing fee is preferable, for although this will also increase the cost of paralegal fees it will minimize the displacement of many paralegals.

We are all familiar with the saying, "There's always room for someone good." Paralegals who have been in the trade for a number of years know their business well or they would not be able to survive. If the public had no need of paralegals, then we would not be here. The fact that we are here shows that we are needed and, in fact, have found a niche within the legal community. We have done this by ourselves, without the assistance of lawyers or the law society. Should the law society become the regulator of paralegals, many of the services we offer will be curtailed.

Only a few days before he appeared before this committee last April, law society treasurer Gavin MacKenzie told the Toronto Star about his plans to curtail the activities of paralegals. I note that Mr. MacKenzie did not tell you about these plans when he appeared before you on April 26, 2006. You may wish to invite Mr. MacKenzie back to explain the disparity. The curtailments that Mr. MacKenzie plans, if he's given a mandate under this legislation to regulate paralegals, are not supported by any sound reasoning but instead by economic considerations in support of sole practitioner lawyers. Moreover, such curtailments serve to reinforce an impression the law society likes to promote: that paralegals are less skilled in providing basic legal services than are lawyers.

This brings me to an important point: There are many government sites which offer legal forms online, so that any person, regardless of education, training, experience, can access and complete legal documents. Some lawyers author self-help manuals for divorces, wills, powers of attorney. If the public at large is deemed capable of filling these forms out, does it not make sense that a paralegal, knowledgeable and skilled in the completion of legal documents, should be able to assist them? Low-cost paralegal assistance in the completion of legal documents helps those who are poorly educated and/or not fluent in the English language access the legal system. Low-cost paralegal assistance in completion of legal documents saves our court staff time and money by ensuring that forms are completed and filed quickly and accurately.

There are very serious issues with the broad scope of definition of legal practice in Bill 14, as well as within

the designation of the law society as the regulator of all legal practice. Bill 14's definition of "legal services" is so broad that it seems that virtually every person engaged in business management consulting in Ontario is engaged in the provision of legal services. This is evidenced by the long list of speakers who are appearing before this committee, including insurance companies, medical associations, banks, car lease and real estate companies, to name a few. Does the government intend that the law society be the regulator of all business consulting professions? This would indeed be a coup for the law society and one that I think they are not well equipped to handle. The plan may be that many business consulting professions will receive an exemption from this legislation, though many will not. At the end of the day, Bill 14 will only apply to the independent paralegal, who the law society believes, rightly or wrongly, is in competition with its lawyer members. The potential for a bureaucratic monopoly will always exist if this legislation passes in its present form. Exemptions given now may just as easily be withdrawn at a later date.

Another problem with Bill 14 is the huge conflict of interest that arises when one part of an industry is allowed to regulate its competition. A paralegal is not a lawyer and provides different services in the same field, although those services sometimes do overlap, resulting in competition between lawyers and paralegals. Often, for its own reasons, the public chooses a paralegal rather than a lawyer.

There is competition in every industry. Why should the legal field be any different? In Canada, in most sectors of trade and commerce, competition is regarded as a good thing. I'm hard pressed to think of one other area of professional practice where one profession regulates its competitor. Doctors do not regulate midwives, naturopaths, nurse practitioners or paramedics. The very concept of one profession regulating another in competitive practice ensures that the goals and objectives of the dominant profession will prevail, to the detriment of the general public.

In Great Britain and Australia, countries which also base their legal systems on the British common law, there's a move to deregulate legal service providers and give status to different kinds of advocates and advocacies in the interest of allowing their public greater access to justice. Great Britain and Australia are moving forward; Ontario proposes that we take a step back.

In the past 10 years, the paralegal organizations have worked tirelessly toward self-regulation but, for whatever reason, there have always been impediments to these proceedings, most of which have been brought forth by the law society. There have been three reports, as previously mentioned: two commissioned by the government and one by paralegals, each of which recommended loud and clear that paralegals should be self-regulated in order to allow for fair competition in the legal services marketplace. Despite their thorough examinations of the legal services marketplace, the government has chosen to ignore the recommendations of these reports.

In his Task Force on Paralegals report, 1990, Professor R. W. Ianni stated: "The regulatory model chosen for independent paralegals should be the least intrusive necessary, consistent with the public's need for greater access to legal services, as well as for some protection against possible abuses in the delivery of those services."

In his report, A Framework for Regulating Paralegal Practice in Ontario, which was released May 31, 2000, the Cory report, the Honourable Mr. Justice Cory stated: "I would emphasize that it is of fundamental importance that paralegals be independent of both the Law Society of Upper Canada and the province of Ontario. The degree of antipathy displayed by members of legal organizations towards the work of paralegals is such that the law society should not be in a position to direct the affairs of the paralegals."

Further, a submission prepared for Professor Ianni's task force in 1989 by Ian R. Nielsen-Jones, deputy director of investigation and research services for the federal Competition Bureau, states: "It will be my conclusion that the market forces, having demonstrated a need and a public benefit to be gained from independent legal services, should be allowed to govern the provision of these legal services to the extent possible, consistent with the requirement of competence and integrity inherent in the provision of professional services. I would urge the task force as an objective and unbiased adviser to the government, to carefully consider expanding the scope of practice presently available by law to paralegals with the intention of introducing more competition to legal services for the benefit of the public."

Every single report commissioned to study paralegal regulation has concluded that while paralegals should be regulated, the regulator should not be the law society.

The PSO is ready and able to be the regulator of paralegals in the public interest. The mechanisms for successful regulation by our body have long been in place. As a society, we have worked many long hours on a volunteer basis to prepare for the day when we can become a self-regulated industry.

Prior to the proposed introduction of Bill 14, we looked forward to a long and successful future in our chosen careers, yet it now appears that these long, hard hours of work could be for naught if this bill is enacted in its present form.

We therefore ask that in consideration of our position and in light of the arguments we have put forth today, you review and amend Bill 14 to allow for self-regulation on behalf of paralegals. It is only through self-regulation that paralegals can continue to provide a valuable service to the Ontario public. The interests of low-income and ethnic Ontarians are at stake.

Thank you for considering the interests of low-income and ethnic Ontarians.

The Vice-Chair: Thank you very much, Ms. Simms. Unfortunately, the time has expired. I do want to thank you very much on behalf of the committee for your presentation and for being available to make it at this point in time.

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USED CAR DEALERS ASSOCIATION OF ONTARIO

The Vice-Chair: I would now ask that the Used Car Dealers Association of Ontario representative come forward please. Good afternoon.

Mr. Warren Barnard: Good afternoon, members of the committee. I wish to thank you for the opportunity to speak. My name is Warren Barnard. I am the legal services director of the Used Car Dealers Association of Ontario. My submission will be brief, and our concerns as you'll hear are really centred around very specific sections of the proposed Bill 14.

Before I get into that, if I may, just briefly, I want to give you a short outline of who we are as an association, who the UCDA, the Used Car Dealers Association, is. Our association represents about 4,300 registered motor vehicle dealers throughout Ontario, both large and small, franchise dealers and independent dealers, in large cities, small towns and rural areas. Our members employ close to 20,000 registered sales people, in addition to other employees that they would employ as well.

The UCDA will be celebrating in a couple of months, in November, its 22nd anniversary. We're a federally incorporated, not-for-profit association and we are the voice of the used vehicle industry in Ontario. Our mission is to enhance the image of the industry through representation of our members, education, as well as mediation between consumers and dealers.

The UCDA endeavours to carry out this mission by working with all levels of government, particularly at the provincial level, the Ontario Ministry of Government Services, as well as the ministry-appointed regulator that regulates our industry, which is the Ontario Motor Vehicle Industry Council, or OMVIC for short. We also work closely with other motor vehicle industry associations, as well as with consumer groups throughout the province.

We offer educational seminars and material to our members through our member services department, and we have helped thousands of dealers and their employees to better understand their legal obligations and legal rights and the remedies of all parties when selling or leasing vehicles to consumers. Through mediation and practical advice, our legal services department, comprised of two full-time lawyers, including myself, helps to avoid or resolve hundreds of consumer concerns and disputes with dealers per year without the need for any further legal action.

Now, if I may, I'd like into get into our concerns about Bill 14. I want to start off by stating that we do support the broad goals and aims of the bill to bring into the fold the regulation of legal services in Ontario. Our concern is really centred around the definition of what a legal service provider is and how that may potentially affect our members and their employees.

Schedule C to Bill 14 proposes amendments to the Law Society Act which include a licensing and regulatory regime for anyone who provides "legal services." The UCDA, as I mentioned, is fully supportive of this initiative to ensure that legal service providers in Ontario comply with prescribed standards in the public interest.

Section 2(10) of schedule C proposes that a new subsection be added to the Law Society Act. That subsection would be subsection 1(5), and it would establish in a very general and broad sense the type of activity that would require licensing and be subject to regulation under the act. The proposed section states, "For the purposes of this act, a person provides legal services if that person engages in conduct that involves the application of legal principles and legal judgment with regard to the circumstances or objectives of a person." That's a very broad description. On its own, I believe that the description would likely be restricted to apply reasonably to someone who is indeed providing specific advice of a legal nature to a client or to an individual.

Our concerns really stem from what follows that subsection, and that's the proposed new subsection 1(6) to the Law Society Act, which more specifically describes and breaks down the activities that would be regulated under the bill. That proposed subsection states:

"(6) Without limiting the generality of subsection (5)"—which I just read—"a person provides legal services if the person does any of the following," and part of that "any of the following" is:

"2. Selects, drafts, completes or revises,

"i. a document that affects a person's interests in or rights to or in real or personal property."

That's subparagraph 1(6)2i. That's a very broad clause and we believe a plain reading of this proposed subsection could reasonably lead to the conclusion that an individual engaged in many common and routine business and commercial activities would be subject to regulation as providing a legal service. These individuals, we fear, could easily include the 23,000 registered motor vehicle salespeople in Ontario who work for the almost 9,000 dealers who are registered across the province.

Every day these individuals draft, complete and revise, to use the words in the subsection, documents that relate to the purchase, sale or lease of motor vehicles. Once entered into, clearly these transactions are affecting a person's legal interests or rights to or in personal property. There's no doubt that they are. If you buy a car or you lease a car, it's done through documentation. Obviously the whole purpose of that document, that contract, is to revolve around someone's legal rights or title to the vehicle.

But should this be considered providing legal services for the purpose of the act? Does it really require oversight by the Law Society of Upper Canada or, for that matter, any other legally governing organization? We think the answer should clearly be no. Frankly, we doubt if the desire of the law society is to do so. However, the impact of this subsection, as I mentioned, creates some fear within our industry and frankly could

extend well beyond the motor vehicle industry to any purchase, sale or lease transaction of virtually anything, any type of tangible property: furniture, computer equipment, televisions, appliances or real property as well. All are sold, leased or financed by way of documentary agreements, what we all would term a contract—certainly a legal document.

Proposed subparagraph 1(6)2vi also raises concerns. It goes even further than the previous subsection. Legal services are said to be provided by a person who "selects, drafts, completes or revises a document that affects the legal interests, rights or responsibilities of a person, other than the legal interests, rights or responsibilities referred to in subparagraphs i to v," and I previously mentioned "i."

This subsection would seem to encompass virtually any other documents or a documentary transaction that wasn't captured by the previous subsections. It can be said to affect the legal interests, rights or responsibilities of any person, again which would bring it into the purview of the draft legislation.

We're hard-pressed to think of any commercial activity or commercial document that doesn't affect someone's legal interests in some way. Even a credit card receipt at a cashier at the grocery store or at Wal-Mart can be said to do that. It could very reasonably be argued that every store clerk or salesperson would be considered for the purposes of this bill to be a legal services provider as Bill 14 currently defines it.

Motor vehicle dealers and salespeople, in addition to preparing documentation for the sale and lease of vehicles, also prepare documents relating to those transactions, such as assisting in the financing of a vehicle's purchase or the purchase of an extended warranty or credit insurance for a consumer, to name just a few. We're concerned that proposed subparagraph 1(6)2vi would seem to suggest that this also makes anyone signing or preparing that document a legal service provider.

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As I mentioned earlier, we agree fully that the regulation of non-lawyers who provide legal services or legal advice to clients for consideration—a fee or some other consideration—certainly need to be regulated in some way. We think that's long overdue. But we're not of the view that motor vehicle dealers or salespeople who prepare these documents I'm speaking of should be regulated as legal service providers. We're confident it was not the intention of the drafters of Bill 14 to include them within its scope. We very much doubt as well that the Law Society of Upper Canada has any desire to license and regulate such activities either.

Further, motor vehicle dealers and salespeople are already registered with and regulated and licensed by the aforementioned OMVIC, the Ontario Motor Vehicle Industry Council, which since 1997 has been delegated by the Ministry of Government Services to administer the Motor Vehicle Dealers Act. OMVIC's mandate, as the regulator, is to ensure a "fair, safe and informed marketplace" by enhancing consumer confidence and protection when dealing with a motor vehicle dealer. OMVIC is empowered to enforce the provisions of the Motor Vehicle Dealers Act and other consumer protection legislation that relates to the sale of motor vehicles. It currently administers an internal self-discipline process to ensure that dealers abide by an established code of ethics and standards of business practice. That discipline process includes administrative fines and penalties and is currently used by OMVIC where a dealer has violated the code.

Since 2001, OMVIC has also required new registrants, both dealers and salespeople, to pass a certification course, which includes instruction on how to complete documents, such as bills of sale and lease agreements, and includes basic legal training, if you will, on what a dealer's rights, responsibilities and obligations are, as well as what the consumer's rights are under the Consumer Protection Act and other legislation. So quite simply, there is no need to further license or regulate dealers and salespeople who are already regulated by OMVIC.

To conclude, we again agree that the intent of the bill is admirable. We support the bill as a whole, but its present wording extends its scope, at least potentially, beyond what is reasonably necessary to accomplish its goals. We therefore would submit that amendments be made to Bill 14, or in regulations thereto, that would make it clear that registered motor vehicle dealers and salespeople engaged in the buying, selling or leasing of motor vehicles or related products and services are not providing legal services and therefore are not required to be licensed as legal service providers; in other words, would not be subject to Bill 14's provisions amending the Law Society Act.

I thank you very much for the opportunity and invite any questions you may have.

The Vice-Chair: Thank you, Mr. Barnard. We now have 17 minutes for questions and comments. The lead is to the official opposition.

Mrs. Elliott: Mr. Barnard, as you will know, we've heard from a number of organizations that have expressed concerns very similar to the ones you're expressing today. In fact, the concerns that you particularly have are very similar to the Canadian Bankers Association, whom we heard from earlier today, because they deal with similar types of documentation in terms of drafting contracts, loan and security agreements and so on.

I would certainly agree with you: I very much doubt that it was the intent to catch organizations such as yours and the bankers association and the work that their members do in this legislation, but we're increasingly seeing that that's part of the problem in throwing the net widely. You catch some of what you want and you catch a lot of what you don't really mean to be regulating in the first place. So we recognize your concerns as being very valid and significant. I guess our task is to look towards how we can regulate the problem that needs to be regulated and leave everybody else alone to do their business. So thank you very much for bringing this before us.

Mr. Barnard: I agree. Thank you.

Mr. Kormos: Thank you, Mr. Barnard. As has been indicated, and you're well aware, your concern is consistent with the concern of a whole lot of other people who are put in a similar position. I don't, at least at this point in time, subscribe to the conspiracy theory that somehow the law society wants to extend its coverage to this broad range. At the same time, it's my view that the exemption process is not the correct way to build legislation, because inevitably somebody is going to be missed, and at the end of the day it's not our job, in my view, to delegate this to the law society. We, as legislators, should be dealing with it here and now.

I know Mr. Zimmer, who is a fair-minded person, who is among the best and the brightest of his caucus, would do and will be doing his best to look at language that can adequately describe—we're targeting paralegals. We know what the problem is. We know what the issue is. It's paralegals and the regulation of them, and that will, quite frankly, enhance the profession of the paralegal. The dispute is still going to remain about whether it's the paralegals who should regulate themselves or whether it's the law society that should regulate paralegals. That's going to remain an issue.

Mr. Barnard: We'll probably stay out of that dispute.

Mr. Kormos: I'll bet you will.

But surely, Mr. Zimmer—and there are a whole lot of smart people you have working for you down on Bay Street there who can look at other statutes, because it seems to me the Legislature has grappled with this issue before. We have no interest—and we've talked about this before. Look, do we want the pastor, the clergyperson who sits down—seriously—with a parishioner and helps them finish a legal document or fill out a legal form or advises them, God forbid, of their legal rights at an interim level to be the target? Of course not. Do we want hard-working constituency staff of MPPs and MPs, who, of course, are very careful not to cross the line, but who deal with very serious emergencies on an hourly basis in constituency offices, yes, and help people fill out forms etc., etc.—and mine will continue to do so unless and until somebody in real authority says they can't, and I appreciate the hard work that they and their colleagues in other members' offices do. Do we want to target them?

People who are to be regulated are people who are in the business of providing a business, of providing legal services, and who, for a fee, do any number of these enumerated things. Isn't it easy enough for the real smart people down on Bay Street—incredibly competent, experienced people; and they are—to sit down and contemplate language that would identify the community of paralegals running business, charging fees for their services out there in Ontario, whom the Legislature wants to bring into a regulatory regime and most of whom want to be in a regulatory regime, with, again, the issue of the law society versus self-regulation. Is it that difficult, or is the law society digging its heels in? I don't know. It seems to me we would solve a whole lot of grief and be far more straightforward, candid—the public has got to understand what this is all about. If it's going to be a regulatory regime for paralegals, then let's identify who paralegals are and explain how they're going to be regulated.

I don't know. Mr. Zimmer, surely you have the answers and surely you've got the resources at your disposal, at your fingertips, to get the answers that you don't happen to have with you today. We can solve a whole lot of grief, we can solve a whole lot of problems, by simply putting on the table in short order amendments that would address this issue. It seems to me it might not—this is just off the top of my head, okay, Mr. Zimmer? I'm just thinking here, just reflecting, that maybe to talk about the practice of providing legal services—because we talk about the practice of law here when we talk about the lawyers in the bill; the practice of providing legal services, the charging of fees for doing any of the following things. Because you see, a car dealer, a car salesperson, does all these things but they don't charge a fee for it. It's part and parcel of the transaction.

Mr. Barnard: That's correct.

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Mr. Kormos: A clergyperson does it but doesn't charge a fee for it; a human resources person does it but doesn't charge a specific fee for it. Isn't that the key here? Are we capable of legislating free advice, no matter how poor it might be? As we've noted before, it's being given every minute of every day. That's not what we're targeting, is it? I don't know. It just seems to me that we're putting a whole lot of people through a whole lot of grief, when it could be addressed and resolved in a way that I think would make for better legislation, clearer legislation, more responsible legislation.

Mr. Zimmer, you're bright and capable. I'd say you are a leader in your caucus. You are, and I say that with all sincerity. We're relying upon you, as parliamentary assistant, to lead us out of this wilderness.

Thank you, Chair, and thank you very much, Mr. Barnard.

The Vice-Chair: The government side? No one? No questions?

Mr. Zimmer: Thank you very much for your submission. As my colleagues opposite have said, we've heard several presentations that made the same point, so we'll add yours to those that we have to consider carefully when the committee concludes its work at the end of the hearings.

The Vice-Chair: Thank you, Mr. Barnard, for bringing your concerns to the committee.

STEVEN SAGER

The Vice-Chair: I now want to call upon Mr. Sager. I'm not sure if I pronounced your last name properly. I apologize if I haven't.

Mr. Steven Sager: I used to smoke cigars. The name is Sager.

The Vice-Chair: Mr. Sager, you have 20 minutes in which to make your presentation. If you don't use up the entire 20 minutes, then there's opportunity for the members of the standing committee to ask questions or make comments about it. If you would identify yourself for the record and then just proceed.

Mr. Sager: For the record, Madam Chair, my name is Steven Robert Sager. I come to you today as one of the original founding members of the Paralegal Society of Ontario and a past president of the Paralegal Society of Canada. I, like many of today's paralegals, am a university graduate, mine being in criminology and law. Some have sat as judges or worked as lawyers in other countries. Many have become members of the Ontario bar. Others have elected not to do so, like myself, and work what I consider to be the lower courts, where I act as an agent.

The area that I wish to speak of today is a somewhat grey area when we're talking about federal statute being overshadowed or compromised by new provincial legislation. I have appeared in the criminal courts as a defence agent for approximately 16 years, with no problems. There's never been a time that I haven't been granted standing by a judge of the criminal courts at the provincial level. Where I have a fear, and I addressed this fear at the Cory commission to Justice Cory himself, is the number of people who are in the criminal justice system who are not represented, primarily because they do not qualify for legal aid and they can't afford a lawyer. The end result for most of these people is going to be a plea anyway; they're not going to go on to trial. I would say, from what I understand the statistics are, that 80% of everything going through the provincial criminal court system is dealt with by way of pleas. The paralegals that I have dealt with over the years have dealt with clients' needs through pre-trials with crown attorneys and also with judicial pre-trials, where we've had no problems.

Although we say that a federal act shouldn't be overshadowed by provincial legislation, the way I see it at the moment is that it will, in fact, because judges are independent; they run their courtrooms as they see fit. If a piece of provincial legislation comes out barring paralegals from the criminal court, I submit to you that it stands in opposition to the federal statute, where a person is allowed to be represented by an agent.

I just want to make certain that there's going to be, through this committee, a thorough investigation, where the committee is going to look into any conflict between the rights that are guaranteed currently to the citizens of Ontario in the criminal justice system by the Criminal Code to be represented by an agent—which is also guaranteed in the Charter, the right to fair and competent representation.

I have found, through numerous committee meetings, especially the Justice Cory hearings—Justice Cory himself stated in his report that he didn't feel that paralegals should be representing people in the criminal justice system because there were so many rights that could be violated, and the big fear was people being incarcerated through various criminal charges. I've found, with the paralegals I have dealt with, the cases that I've dealt with over the last 16 years—I'm not saying I'm a good criminal defence advocate, surely, but in the type of summary conviction cases I have dealt with, I have not had one client be sentenced to any custodial term.

So my position is, where I've heard repeatedly in most meetings through different committees, through the Cory representations—we keep saying that paralegals should not be in the criminal justice system. Provincially, this is what we're looking at through this new legislation, whereas I have always been governed by the federal statute, particularly section 800 of the Criminal Code, that says that I may, as an agent, represent a client on summary conviction in the criminal court system.

My primary purpose here today, as it has been in the past, even at the Cory commission, where I put in written presentations with respect to paralegals in the criminal justice system, is to make certain that this committee does a diligent effort in making certain that the provincial legislation in no way tries to overshadow the federal legislation, which currently permits agents to appear as representatives in the provincial criminal courts.

Those are my presentations.

The Vice-Chair: Thank you very much, Mr. Sager. We have 12 minutes for questions and comments, starting with the third party. Mr. Kormos.

Mr. Kormos: Thank you, Mr. Sager. Interesting comment. You see, that's one of the problems with the legislation: The legislation doesn't contain any indication of the scope of practice to be proposed for regulated paralegals.

Mr. Sager: This is what I've seen in my reading of it.

Mr. Kormos: It's convenient—and I'm not suggesting this is the government's motive—for governments to delegate this stuff, because then they can wash their hands of it, right? They don't have to take any of the political fallout from whatever decision that arm's-length body makes, and the Law Society of Upper Canada is very arm's length. They can say, "Don't complain to us."

This whole issue has—it's not the most fractious issue in the province, but the paralegals, some of them, feel that it's inappropriate for the law society to regulate them; to wit, to be members of the law society. Some merely think there's an unfair breakdown of lawyer members versus paralegal members, and others, I'm told, will be advocates for the proposition, just as social service students in community colleges were eager to become part of the BSW/MSW college of social workers. See, this is the problem: Nobody here can answer your question. We have no idea what's being contemplated in terms of the scope of practice.

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Mr. Sager: This is the feeling I got when I read it.

Mr. Kormos: We have no idea whatsoever. I'm not even sure, notwithstanding the references to statements allegedly made by Mr. MacKenzie and statements that I did hear him make here—he's the treasurer, but it's not

up to him, surely, as a single person. So I'm not sure, because I don't know the answer, that the law society has sat down and started doing preliminary work presuming that the bill will pass. That's my trouble with this legislation and, quite frankly, any other legislation that's akin to it, that's similar to it in structure. Those things should be being dealt with in public, transparently and on the record.

I dearly want to hear some expertise. Let's get some of the judges in here. They'd be as good a source as any, wouldn't they—

Mr. Sager: They would.

Mr. Kormos: —in terms of how paralegals have worked in, let's say, provincial courtrooms, because clearly we've got a problem when we get up into the Superior Court. That's a different—

Mr. Sager: If I can comment: Justice Marshall, who's a senior court judge, appeared at the Cory hearings and very strongly supported the position of trained paralegals being in the criminal courts representing people on summary conviction matters. I've appeared before her countless times over the years representing clients, with no problem. My greatest fear, of course, is that for paralegals like myself, who primarily, to this point in time, fall under and are governed by the federal statute—because we're working under a federal statute; we're being permitted to be in the courts by the federal statute—this type of legislation, in its current form, as broad as it appears to be right now, especially when I'm listening to the automotive dealers' association up here giving a talk on how they don't want to be affected by this, is very dangerous legislation, as far as I'm concerned.

Mr. Kormos: The Attorney General wants this passed; he wants this passed so badly he can taste it. He stays up late at night worrying that this bill isn't going to get front and centre on the order paper. He has done everything he can to weave and bob his way with this bill so that it's ready for third reading once the House resumes. I think it would behoove us all to spend—we're here for another year, folks—a few more days with this, at least in committee. I'd like to see the law society here—and not just for 30 minutes but for an extended period of time—to respond to the concerns that have been raised. Let's hear some answers. We've had some serious, legitimate questions; let's hear some answers. The law society and a few of the other people who could shed some light on this, the Ministry of the Attorney General interpreting some of this stuff here, some of which is gobbledygook, quite frankly—it would serve us all well, wouldn't it?

Mr. Sager: I would think so. Let me further add that, as far as competing with lawyers in the services I provide, we're in an area where the lawyers in some regards, especially senior lawyers, senior counsel, to operate their offices, to operate their businesses, need a certain scale that they charge per hour. Paralegals generally are small business operators. Ms. Simms was saying that there are maybe one or two practitioners in that office. We are not dealing with the type of law, the broad aspects of law, that most lawyers, or all lawyers basically, are dealing with.

The greatest referrals that I get are from lawyers: "I have a client in my office who's in a bit of a jam financially, but he works for the Toronto Transit Commission and owns a house, and as such doesn't qualify for legal aid. Now, if you can represent him, great. Otherwise, he's going to appear in court by himself unrepresented." The problem is, is this correct? Well, no. Fine, I have a law degree, but before I went back to law school, I was a Toronto police officer for a number of years, and I've seen both sides of the street. I know that when we made an arrest sometimes, on certain individuals we used the shotgun approach: "Let's scatter the wall and see what sticks."

Mr. Kormos: And throw in an "obstructing police" for good measure.

Mr. Sager: There you go.

Mr. Kormos: That was always the ace up your sleeve, right?

Mr. Sager: There you go. So we have crown attorneys—and over the 16 years that I've been doing this, I've found most of them to be very good, hard-working, diligent people who are trying to do the best job they can in a system that is so overburdened that you just don't have time to deal with each case and give it the thought and control that it should be given.

The same thing applies to duty counsel. You go down to old city hall's first appearance court: You've got duty counsel down there, and they don't know which way is up. There could be 160 people going through court who need to speak to duty counsel. How in God's name is that individual going to be able to give any just and proper information to a person, even if that person wants to plead guilty? How does the crown attorney deal with—he's got four or five charges in front of him. Fine, they've gone through the process of pre-trials, sometimes no pre-trials; sometimes a person, like I said, is coming in for the very first time and they want to plead guilty right now: "I want to get this over with." What does an overburdened crown attorney do?

Representation somewhere along the line has to be brought in to protect these people's rights. I don't think this legislation, as it reads right now, is going to do that.

Mr. Kormos: Thank you, sir.

The Vice-Chair: Anyone from the government? No. Ms. Elliott, would you like a comment or question?

Mrs. Elliott: No. I'd just like to thank you very much for your presentation.

The Vice-Chair: Thank you, Mr. Sager.

DAVID KOLODY

The Vice-Chair: I'd now like to call upon David Kolody and Deirdre McIsaac.

Mr. David Kolody: Unfortunately, my wife couldn't be here today. She's at home with our children. It's difficult for our family to travel.

The Vice-Chair: I well understand that. If you would like to make your presentation, you have 20 minutes. If you don't use the entire 20 minutes for your presentation, then there is opportunity for the members of committee to ask questions or to comment. At the outside, would you identify yourself for the record, and then go ahead with your presentation.

Mr. Kolody: For the record, my name is David Kolody. I'd like to thank the committee for the opportunity to present here. We just submitted our submission very recently, so it's quite an honour to be invited here.

We are concerned about the legislation in Bill 14 regarding legislating mandatory annuities for medical negligence claims. The wording of one of the criteria for annuities is ambiguous. It will have two negative consequences. First, it places the victim of medical negligence at risk that their future care award would not be indexed to inflation; second, it will increase the litigation costs, it'll lengthen a trial and also decrease the probability of a pre-trial settlement.

We're here today to ask that you change the legislation and update it such that it reflect that the annuities should be indexed to the CPI, or consumer price index.

Over the last 70 years, inflation has varied greatly. There have been over four periods of double-digit inflation. The average rate has been about 4.1%, but as you can see from the graph, it's been all over the map. No one can predict inflation. Certainly, 70 years ago no one could have predicted what this graph would have looked like and how much it varies. No one could have predicted stagflation in the 1970s or early 1980s. And even besides the 1970s and 1980s, there were other periods of high inflation in the 1940s and 1950s. There's always a risk there might be another period of high inflation.

The effect that inflation has on the funds to provide a future care award are quite profound. A future care award might be required for time periods of 70 years or more. There are injured children whose life expectancy has not been affected who will go on to have a normal life expectancy, which is 77 years for males in Ontario and 80 years for females. So if inflation is not adequately provided for, even a small shortcoming will have a huge ramification over these time scales. If we look at the difference between a 2% inflation projection and a 4.1%, at the end of the term, there would be a drastic shortfall in funds.

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There are three methods to provide for the future care of the victim of medical negligence. First, there's a lump sum method, which this legislation will eliminate, or eliminate the victim's rights to get. Lump sum provides for the monthly care costs through its investments. There are annuities indexed to a fixed rate, and there are annuities indexed to changes in the CPI.

The lump sum method provides protection from inflation because it's invested in instruments such as GICs and bonds, and the nominal interest rate of these investments varies with inflation. For example, in 1981, inflation was 12% and a five-year GIC was 15%. In 1999, inflation was 2% and a five-year GIC was 4%. Inflation may vary greatly, but the rate of return on fixed-income vehicles varies with it. There's no requirement for a future care award with a lump sum for the court to predict inflation for the next 70 years. Indeed, the lump sum method assumes a positive rate of return above inflation. The way that a lump sum is calculated with a discount rate as specified in rule 5309, it uses assumptions as determined by a set of actuaries on the real rate of return, which is the rate of return above inflation. So the lump sum is calculated cognizant of inflation. There's no requirement to predict it.

Annuities indexed to a fixed rate do not provide protection from inflation. Inflation cannot be accurately predicted for the next 70 years. Fixed-rate annuities actually require two things: both that you can accurately predict it. As we showed in the previous graph, if you're short even by as much as 0.5% or 0.1%, you can have a drastic shortfall over the time periods that we are looking at here. So a fixed-rate annuity requires two things, both that you can accurately predict it and that it's constant. As we've seen in the last 70 years of inflation history, inflation has been nothing related to being constant.

What a fixed-rate annuity does is transfer the risk of inflation onto the victim of medical negligence. A shortfall in funds would have to be addressed by the family or have to be assumed by the province if inflation is not adequately addressed.

CPI-indexed annuities do provide protection from inflation. As stated by Dr. Gray here this morning, insurance companies are highly skilled at risk analysis. With fixed CPI-indexed annuities, the insurance company takes on that risk and they index it as per the rate of change in the CPI. It's dynamic. There's no need for a court to predict inflation for 70 years at the time that the future care award is made. The legislation also requires that the annuities be reasonably available, although that clause is subject to some interpretation. CPI-indexed annuities are offered by a number of the major life insurance companies.

If we look at the precedents for CPI indexing, pension benefits for retirees in defined-benefit pension plans are indexed to the CPI. Even the Ontario public service pension plan is indexed to the CPI. All other government funds, such as CPP, are also indexed to the CPI. A victim of medical negligence needs protection from inflation for a very long time frame. For an injured child, that's 70 years or more. That's far greater than, for example, for a retiree, who might need protection from inflation for 20 years or so. As we've seen over those great time spans, if you mis-guess inflation by even the smallest amount, there would be a huge shortfall in funds.

With this legislation, because it is ambiguous in its wording, there are two criteria: both that it provide reasonable protection from inflation, but it doesn't define what that is, and also it says that it should be reasonably available. What this does is it enables the CMPA to argue for fixed-rate annuities. Right now, medical negligence

cases are already very difficult and costly. There are three aspects to a case: There's liability. Was there specific medical negligence committed? There's causation. Did that specific negligence cause the specific injury? And there are damages, which is a calculation of the amount of award to mitigate the damages from the injury.

What this legislation does, because it is ambiguous, is create a whole new battleground for litigation called annuity indexing. The courts will be confronted by many expert witnesses for both the plaintiff's side and the defendant's side to argue about what the inflation rate will be for the time period of the next 70 years. The CMPA will hire six or more and take up a month of court time. A trial that would have lasted eight weeks will be stretched out to 12, all to hear from a whole panel of economists, each with their own opinion on what inflation will be. That's what fixed-rate annuities require.

This additional conflict will make it more difficult to reach a pretrial settlement. It's a whole new source of disagreement between the plaintiff and the defendant. Already, we have three very difficult areas to get through, each with its own set of medical experts. Now we're adding a fourth because of this legislation. The truth is, no one can predict inflation for the next 70 years, certainly not with the accuracy that's required to care for an injured child.

We ask that the committee recommend that the legislation be changed so that it indicates that the annuity should be linked to the CPI. This will ensure that the injured party does not incur the risk of inflation. It will ensure that litigation is not made more difficult and costly. This additional cost in litigation is actually borne by the victim, because the costs awarded by the court today to bring forward a case do not come anywhere near to covering the real true costs. So any more additional litigation required comes out of the bottom line and what's available to the victim of medical negligence.

I'd like to add one more point. In my research in preparing for today—of course, I didn't make it through my slides—I referenced off legislation done from Australia, which is similar to this, and they did reference the CPI in their legislation.

Thank you. I'd like to answer any questions you may have.

The Vice-Chair: We have 12 minutes for questions and comments. The government side has the first lead.

Mr. Zimmer: Can I ask you something about your background? Are you in the insurance industry?

Mr. Kolody: I'm a parent of a severely disabled child who's in the court process right now. We launched our case seven years ago, and we hope to be done next year.

Mr. Zimmer: You have training in insurance? I'm just wondering. You did this impressive research, which I compliment you on.

Mr. Kolody: Thank you. I'm an engineer, and my wife is an economist.

Mr. Zimmer: I see. Thank you very much. I've got your material here, and I can tell you, I have an interest in the economics of this issue, so I intend to study it carefully. It's very well presented. Thank you.

Mrs. Elliott: Thank you, Mr. Kolody. Let me just say at the outset, I'm very sorry that you're in this position and having to do this research. It must be very difficult for you to come before us to discuss this.

I have two questions, if I may. One is, in your comments about having the annuity indexed to CPI, I take it that you don't particularly have a quarrel with having to accept an annuity instead of a lump sum payment at the outset, because that's what the legislation proposes, but as you know, now, it's not mandatory to accept that. Could you just give us your comments on that, please?

Mr. Kolody: Certainly. We would have preferred a mixture of both. That would be our preference. In our case, I think we would prefer to get the majority structured, but partial also for lump sum. We today, when I made this presentation, just picked our battles per se to ensure that the CPI or the proper protection from inflation is addressed. Previous people before you have presented comments towards the appropriateness of taking away this right to a lump sum.

I do agree with those comments, but I think it has also been mentioned that a great number of cases today that are currently through the legal system are structured. I think that they are also a mixture of both, where the parents obviously do look out for the best interests of their child. Structures have benefits if they're protected from inflation. So in our case, we would actually like to do a mixture of both.

Mrs. Elliott: It certainly seems reasonable to me, especially when you're considering a child who has become disabled as a result of whatever has happened. Because there is such a long period of time under consideration and one can't account for the vagaries of inflation, it would seem to me that it's very sensible advice to have it indexed to the CPI. So thank you very much for that.

Mr. Kolody: Thank you.

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The Vice-Chair: Mr. Kormos.

Mr. Kormos: Thank you, Mr. Kolody. I'm not surprised you demonstrate how people who are embroiled in these prolonged and very tragic litigation processes become experts in their own right in short order.

As we had some discussions this morning, the CMPA was here. I have no quarrel with them arguing for a legislative response to what they perceive is high cost. I understand that.

I was concerned about the word "shall" in the legislation, of course "shall" on motion by either the plaintiff or defendant. In other words, either party can compel the court to order a structured settlement. I suggested that the word "may" might be more appropriate. Again, I don't know whether it's fair to put that to you, because that's pretty simplistic. Are you suggesting that perhaps a more thorough consideration and a specific provision for a blended award is appropriate? By "blended" I mean lump sum plus structure. In other words, just as the CMPA

wants to see the word "shall" in here, would you like see specific language providing for a blended award?

Mr. Kolody: Each case would be different and each plaintiff no doubt would look for the best interest for their child. I don't know if the legislation needs to propose—I think it's best left to the advocates for the severely injured. I believe that the process to do this is not done in a week or a month; we're talking about many years to work through this process. In all of these cases, the people who advocate on behalf of the severely injured will gain that expertise to do the right thing, so the option should be left to them.

But I'm very concerned today that in the current form, a trial that was scheduled for eight weeks will now be 12, and we will need to hire two expert witnesses to rebut their six.

Mr. Kormos: I understand. I think we all understand the problems that creates. "The annuity must include protection from inflation to a degree reasonably available in the market for such annuities." That's pretty weaselly language.

Mr. Kolody: Yes.

Mr. Kormos: "To a degree reasonably available in the market"; it doesn't say, "must include protection from inflation," period. That little trailer there on the end—do you understand what I'm saying, Mr. Zimmer?—is the weaselly stuff. I find that a little scary.

Mr. Kolody: Yes. We know of at least a couple of firms that sell CPI-indexed annuities. Not all do. Does that mean they're not reasonably available? I'm sure the CMPA will put forward that argument.

Mr. Kormos: And "protection from inflation": You are saying that should specifically be defined as meaning a CPI-indexed annuity?

Mr. Kolody: Yes. We don't want an uphill battle to try to get CPI, as opposed to a fixed rate.

Mr. Kormos: Okay. The problem is that this is schedule A of a bill whose focus is paralegals. Many of us, when we first read the bill months ago, went, "Holy moly, what's going on here? This one's stuck in here." It applies only to medical malpractice, interestingly, as well. I found that and thought, "Hmm," and right away some red flags went up, because we know what's going on there. If this was good for everybody, well why didn't it apply to all personal injury actions, huh, Mr. Zimmer? But it appears that the CMPA types had their way with somebody in there.

The problem is that this is going to be lost in the thrust of the bill. I think your presence here today is very important. There's not a single member of the media present, and understandably; it's 4:30 p.m. How are we going to focus some public attention on this, in terms of that community of families of innocent victims, because that's what we're talking about, isn't it? How are we going to focus some attention and ring some alarm bells on this and get people interested? We haven't got a whole lot of time.

Mr. Kolody: We are definitely concerned, and after this we will probably engage the media to try to bring some focus to this. We believe that future care costs need to be protected from inflation and all Ontarians need to know about this. We hope that the legislation will be amended very soon. I think we will continue on with the fight and take it to however far. We were very concerned about the care costs for our son. This is a responsibility that exceeds our lifetime, and that's a very sobering thing that not too many people have reflected upon. We don't want to be worried for the rest of our lives about what inflation will be the year 2050.

Mr. Kormos: What will inflation be when you're gone, never mind the rest? Okay. The government is fast-tracking the bill, and again, that's just the way it is.

Mr. Kolody: There's no mention in any of the CMPA submissions to the government about indexing. Talking about annuities without talking about the indexing is like talking about a mortgage without talking about the interest rate. It's all about the indexing.

Mr. Kormos: I appreciate that very much. I'd encourage you to write letters to the editors of major Toronto newspapers, for starters. That's how this stuff gets on the Premier's office radar.

The Vice-Chair: Thank you very much, Mr. Kolody. We certainly appreciate your travelling here and bringing your personal perspective to this committee.

Mr. Kolody: Thank you very much.

The Vice-Chair: Our next presenter won't be arriving until 4 o'clock, so we are going to recess for 30 minutes and then we will reconvene at 4 o'clock.

The committee recessed from 1527 to 1550.

INSTITUTE OF AGENTS AT COURT

The Vice-Chair: I call this meeting of the standing committee on justice policy to order. We have one last presenter, the Institute of Agents at Court. You have 30 minutes to present your brief, and out of that 30 minutes, if there's any time left, there's an opportunity for members of the committee to ask you questions or make comment on your presentation. Before you start your presentation, would you please identify yourselves for the record.

Mr. Greg Burd: Good afternoon. For the record, my name is Greg Burd. Sitting to my right is Susan Crisp and sitting to my left is Todd Brown. We're all members of the Institute of Agents at Court. We've provided you with a brief prepared by our task force which outlines the issues with respect to Bill 14, and we'll address those issues with you today. In addition, our task force made a written submission to the committee on April 20, 2004, which details our concerns.

The Institute of Agents at Court is an organization founded in 1987, which represents the interests of paralegal members and paralegals at large in Ontario. The IAC has actively participated in discussions about paralegal regulation since its inception. The IAC supports the concept of paralegal regulation in Ontario and looks forward to implementation of the proposed regulatory scheme by this government, subject to certain amend-

ments and considerations which we will detail today. The IAC eagerly awaits an opportunity to work with the government of Ontario and the ultimate paralegal regulator in the development and ongoing evolution of paralegal regulation in Ontario. I will be addressing an issue, as will Mr. Brown and Mrs. Crisp.

The first issue we would like to address is the addition to the act of provisions for grandparenting. We acknowledge that the act provides that the Law Society of Upper Canada, through the legal services provision committee, will ensure that all persons who provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide. It is suggested that the bylaws, established by the law society for the purposes of the committee in implementing its mandate, will address the grandparenting of individuals into the regulatory regime. It is not the committee that will set out the requirements for grandparenting but rather the law society itself, by virtue of establishing and amending law society bylaws. It is acknowledged that the law society's 2004 task force report includes recommendations on grandparenting.

We, as the IAC, recommend the inclusion in the act of a provision ensuring that an individual who has been providing legal services for three of the last five years prior to the passing of the act will be permitted to sit the licensing exam as established by the law society.

Ms. Susan Crisp: The next area of concern that we would like to address is equivalencies. Individuals involved in areas of the justice sector other than paralegals may choose, after many years in their current professions, to make career changes and commence paralegal work. For example, police officers and justices of the peace with five or more years' experience in provincial offences court may possess the experience and skills necessary to write the paralegal licensing exam. These individuals may also possess related academic qualifications.

As section 102 of the law society report suggests, acceptable equivalency could possibly include certain forms of work experience, as well as educational experience, or some combination of the two. However, the law society report suggests that a person who meets the acceptable equivalency requirements may only qualify for advanced standing in an approved community college program offering paralegal education. Recommendation 6 of the law society report suggests that the community colleges offering such approved programs, subject to law society approval, would conduct the assessment of equivalencies.

We would suggest that it is unreasonable for an experienced and well-seasoned police officer or justice of the peace to be required to complete a one- or two-year community college program in paralegal education. A more considered approach would be for the community colleges offering the approved paralegal programs to conduct a prior learning assessment of these candidates on an individual basis, subject to the approval of the law society.

There is existing legislation which can be held as an example of appropriately dealing with equivalencies. In this regard, we would refer members of this committee to section 4 of Ontario regulation 867/93 relating to the Midwifery Act, 1991. This information is actually detailed in the report that we've given to you—and I won't review it in detail with you here today—but a review of the section will set out an appropriate suggested approach to dealing with equivalencies for the purposes of this act.

We would recommend the inclusion in this act of provisions ensuring that an individual who possesses acceptable equivalencies be permitted to submit to a prior learning assessment administered by the community colleges offering approved paralegal educational programs or by such other administrator as approved by the Law Society of Upper Canada to determine the individual's qualification to sit the licensing exams as established by the Law Society of Upper Canada.

The other issue of concern that we would raise with you is relating to commissioner-of-oath appointments. Paralegal operations will be more efficient and will be better able to serve their clients if they are appointed commissioners of oath at the time of licensing. Currently, paralegals must arrange for their client to attend at a lawyer, justice of the peace or such other qualified individual solely for completing affidavits or declarations. These are often necessary in the matter for which the paralegal has been retained.

This outsourcing can be inconvenient, potentially an added expense to the client or paralegal and time-consuming. Licensed legal services providers should be appointed commissioners of oaths contemporaneously with the implementation of their licences so that they may properly deal with their clients' matters. Part VI of the 2004 consultation document prepared by the law society in connection with paralegal regulation under the licensing and accreditation section provided that, "Accredited paralegals would become commissioners of oaths within their designated areas."

We would therefore recommend the inclusion in the act of a provision whereby those persons granted licences to provide legal services in Ontario shall be commissioners of oaths within the areas in which they are licensed to provide legal services.

Mr. Todd Brown: Good afternoon, everyone. My name is Todd Brown. I wanted to comment just briefly on the video and audio conferencing provisions that were to be included in the Provincial Offences Act, and further, the status of paralegals as not being officers of the court.

The proposed amendments to the Provincial Offences Act set out in the act include a provision for the taking of evidence by electronic means. The IAC joins other advocacy groups in the view that these provisions will usurp the effective examination of witnesses. What's envisioned is that a police officer could potentially give evidence from a remote location, like a police station or

elsewhere, by a video link into the courtroom. You would have live defence witnesses there being subject to the scrutiny that the crown could put to them under the stress and rigours of being in an actual courtroom, whereas a police officer conceivably would be sitting comfortably in a police station. That's a problem that we have with the bill as it's proposed.

It's our view that the government should not understate the utility of a conventional examination. The suggestion that the regulatory nature of proceedings under the Provincial Offences Act somehow diminishes the need for real scrutiny of witnesses is unsound. Indeed, the opposite is true, in our view. Severe consequences flow from convictions under provincial legislation. People go to jail, licences are suspended and fines are imposed, sometimes in the hundreds of thousands of dollars.

The proposed amendments purportedly were designed to make better use of police officers' time and to minimize disruptions to their regular police duties. Notwithstanding that these proposed amendments will permit an officer to give evidence from a remote location, it will in no way reduce or restructure the time that an officer must give to the trial process and serves to undermine the face-to-face examination process currently afforded by required courtroom attendance. Accordingly, the time-tested model of examination and cross-examination should, in our view, remain intact and unfettered. We respectfully submit that hindering the meaningful examination of witnesses does not promote access to justice.

We recommend the deletion from the act of the proposed amendments to the Provincial Offences Act that provide for the delivery of evidence and cross-examination of witnesses by electronic means.

Further, section 26 of the act repeals section 29 of the Law Society Act and replaces it with the provision that only barristers and solicitors will be deemed officers of every court of record in Ontario. We respectfully submit to you that it is in the public interest and in the interest of justice that all licensed legal service providers, whether licensed as barristers or solicitors or licensed to provide legal services, be deemed officers of every court of record in Ontario.

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We recommend that section 29 of the Law Society Act be repealed and the following substituted therefor:

"Every person who is licensed to practise law in Ontario as a barrister and solicitor and every person who is licensed to provide legal services in Ontario is an officer of every court of record in Ontario."

Mr. Burd: We appreciate this committee's consideration of our submissions. We're now open to any questions that you may have.

The Vice-Chair: We have 20 minutes for questions and comments. I believe Mrs. Elliott has the first lead.

Mrs. Elliott: I'd just like to thank you for your presentation. You've raised some issues different from some of the ones that we've been hearing today, all of which we will definitely consider as we go forward with our consideration of this legislation. I'm sorry that you had to come back twice as well, so thank you for bearing with us.

The Vice-Chair: Mr. Kormos.

Mr. Kormos: Thank you kindly, folks. First, I appreciate your having any—nobody's had any interest whatsoever in the amendments to the provincial offences legislation that will deal with the taking of evidence, when it's one of the most dramatic and dangerous things that we've broached, especially when, again, it's not in the bill. We have no idea what these guys have in mind. Videoconferencing, on a good day—it could be a mere telephone call; it could be by affidavit. That's pretty scary stuff. As I understand it—Mr. Zimmer, help me—the courts already have considerable discretion to allow for flexibility in how evidence is given, depending upon the circumstances. It seems to me that that's where we should leave the matter. This is dangerous stuff, so I appreciate you folks focusing on it and having interest in it.

The other thing: officers of the court. We're officers of the court by virtue of being lawyers. I don't know why you'd want to be an officer of the court, because by virtue of being an officer of the court, all that does is make me more subject to the judge's authority than a person who isn't an officer of the court would be. In other words, judges can make us do things that they can't make non-officers of the court do. So tell me about that.

Mr. Burd: Well, we wouldn't want to have any advantages that a barrister and solicitor doesn't have.

Mr. Kormos: But what is in it for you, from your point of view?

Mr. Brown: I'm happy to address that. When Greg or I or other people in our position stand up in a courtroom and say something, we want it to be accepted at face value. Quite frankly, with our status as paralegals now, it's not—not always, anyway. It's a real difficulty. If people like myself are going to be subject to almost the same requirements as lawyers and barristers and solicitors with regard to our conduct—ethical conduct, professional conduct—and almost identical responsibilities to our clients, why wouldn't that then be reflected in the legislation? Why wouldn't the presiding jurist, be it a provincial court judge or justice of the peace, be entitled to rely on the status of myself, for instance, as a person licensed by the law society to provide legal services and be able to rely on what I say as being true? It would allow the court to discharge its function more efficiently, it would allow us to provide better service to our clients, and it just makes perfect sense.

Mr. Kormos: I appreciate that. Perhaps, Chair, we can ask legislative research to give us a little paper on the history of officers of the court, what the implications are. You're quite right: The bill very specifically identifies only barristers and solicitors as officers of the court. If the government is trying to sell the law society's regulation of paralegals, it seems to me it would be a selling point for it to be able to explain to paralegals all of the advantages of being a member of the law society.

Commissioners of oaths: Are you folks not getting the Attorney General's office to give you commissioner status in your respective offices?

Ms. Crisp: We have certainly asked for that.

Mr. Kormos: But are you not able to make the specific applications and pay the—what is it—$75?

Ms. Crisp: We feel that in connection with this legislation, it should happen automatically.

Mr. Kormos: Okay.

Ms. Crisp: I don't know, as a standard—

Mr. Brown: You can make an application now.

Ms. Crisp: Yes, you definitely can make an application.

Mr. Kormos: Is there a problem in them being granted?

Mr. Brown: Without saying too much, what I would expect is that—

Mr. Kormos: Please do.

Mr. Brown: —the requirements to be a commissioner of oaths now are actually lower than the quality of candidate you're going to have post-legislation.

Mr. Kormos: I agree, but just let me know: Is there is a problem, or is there basically no problem in terms of paralegals applying for commissioner of oaths status?

Mr. Burd: I don't know that it's a problem. I just know that the ones who have the parameters placed upon them—basically they're only a commissioner for the district or location that they're in. So if they were to be doing a case in Napanee and they're operating out of Owen Sound, they wouldn't be able to commission an oath outside their jurisdiction.

Mr. Kormos: Okay, that's interesting.

The other thing is the equivalency. Again, that's a problem because that's not something—I'm glad you did talk to us about it. Many of us have been interested in it, the grandparenting phenomenon. But that's not what we're going to be asked to vote on, I suspect, at least at this point, because that's something that's being delegated to the law society.

Ms. Crisp: Perhaps it shouldn't be, though.

Mr. Kormos: I'm sorry?

Ms. Crisp: Perhaps it should not be delegated to the law society. I think it's far too important a point to be left to the law society.

Mr. Kormos: "Ms. Crisp says to Mr. Zimmer." Look, I appreciate it, because, as you point out, in other legislation that dealt with regulated professions, it was in the legislation.

Ms. Crisp: Correct.

Mr. Kormos: And again, appreciating that the fine print, the minutiae, might be left to regulation, the basic structure of equivalency was addressed in the regulation of midwifery as a profession here in the province of Ontario.

Ms. Crisp: That's right.

Mr. Kormos: We don't know very much about the development or any work that has been done so far on training programs. Have you folks been involved as consultants or participants in discussions around training programs from either the private sector of training—they spoke to us earlier—or the public sector?

Ms. Crisp: I have been involved at various points in time with the community colleges, various different programs.

Mr. Kormos: But in anticipation of the regulation of paralegals?

Ms. Crisp: Yes.

Mr. Kormos: What sort of things have been talked about? What's being discussed?

Ms. Crisp: In terms of—

Mr. Kormos: The types of training, the types of academic background that's going to be a prerequisite.

Ms. Crisp: Initially, what every college is looking at is a two-year program that will address the needs that will be brought forth by virtue of the regulation. In addition to that, going along with equivalencies, they are looking at a program—for example, Durham College offers a one-year program that just started this September which looks to me, based on the curriculum, to specifically address someone who would be seeking to get the upgraded education that would qualify him or her to meet the equivalency standards to write the licensing exam.

Mr. Kormos: Okay. The private college that was here yesterday was demonstrating a one-year program to us and, without specifically saying so, was suggesting that that was the type of curriculum that was appropriate. So you're saying it's a two-year curriculum that's being looked at as a base?

Ms. Crisp: No. There's a one-year program that right now appears to be only offered at Durham College. But it specifically says, through its outline, that it's directed to those individuals who have prior academic qualifications or prior work experience who may be seeking to qualify to write the licensing exam.

Mr. Kormos: Why are there so many factions in the community of paralegals? You know that, had there not been so many factions, had there been one voice or at least one broader dominant voice, paralegals would probably have been well on their way to self-regulation in one form or another some time ago. What's the problem?

Ms. Crisp: I'll let you answer that one.

Mr. Burd: Twenty years ago, with the Lawrie decision, the scope of practice for paralegals was basically in a tribunal or in a court where there were checks and balances: You had a prosecutor, you had a justice of the peace or a provincial judge. So there was always a check and balance, and if somebody was incompetent, it could be caught and it could be saved. But as 20 years have gone on, the practice has expanded and it has gone into areas where there aren't any checks and balances, where you're not in a court doing solicitor-type work. The Institute of Agents at Court is basically people who appear in tribunals where those checks and balances are always there. Where the factions separate is where you have people doing solicitor-style work as opposed to people appearing in provincial offences courts. We don't seem to be able to agree on certain issues, although we all agree, I believe, that we should be regulated.

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Mr. Kormos: By whom? Mr. Zimmer was going to ask you this.

Mr. Burd: Maybe I'll wait for Mr. Zimmer.

Mr. Kormos: No, no. I'll take the luxury of asking you—well, let's wait for Mr. Zimmer; let him ask you. Otherwise, he wouldn't have any questions left. Thank you very much, folks. I appreciate very much your being here.

The Vice-Chair: The government side. Mr. Zimmer.

Mr. Zimmer: Thank you for your very detailed presentation today and at various other times that we've met at the Attorney General's office on this. I think it would be useful to the members of this committee if I asked each of you for your professional background. You're members of the institute, but in the private world what do you do? Susan?

Ms. Crisp: I'm actually an in-house law clerk with the law firm of Goodmans, and I've been there for 15 years. I also run an independent legal education and training business through which I provide training to other in-house law clerks, other groups of independent paralegals in certain specific areas of law, on certain legal-specific software and then also provide training to the colleges, to their classes in various different areas.

Mr. Zimmer: Greg?

Mr. Burd: I'm the president of a company called Not Guilty Inc. Since 1986, we've been running our head offices in Brampton, Ontario. It's a family business; my father started it. He was a Metro Toronto Police officer for 23 years. We had a lawyer who was sharing office space with us.

My background: Actually, I'm a musician. I was a musician on the road for so many years that I wanted to get off the road, and that's where my training came in. I had 20 years, basically, in the provincial offences court, watching the jurisprudence grow and develop under the Provincial Offences Act scheme. That's my background.

Mr. Brown: I own a company called Redline Legal Services Inc. We defend people in provincial offences court. The vast majority of our clients are facing driving-type charges.

I started in 1991. I went to work at a company that basically did the same thing—it was a group of ex-police officers—and I've stayed in the field ever since. That's really what it all boils down to. I don't have anything else relevant to legal provisions.

Mr. Zimmer: I'd like to ask each of you, just as a very short question—and you clearly support the concept of paralegal regulation, but let me ask you each this, the answer from 30,000 feet: Why would each of you, given your personal experience and history with the institute, support the concept of paralegal regulation?

Ms. Crisp: I support the concept of paralegal regulation because I think that it's important that a bar be established, that standards be established for education, for ethics, for performance on a day-to-day basis. It's important that the public be protected, and I think that's the only way that that protection is going to be provided. The time is overdue for that protection to be put in place.

Mr. Burd: I would second, and place an emphasis on the protection of the public, especially in the areas where we practise, which is in the provincial offences court, dealing with traffic offences, mainly. There are some people out there who advertise in a way that I can only say is unscrupulous and misleading, so much so that we've built up a case with many examples and many complaints and we've forwarded it to the Competition Bureau, but either they don't have the means or the people or the time to pursue this type of false and misleading advertising. I see regulation as a means to ending that kind of unscrupulous business-type practice in the independent paralegal world. That's really the gist of why I can't wait for some regulation to come into place.

Mr. Brown: When a member of the public hires a paralegal and they sit across their desk and listen to a whole bunch of legal jargon, a lot of information that may or may not be true, a member of the public really has to take a leap of faith, because you're not buying a widget. You could pick up this glass and look at it if you wanted to buy it; you could analyze it and see if it's something that holds no broken promises. But legal services—it goes for legal services of all types—you really have to put your issues in the hands of a third party who may or may not have your best interests in mind.

The vast majority of people providing service, in particular in the field of provincial offences, do an excellent job. It's really a niche type of service that's being filled. The commentary from earlier commissions, like the Ianni report and the Cory report, have all had relatively good things to say about provincial offences agents. There are a handful—I'd say 10%—who make 90% of the trouble. There are no teeth in any legislation right now that can effectively deal with them; I think they have to be dealt with. I think the government owes it to the public. Responsible professional provincial offences agents like myself, Greg and anybody else who has taken time to turn their minds to the bill, need that too; everybody needs it.

Mr. Zimmer: Thank you very much and thank you for coming back today. Sorry we couldn't hear from you yesterday afternoon.

Mr. Kormos: Do they have any opinion on who should be regulating the paralegals? I didn't ask them that because I thought you were going to ask them that. I don't know what it is.

Mr. Zimmer: Your questions are finished and my questions are finished.

Mr. Kormos: Who should be regulating the paralegals?

Mr. Burd: Our mandate would indicate, to be quite frank with the panel here, we'd fall in line with the Ianni and the Cory report: anybody but the law society, but that's the mandate we have from our people. I know they tell you that it's better the devil you know than the devil you don't know, but that's our mandate: regulation by

anybody but the law society; however, regulation is at the top of the chain.

Mr. Kormos: Okay. I appreciate it. You've been very fair.

The Vice-Chair: I certainly want to thank you for, first of all, accommodating us by coming in earlier and returning. So I certainly appreciate the brief that you have brought to this committee.

This adjourns the hearings for today.

The committee adjourned at 1618.

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