



The Law Society of
Upper Canada | Barreau
du Haut-Canada

TAB 7

Report to Convocation February 27, 2014

Compensation Fund Committee

Committee Members

Peter Wardle (Chair)
Seymour Epstein
Michelle Haigh
Jack Rabinovitch
Heather Ross

Purpose of Report: Decision and Information

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COMMITTEE PROCESS

1. The Committee discussed the matters in this report on April 10, 2013, June 19, 2013, August 28, 2013, December 2, 2013, January 15, 2014, and February 12, 2014. Committee members in attendance were Peter Wardle, Chair (all meetings), Seymour Epstein (all meetings), Michelle Haigh (all meetings except August 28, 2013, and February 12, 2014), Jack Rabinovitch (April 10, 2013) and Heather Ross (all meetings except April 10, 2013, and January 15, 2014). Staff in attendance were Zeynep Onen, Director, Professional Regulation (all meetings), Dan Abrahams, Manager, Compensation Fund (all meetings), Elliot Spears, Senior Counsel, Legal Affairs (April 10, 2013), Fred Grady, Manager, Finance (June 19, 2013, January 15, 2014, and February 12, 2014) and Roy Thomas, Director, Communications (January 15, 2014)

FOR DECISION

**REPEAL AND REPLACEMENT OF GUIDELINES FOR THE
DETERMINATION OF GRANTS FROM THE COMPENSATION FUND**

Motion

2. That Convocation repeal the existing *General Guidelines for the Determination of Grants from the Compensation Fund* and the existing *Guidelines for the Determination of Grants from the Compensation Fund Relating to Paralegals*, set out at Tab 7.1.2, and replace them with new *General Guidelines for the Determination of Grants from the Compensation Fund Relating to Lawyers and Paralegals*, set out at [Tab 7.1.1](#).

Overview

3. The Compensation Fund Committee has developed new Guidelines for the determination of grants from the Compensation Fund. This would replace both of the current Guidelines (one for lawyers and one for paralegals). The Guidelines are not binding; their purpose is to structure the exercise of the Law Society's discretion and promote consistency in determining grants from the Compensation Fund. The amended Guidelines are written to be clearer and more accessible but the underlying principles used to determine grants have not changed. Amendments are described in this Report and in more detail in the Concordance Tables set out at [Tabs 7.1.3](#) and [7.1.4](#).

Background

4. The Compensation Fund was created in 1953. Its existence serves the Law Society's mandate of public protection. Pursuant to subsection 51(5) of the *Law Society Act*:

Convocation may make grants from the Fund in order to relieve or mitigate loss sustained by a person in consequence of,

- (a) dishonesty on the part of a person, while a licensee, in connection with his or her professional business or in connection with any trust of which he or she was or is a trustee; or
 - (b) dishonesty, before the amendment day, on the part of a person, while a member, in connection with his or her law practice or in connection with any trust of which he or she was or is a trustee.
5. Law Society By-Law 12 establishes the Compensation Fund Committee and sets out its mandate and responsibilities. Under the By-Law, the Committee is responsible for the administration of the Compensation Fund. The Committee provides general oversight for the Fund, considers grant recommendations for losses attributable to lawyer and paralegal dishonesty, and develops and proposes policies related to the Fund.
6. Convocation has previously approved two distinct sets of Guidelines, one dealing with losses attributable to dishonesty on the part of lawyers, and another set dealing with compensation for losses attributable to paralegal dishonesty. The two sets of Guidelines are very similar, though not identical.
7. The nature of the Guidelines was recently addressed by the Ontario Divisional Court. In *Tarek El Hennawy et al. v. The Law Society of Upper Canada* (January 28, 2014), 2014 ONSC 375 (attached at **Tab 7.1.6**), the Court stated, at paragraphs 30 and 31:

Convocation's authority to establish these Guidelines is derived from its absolute discretion to make grants from the Fund. The Guidelines are a way of structuring the exercise of that discretion and providing some consistency. We agree that Convocation was entitled to establish these Guidelines and required no express statutory authority to do so. ... The Guidelines expand on the criteria regarding eligibility for grants from the Fund. They are not inconsistent with the *Act* because the *Act* does not provide that any claimant is *entitled* to receive a grant if they meet the threshold criteria in s.51(5). We find that the provisions of the statute and the Guidelines are consistent.

Further the Guidelines are non-binding and do not fetter the Committee's discretion. Guidelines are helpful by allowing applicants to know in general terms what the policy and practices are. The case law recognizes the authority of statutory tribunals to pass guidelines governing their broad exercise of discretion so long as these guidelines are recognized as being non-binding. ...

In this case the Committee accepted that it was free to depart from the Guidelines and the Committee properly considered the relationship of the Guidelines to the *Act* and the manner in which they were to be applied.

8. The purpose of the Guidelines is not to bind the Law Society or fetter its discretion but to structure the exercise of that discretion and provide consistency in decision-making. The Guidelines are intended to be helpful, as the Court said in *El-Hennawy*. The Guidelines also emphasize that access to the Fund is, for the most part, limited to circumstances where there is a connection between the licensee's dishonesty and his/her capacity as a licensee, specifically in the context of the practice of law or provision of legal services.
9. The Compensation Fund Committee has been reviewing the Guidelines used to assist in the determination of claims for compensation. The Committee reviewed a number of examples of guidelines and rules drawn from various jurisdictions in Canada and the United States. The Committee also considered the experience of the Fund itself.
10. If approved by Convocation, the new Guidelines will not change the manner in which the Law Society deals with claims for compensation for the Fund. They are better organized and more accessible and will more clearly assert the basis upon which compensation is paid (the need for a connection between the licensee's dishonesty and his or her practice of law and provision of legal services).

Key Principles

11. The following are principles identified by the Committee as key to the proposed new Guidelines , as well as the new Compensation Fund Policies and Procedures (approved by the Committee and appended for Convocation's information):

- a. Accessibility and Clarity. The current Guidelines have been assembled over a number of years and have had a number of authors. The Committee feels that the Guidelines should be clearer and more accessible to those most likely to rely upon them: not just staff and benchers, but also licensees (whose alleged dishonesty may give rise to claims) and prospective claimants. Where feasible, plainer language has been adopted.
- b. Transparency. Without fettering discretion, the Guidelines should nonetheless state as straightforwardly as possible what types of situations will generally permit claims for compensation and what should not.
- c. Flexibility. The Guidelines are not binding. They are not intended to fetter the discretion of Convocation or, by delegation, the Compensation Fund Committee.
- d. Symmetry. The lawyer and paralegal guidelines are already very similar. They serve an identical purpose in relation to the statute. While the two Funds are separately maintained, with distinct levies charged to licensees in both categories, there is no obvious reason for two sets of Guidelines.
- e. Separation of Guidelines and Policies and Procedures. The Committee has opted to remove guidelines that are essentially “procedural” in nature, permitting the Guidelines to focus on substantive issues that assist in the application of statutory discretion.

The New Guidelines

12. The *Guidelines for the Determination of Grants from the Compensation Fund Relating to Lawyers and Paralegals* reorganize and restate the principles that are contained in the existing Guidelines. The new Guidelines are appended at **Tab 7.1.1** and the existing Guidelines are together appended at **Tab 7.1.2**.
13. Two concordances are also appended. One concordance, at **Tab 7.1.3**, lists the new Guidelines and compares them to the equivalent versions in the existing lawyer and paralegal Guidelines. It also provides a short explanation for why the Committee is proposing the new version. In some instances, guidelines and model rules used in other

jurisdictions in Canada and the United States have informed the choice of language proposed for the new Ontario Guidelines.

14. The second concordance, at Tab **7.1.4**, lists the existing Guidelines for both lawyers and paralegals and points to the closest equivalent in either the new Guidelines or in the Policies and Procedures or, in a few instances, both.
15. To promote clarity and transparency, the new Guidelines contain a number of structural and organizational enhancements. Notably, the Guidelines are now grouped into sections, as follows:
 - A. Preface
 - B. Who Can Claim
 - C. Losses for Which Compensation May be Available
 - D. Determining the Amount of Compensation that is Payable
 - E. Losses for Which Compensation is Not Available
16. The Preface is especially important in articulating the general principles that led to the creation of the Compensation Fund and that have supported its continuation. In addition, the Preface makes clear that the purpose of the new or updated Guidelines is to restate and clarify existing core principles, not to change them. In this context, the Preface confirms that the new Guidelines will be applied to all outstanding Compensation Fund claims.

Policies and Procedures

17. New Policies and Procedures, at Tab **7.1.5**, have been created to supplement the statutory provisions and the Guidelines. Their major function is to describe the decision-making process at the Fund, rather than address substantive issues flowing from subsection 51(5) of the *Law Society Act*. The Policies and Procedures have been adopted by the Committee and are provided to Convocation for information. Unlike the Guidelines, which require the approval of Convocation, the Policies and Procedures can be amended

by the Committee, as required. Both the Guidelines and the Policies and Procedures will be made readily available to claimants, licensees and the public, via the Law Society's website and other means.

18. Some items that are contained in the existing Guidelines appear to reside more suitably in the Policies and Procedures. Items which have been moved to from the Guidelines to Policies and Procedures are identified in the concordance table at Tab 7.1.4, but are summarized as follows:
 - a. The matter of costs, or counsel fees, that might be payable from the Fund in limited circumstances to counsel who assist claimants with the presentation of a claim. It confirms that costs are rarely payable from the Fund, except in circumstances where counsel has been involved in a Claims Officer hearing, pursuant to the new fact-finding mechanism adopted by Convocation and incorporated in By-Law 12 in 2013.
 - b. The requirement to notify law enforcement when criminal conduct is suspected.
 - c. The requirement that claims arise in Ontario and involve Ontario lawyers, save as provided in the National Mobility Agreement.

For Approval

**NEW GENERAL GUIDELINES FOR THE DETERMINATION OF GRANTS FROM
THE COMPENSATION FUND RELATING TO LAWYERS AND PARALEGALS**

A. PREFACE

1. *General:*

These Guidelines outline the general principles that will guide the Compensation Fund in the exercise of its discretion pursuant to the *Law Society Act*, R.S.O. 1990, c.L.8, s.51, as am. These Guidelines are not rules, are not exhaustive and will not necessarily apply to every conceivable situation. The facts and circumstances of each case will be carefully considered as part of decision-making.

Grants are generally payable from the Compensation Fund to those who have suffered losses due to dishonesty on the part of lawyers or licensed paralegals. Most commonly, a loss for which compensation is payable results from theft or misappropriation of money that ought to be held in trust for a client as a retainer or as the proceeds from a settlement, a sale of property or an estate.

These Guidelines were adopted in this form by Convocation in 2014. The updated Guidelines are not intended to change the substantive considerations in determining a claim but are intended to restate and clarify, in plain language, the underlying principles and process that apply to the determination of Compensation Fund claims. The updated Guidelines apply to all outstanding Compensation Fund claims.

2. *Final decision:* A decision by the Compensation Fund to pay or not pay compensation is final.

3. *Proof:* To make a grant, the Compensation Fund must have satisfactory proof of loss. What is satisfactory proof will vary, depending on the nature of the claim and the evidence that is reasonably available. Proof that funds were given to a lawyer or paralegal could include, for example:

- Receipts issued by the lawyer or paralegal
- Statements of account from the lawyer or paralegal
- Bank records of the claimant
- Cancelled cheques issued by the claimant or on the claimant's behalf

4. *Fund of last resort:* The Compensation Fund is a fund of last resort. The Fund will determine, at its discretion, whether all reasonable steps, in the circumstances, have been taken to recover a loss through other means, for example through litigation.

B. WHO CAN CLAIM

5. *Lawyer-client / paralegal client relationship:* Subject to the exceptions set out in these guidelines, the claimant must be a person who had a lawyer-client or paralegal-client relationship or other similar fiduciary relationship with the person whose dishonesty is the reason for the loss.

6. *Exception – estate beneficiaries.* A beneficiary of an estate may claim for compensation, where a loss from the estate is because of the dishonesty of a lawyer who has acted as solicitor for the estate or estate trustee or both.

7. *Financial institutions and insurers:* The Compensation Fund will not pay grants to banks or other financial institutions that are in the business of lending money, nor will it compensate for losses covered by a contract of insurance, including title insurance.

C. LOSSES FOR WHICH COMPENSATION MAY BE AVAILABLE

8. *Loss:* For the purposes of the Compensation Fund, loss is defined as the difference between what the lawyer or licensed paralegal received from the claimant or on the claimant's behalf, and the amount that was earned and accounted for, and/or returned to the claimant.

9. *Dishonest conduct:* The loss must result from a lawyer's or paralegal's dishonest conduct. Dishonest conduct includes wrongful acts committed by a lawyer or paralegal, such as theft or embezzlement of money that ought to be held in trust for a client, or the wrongful taking or conversion of money or property. It can also include wrongfully failing to return a retainer that has been paid by a client but not earned.

10. *Lawyer-client, paralegal-client or fiduciary relationship:* The loss must arise in the context of a lawyer-client or paralegal-client relationship or other similar fiduciary relationship between the lawyer and client or paralegal and client. Such a relationship generally involves the provision of legal advice, legal representation and/or legal services by a lawyer or paralegal to a client.

11. *Practice of law / provision of legal services:* Apart from exceptions contained in these guidelines, the loss must be connected to the practice of law or the provision of legal services. Any funds or property alleged to have been lost must have been received by the lawyer or paralegal in his or her capacity as a lawyer or paralegal. If a lawyer or paralegal has acted dishonestly in a matter that is not connected to the practice of law or provision of legal services, compensation will not be available.

12. *Legal entitlement:* The claimant must be legally or beneficially entitled to the money or property for which he or she is seeking compensation.

D. DETERMINING THE AMOUNT OF COMPENSATION THAT IS PAYABLE

13. *Amount of loss:* The Fund will consider the value of work performed by the lawyer or paralegal and the cost of disbursements, whether or not the claimant received an account for the

work or the disbursements. The fact that work was performed may cause the Fund to reduce a grant or deny one altogether.

14. *Maximum grant:* Convocation will, from time to time, determine the maximum amount payable by the Fund. For losses resulting from funds given to a lawyer after April 22, 2008, the maximum grant is \$150,000. Grants for such losses originating prior to April 22, 2008 are subject to the maximum in place at the time funds were advanced. The maximum grant is \$10,000 for a loss resulting from dishonesty on the part of a paralegal licensee.

15. *Risk and carelessness:* The Compensation Fund will consider the extent to which the claimant was careless or took unreasonable risks. Risk and carelessness on the part of the claimant may reduce or eliminate a grant. In assessing risk and carelessness, the Fund may consider, for example:

- (a) whether it was reasonable for the claimant to trust the lawyer or paralegal concerned without, for example, considering other sources of professional advice (accounting, legal or otherwise);
- (b) whether the claimant was reckless in entrusting the money to the lawyer or paralegal; and
- (c) whether the claimant was careless in protecting his or her own interest after having a reasonable opportunity to suspect that a loss due to dishonesty might be occurring.

E. LOSSES FOR WHICH COMPENSATION IS NOT PAYABLE

16. *General:* The following losses will not result in compensation from the Fund:

- (a) Losses by spouses, children, parents, grandparents, siblings, partners, associates and employees of the lawyer(s) or paralegal(s) causing the loss
- (b) Losses covered by a bond, surety agreement, or insurance contract to the extent to which coverage applies
- (c) Losses by any business entity controlled by the lawyer or paralegal
- (d) Losses by any governmental entity or agency
- (e) Losses by banks or other financial institutions
- (f) Interest, damages, expenses, costs and other consequential or incidental losses

17. *Loans:* The Compensation Fund will not compensate for a loss resulting from a loan to a lawyer or paralegal unless the claimant was persuaded to lend money by the lawyer or paralegal because of an ongoing lawyer-client or paralegal-client relationship. Such a relationship must exist separate and apart from the loan itself.

18. *Investments:* The Compensation Fund will not compensate for a loss resulting from an investment solicited or facilitated by a lawyer unless the claimant was persuaded to make the investment because of an ongoing lawyer-client or paralegal-client relationship. Such a relationship must exist separate and apart from the investment itself.

TAB 7.1.2

**GENERAL GUIDELINES FOR THE DETERMINATION
OF GRANTS FROM THE COMPENSATION FUND**

1. It must be shown that, at the time the lawyer licensee received funds or property of a claimant,
 - a) a solicitor and client relationship existed between the claimant and the lawyer, and that
 - b) the lawyer received funds or property of the claimant in his or her capacity as a lawyer, and that
 - c) the claimant's loss was in consequence of dishonesty, on the part of the lawyer, in connection with such lawyer's professional business*.

2. Notwithstanding the requirements of guideline 1(a) a solicitor and client relationship between the claimant and the lawyer is not required,
 - a) when it can be shown that the claimant relied on the lawyer and the loss was in consequence of dishonesty by the lawyer in connection with any trust related to the lawyer's professional business where the lawyer is or was a trustee; or

 - b) when the claimant is a beneficiary of an estate of a deceased person whose personal representative has a solicitor and client relationship with the lawyer. Beneficiaries of an estate will be allowed to make claims to the Fund on their own account and separate per claimant limits will apply to each individual claim.

3. Money left with a lawyer to be used in a venture, in which the lawyer and the person advancing the money are both participants, is not money received by the lawyer in connection with his or her professional business, or in his or her capacity as a lawyer, despite the fact that the lawyer performs legal services in connection with the venture. Misappropriation by the lawyer of money left with the lawyer to participate in a venture with the lawyer, or failure to properly account by the lawyer, is not conduct for which relief from the Fund is available.

4. a) There shall be no recovery of money advanced to the lawyer if the purpose of such advance was known by the claimant to be a loan to the lawyer or in circumstances where the claimant should have known that the advance was a loan to the lawyer. It is deemed that the advance was to the lawyer, if it was for the lawyer personally or to the lawyer's spouse or a corporation, syndicate or

*Professional business means the practice of law and the business operations relating to it.

partnership in which the lawyer or lawyer's spouse or both of them directly or indirectly, have a substantial interest.

b) Notwithstanding the foregoing, if a claimant is induced to lend money to a lawyer because of a solicitor and client relationship, consideration can be given to making a grant when the loan is not repaid.

5. There must be satisfactory proof that money or money's worth was received by the lawyer from or on behalf of the claimant and equivalent money or money's worth has not been returned or accounted for to the claimant.
6. Ordinarily,
 - a) the amount of the loss in respect of which a grant may be made is the difference between the amount received by the lawyer and the actual amount returned or otherwise accounted for to the claimant; and
 - b) all amounts paid to the claimant, even though purporting to be interest, or on account of interest, should be deducted in determining the amount of the grant, less the amount of any income tax paid on that interest.

Payment of interest to the claimant, or costs (except counsel fees set out below), expenses or damages incurred or suffered by the claimant will not be made out of the Fund. Counsel fees may be allowed as follows: \$500. (may be increased in complicated cases) for preparation of claim documents and final resolution of the claim plus \$800. per day in the discretion of the Referee if a hearing is held.

7. The amount of a grant may be reduced in circumstances where the claimant expected or should reasonably be considered as having expected that the funds entrusted to the lawyer were to be invested in a risky investment that might not be recovered in full.
8. Carelessness, on the part of the claimant, which causes or contributes to a loss, is a factor which may be considered in making a grant from the Fund. It is not feasible to attempt to exhaustively define what constitutes carelessness. Each claim for a grant depends on its particular facts. It may be considered to be carelessness where a claimant advances or continues to advance money to a lawyer, if the claimant has knowledge of facts which reasonably should cause the claimant to doubt the integrity, or the financial reliability of the lawyer.
9. Where the dealings with the lawyer have been conducted by a trustee or agent for or on behalf of another person, the merits of the claim, the decision to make a grant and the amount of the grant should be determined as though the trustee or agent had been dealing with his or her own funds. If a grant is made, care should be taken that it reaches and

thereafter will be preserved for the person beneficially entitled. If the formal written claim is not made in the name of the person entitled to benefit from any grant made in respect of that claim, the record should be corrected to meet the circumstances and to ensure that the proper person receives the benefit of the grant.

10. Where a claimant has a reasonable cause of action against some other person, which would reimburse the claimant or reduce the amount of his or her loss, and would not be recoverable by such other person from the Fund, the claimant, as a general rule, should be required to take all reasonable steps to effect recovery from such other person before a grant is made from the Fund. It is in the discretion of the Committee whether all reasonable steps have been taken, but such discretion should be exercised primarily in the interests of the claimant rather than the protection of the Fund.
11. Where the lawyer would appear to have a valid claim against the claimant for fees and disbursements in respect of services that have been rendered to the claimant, the approximate amount thereof, can, in the discretion of the Referee, be deducted from the amount of the grant that would otherwise be made.
12. Where a claim arises out of circumstances that strongly suggest criminal conduct on the part of the lawyer, the claimant shall report the facts to the relevant police authority for investigation. The claimant must then satisfy the Fund that he or she has done so failing which the claim may not be entertained.
13. The financial circumstances of the person actually suffering the loss and the degree of hardship suffered by that person as a result of the loss are factors to be taken into account when determining any grant. No grant shall be made to a bank or other financial institution engaged in the business of lending money.
14. Ordinarily, a claimant who elects to take steps to recover the loss in pursuit of a private agreement with an apparently dishonest lawyer will not be entitled to a grant unless the Law Society Compensation Fund and Discipline Departments have been informed before any such steps are taken.
15. In the case of a lawyer who conducts the practice of law in a jurisdiction outside Ontario, other than a practice within Canada that complies with the provisions of the Inter-Jurisdictional Practice Protocol, no grant shall be paid out of the Fund when the funds or property of the claimant were received by or on behalf of the lawyer in connection with a matter that originated in that jurisdiction or in connection with a trust of which the lawyer was or is a trustee that originated outside Ontario.

Revised April 30, 2007

Approved (Convocation) September 2007

**GUIDELINES FOR THE DETERMINATION OF GRANTS FROM THE
COMPENSATION FUND RELATING TO PARALEGALS**

1. In order to qualify for a grant from the Compensation Fund, it must be shown that,
 - a. the paralegal licensee received funds or property of a claimant, in his or her capacity as a person licensed to provide legal services, and that
 - b. the claimant's loss was in consequence of dishonesty, on the part of the paralegal, in connection with the paralegal's professional business. Professional business means the provision of legal services and the business operations relating to it, as set out in the Law Society Act.
2. Notwithstanding the requirements of guideline 1(a) a paralegal and client relationship between the claimant and the paralegal is not required, when it can be shown that the claimant relied on the paralegal and the loss was in consequence of dishonesty by the paralegal in connection with any trust related to the paralegal's professional business where the paralegal is or was a trustee.
3. Money left with a paralegal to be used in a venture, in which the paralegal and the person advancing the money are both participants, is not money received by the paralegal in connection with his or her professional business, or in his or her capacity as a paralegal, despite the fact that the paralegal provides legal services in connection with the venture. Misappropriation by the paralegal of money left with the paralegal to participate in a venture with the paralegal, or failure to properly account by the paralegal, is not conduct for which relief from the Fund is available.
4.
 - a. There shall be no recovery of money advanced to the paralegal if the purpose of such advance was known by the claimant to be a loan to the paralegal or in circumstances where the claimant should have known that the advance was a loan to the paralegal. It is deemed that the advance was to the paralegal, if it was for the paralegal personally or to his or her spouse or a corporation, syndicate or partnership in which the paralegal or the paralegal's spouse or both of them directly or indirectly, have a substantial interest.
 - b. Notwithstanding the foregoing, if a claimant is induced to lend money to a paralegal because of a paralegal and client relationship, consideration can be given to making a grant when the loan is not repaid.
5. There must be satisfactory proof that money or money's worth was received by the paralegal from or on behalf of the claimant and equivalent money or money's worth has not been returned or accounted for to the claimant.
6. Ordinarily,
 - a. the amount of the loss in respect of which a grant may be made is the difference between the amount received by the paralegal and the actual amount returned or otherwise accounted for to the claimant; and

- b. payment of interest to the claimant, or costs (except counsel fees set out below), expenses or damages incurred or suffered by the claimant will not be made out of the Fund. Counsel fees may be allowed as follows: \$500. (may be increased in complicated cases) for preparation of claim documents and final resolution of the claim plus \$800. per day in the discretion of the Referee if a hearing is held.
7. Carelessness on the part of the claimant, or risk undertaken by the claimant, which cause or contribute to a loss, may be considered in making a grant from the Fund. Each claim for a grant depends on its particular facts. While it is not feasible to attempt to exhaustively define what constitutes carelessness, it may be considered to be careless where a claimant advances or continues to advance money to a paralegal, if the claimant has knowledge of facts that reasonably should cause the claimant to doubt the integrity, or the financial reliability of the paralegal.
8. Where the dealings with the paralegal have been conducted by a trustee or agent for or on behalf of another person, the merits of the claim, the decision to make a grant and the amount of the grant should be determined as though the trustee or agent had been dealing with his or her own funds. If a grant is made, care should be taken that it reaches and thereafter will be preserved for the person beneficially entitled. If the formal written claim is not made in the name of the person entitled to benefit from any grant made in respect of that claim, the record should be corrected to meet the circumstances and to ensure that the proper person receives the benefit of the grant.
9. Where a claimant has a reasonable cause of action against some other person, including the paralegal, which would reimburse the claimant or reduce the amount of his or her loss, and would not be recoverable by such other person from the Fund, the claimant, as a general rule, should be required to take all reasonable steps to effect recovery from such other person before a grant is made from the Fund. It is in the discretion of Fund counsel and/or the Committee whether all reasonable steps have been taken, but such discretion should be exercised primarily in the interests of the claimant rather than the protection of the Fund.
10. Where the paralegal would appear to have a valid claim against the claimant for fees and disbursements in respect of services that have been rendered to the claimant, the approximate amount thereof can be deducted from the amount of the grant that would otherwise be made.
11. Where a claim arises out of circumstances that strongly suggest criminal conduct on the part of the paralegal, the claimant shall report the facts to the relevant police authority for investigation. The claimant must then satisfy the Fund that he or she has done so failing which the claim may not be entertained.
12. The financial circumstances of the person actually suffering the loss and the degree of hardship suffered by that person as a result of the loss are factors to be taken into account

when determining any grant. No grant shall be made to a bank or other financial institution engaged in the business of lending money.

13. Ordinarily, a claimant who elects to take steps to recover the loss in pursuit of a private agreement with an apparently dishonest paralegal will not be entitled to a grant unless the Compensation Fund has been informed before any such steps are taken.
14. In the case of a paralegal who provides legal services in a jurisdiction outside Ontario, no grant shall be paid out of the Fund when the funds or property of the claimant were received by or on behalf of the paralegal in connection with a matter that originated in that jurisdiction.

February 21, 2008

TAB 7.1.3

**NEW GENERAL GUIDELINES FOR THE DETERMINATION OF GRANTS FROM THE COMPENSATION FUND
RELATING TO LAWYERS AND PARALEGALS**

CONCORDANCE WITH EXISTING GUIDELINES, AND EXPLANATORY NOTES

	NEW GENERAL GUIDELINES	CURRENT GUIDELINE EQUIVALENT, IF ANY (LAWYER GUIDELINES AND PARALEGAL GUIDELINES)	EXPLANATION
A.	PREFACE		
1.	<p><i>General:</i> These Guidelines outline the general principles that will guide the Compensation Fund in the exercise of its discretion pursuant to the <i>Law Society Act</i>, R.S.O. 1990, c.L.8, s.51, as am. These Guidelines are not rules, are not exhaustive and will not necessarily apply to every conceivable situation. The facts and circumstances of each case will be carefully considered as part of decision-making.</p> <p>Grants are generally payable from the Compensation Fund to those who have suffered losses due to dishonesty on the part of lawyers or licensed paralegals. Most commonly, a loss for which compensation is payable results from theft or misappropriation of money that</p>	<p>There is no direct equivalent in either the General Guidelines for the Determination of Grants from the Compensation Fund (“lawyer guidelines”) or the Guidelines for the Determination of Grants from the Compensation Fund Relating to Paralegals (“paralegal guidelines”).</p>	<p>For the sake of greater transparency and comprehensibility, the Committee believes it is important at the outset to assert the principles that led to the creation of the Compensation Fund and that have supported its continuation. The Committee also wishes to more clearly associate the Guidelines with the discretion conferred on the Law Society by statute.</p> <p>The language used in this guideline with respect to the most common basis for compensation reflects language already employed in routine correspondence with claimants and licensees. In the Committee’s view, it fairly describes the purpose of the Fund as intended by the Legislature and by Convocation.</p>

	NEW GENERAL GUIDELINES	CURRENT GUIDELINE EQUIVALENT, IF ANY (LAWYER GUIDELINES AND PARALEGAL GUIDELINES)	EXPLANATION
	<p>ought to be held in trust for a client as a retainer or as the proceeds from a settlement, a sale of property or an estate.</p> <p>These Guidelines were adopted in this form by Convocation in 2014. The updated Guidelines are not intended to change the substantive considerations in determining a claim but to restate and clarify, in plain language, the underlying principles and process that apply to the determination of Compensation Fund claims. The updated Guidelines apply to all outstanding Compensation Fund claims.</p>		<p>The transitional language in the final paragraph is inspired by similar language included in Alberta’s Assurance Fund Guideline at the time of its last revision, in February 2008. Alberta’s Guideline also begins with a preface stating its intent, which is “to guideline and assist all of those involved in a claim to understand the general requirements and process...to support all those deciding claims to make effective and consistent decisions and to offer helpful information to claimants, members and other interested parties to allow them to reasonably assess and respond to issues associated with their claims.”</p>
2.	<p><i>Final decision:</i> A decision by the Compensation Fund to pay or not pay compensation is final.</p>	<p>There is no direct equivalent to this provision in either the lawyer or paralegal guidelines. However, subsection 51(5) of the <i>Law Society Act</i> states in part that “Convocation <i>in its absolute discretion</i> may make grants from the Fund...”</p>	<p>The Committee believes it is useful for the Guidelines to restate the fact that Convocation’s discretion, as delegated to the Committee and to staff pursuant to By-Law 12, is absolute (although it is fair to concede that the possibility of judicial review is not necessarily precluded).</p>
3.	<p><i>Proof:</i> To make a grant, the Compensation Fund must have satisfactory proof of loss. What is</p>	<p>Guideline 5 of the lawyer guidelines states: <i>There must be satisfactory proof that</i></p>	<p>The new version of the Guideline is intended to add substance. It codifies the existing requirements and frequently used</p>

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	<p>satisfactory proof will vary, depending on the nature of the claim and the evidence that is reasonably available. Proof that funds were given to a lawyer or paralegal could include, for example:</p> <ul style="list-style-type: none"> • Receipts issued by the lawyer or paralegal • Statements of account from the lawyer or paralegal • Bank records of the claimant • Cancelled cheques issued by the claimant or on the claimant’s behalf 	<p><i>money or money's worth was received by the lawyer from or on behalf of the claimant and equivalent money or money's worth has not been returned or accounted for to the claimant.</i></p> <p>Guideline 5 of the paralegal guidelines states: <i>There must be satisfactory proof that money or money's worth was received by the paralegal from or on behalf of the claimant and equivalent money or money's worth has not been returned or accounted for to the claimant.</i></p>	<p>examples for establishing that funds were indeed advanced to a licensee. This approach is not uncommon. See for example the Nova Scotia’ Barristers Society stipulation that the requisite proof could include “copies of billings or invoices from the lawyer in relation to the service(s) for which the lawyer was retained, indicating any fees, disbursements, and other charges paid by the applicant; copies of receipts or cancelled cheques; and copies of relevant correspondence or legal documents, including deeds, wills, contracts, etc.”</p>
4.	<p><i>Fund of last resort:</i> The Compensation Fund is a fund of last resort. The Fund will determine, at its discretion, whether all reasonable steps, in the circumstances, have been taken to recover a loss through other means, for example through litigation.</p>	<p>Guideline 10 in relation to lawyers states: <i>Where a claimant has a reasonable cause of action against some other person, which would reimburse the claimant or reduce the amount of his or her loss, and would not be recoverable by such other person from the Fund, the claimant, as a general rule, should be required to take all reasonable steps to effect recovery from such other person before a grant is made from the Fund. It is in the discretion of the Committee whether all reasonable steps have been taken, but</i></p>	<p>The reformulated guideline aims for greater simplicity and transparency.</p>

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		<p><i>such discretion should be exercised primarily in the interests of the claimant rather than the protection of the Fund.</i></p> <p>Guideline 9 of the paralegal guidelines states: <i>Where a claimant has a reasonable cause of action against some other person, including the paralegal, which would reimburse the claimant or reduce the amount of his or her loss, and would not be recoverable by such other person from the Fund, the claimant, as a general rule, should be required to take all reasonable steps to effect recovery from such other person before a grant is made from the Fund. It is in the discretion of Fund counsel and/or the Committee whether all reasonable steps have been taken, but such discretion should be exercised primarily in the interests of the claimant rather than the protection of the Fund.</i></p>	
B.	WHO CAN CLAIM		
5.	<p><i>Lawyer-client / paralegal client relationship:</i> Subject to the exceptions set out in these guidelines, the claimant must be a person who had a lawyer-client or paralegal-client relationship or</p>	<p>Guideline 1(a) of the lawyer guidelines states: <i>It must be shown that, at the time the lawyer licensee received funds or property of a claimant,</i></p>	<p>The Committee wishes to ensure that the requisite relationship is more clearly defined, since the existing guidelines do not in fact restrict compensation to those who have a licensee-client relationship <i>per</i></p>

	NEW GENERAL GUIDELINES	CURRENT GUIDELINE EQUIVALENT, IF ANY (LAWYER GUIDELINES AND PARALEGAL GUIDELINES)	EXPLANATION
	other similar fiduciary relationship with the person whose dishonesty is the reason for the loss.	<p><i>a) a solicitor and client relationship existed between the claimant and the lawyer, ...</i></p> <p>Guideline 1(a) of the paralegal guidelines states: <i>In order to qualify for a grant from the Compensation Fund, it must be shown that,</i></p> <p><i>a) the paralegal licensee received funds or property of a claimant, in his or her capacity as a person licensed to provide legal services,</i></p>	<p><i>se.</i> The existing guidelines also provide for limited exceptions. The new version makes this clearer, and lays the foundation for appropriate exceptions by referencing the concept of a fiduciary relationship.</p> <p>This concept is to be found in rules and guidelines in other jurisdictions that pay compensation to victims of lawyer dishonesty. For instance, Rule 10A of the American Bar Association’s Model Rules for Lawyers’ Funds for Client Protection (“ABA Model Rules”), states in part that “[t]he loss must be caused by the dishonest conduct of the lawyer and shall have arisen out of and by reason of a client-lawyer relationship or a fiduciary relationship between the lawyer and claimant.”</p>
6.	<i>Exception – estate beneficiaries.</i> A beneficiary of an estate may claim for compensation, where a loss from the estate is because of the dishonesty of a lawyer who has acted as solicitor for the estate or estate trustee or both.	<p>Guideline 2(b) of the lawyer guidelines states: <i>Notwithstanding the requirements of guideline 1(a) a solicitor and client relationship between the claimant and the lawyer is not required, ...</i></p> <p><i>b) when the claimant is a beneficiary of an estate of a deceased person whose personal representative has a solicitor and client relationship with the lawyer. Beneficiaries of an estate will be allowed</i></p>	<p>The new version is intended to simplify the existing wording for this exception, which reflects a policy choice made by Convocation several years ago. The effect of both versions is (1) to create a limited exception to the requirement for a direct lawyer-client relationship that is nonetheless generally consistent with the statutory purpose of the Compensation Fund; and (2) to permit aggregate claims for losses from an estate that could,</p>

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		<p><i>to make claims to the Fund on their own account and separate per claimant limits will apply to each individual claim.</i></p> <p>There is no equivalent to this in the paralegal guidelines because estate work is not within the accepted paralegal scope of practice.</p>	potentially, exceed the per-claimant limit.
7.	<p><i>Financial institutions and insurers: The Compensation Fund will not pay grants to banks or other financial institutions that are in the business of lending money, nor will it compensate for losses covered by a contract of insurance, including title insurance.</i></p>	<p>Guideline 13 of the lawyer guidelines states, in part: <i>No grant shall be made to a bank or other financial institution engaged in the business of lending money.</i></p> <p>Guideline 12 of the paralegal guidelines states, in part: <i>No grant shall be made to a bank or other financial institution engaged in the business of lending money.</i></p>	The restriction on financial institutions is unchanged. The restriction on compensating insurers reflects a longstanding and well-accepted practice at the Fund. It is intended to discourage insurers, who have paid out on claims, from suing unwitting victims of fraud in order to force them to seek compensation from the Fund and thereby relieve the insurer. See also new Guideline 16, which excludes, among other things, claims for losses covered by insurance policies.
C.	LOSSES FOR WHICH COMPENSATION MAY BE AVAILABLE		
8.	<p><i>Loss:</i> For the purposes of the Compensation Fund, loss is defined as the difference between what the lawyer or licensed paralegal received from the claimant or on the claimant’s behalf, and the amount that was earned and</p>	<p>Guideline 6 of the lawyer guidelines states, in part: <i>Ordinarily,</i> a) <i>the amount of the loss in respect of which a grant may be made is the</i></p>	The new formulation is intended to be more straightforward and comprehensible to claimants.

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	accounted for, and/or returned to the claimant.	<p><i>difference between the amount received by the lawyer and the actual amount returned or otherwise accounted for to the claimant; ...</i></p> <p>Guideline 6 of the paralegal guidelines states, in part: <i>Ordinarily,</i> a) <i>the amount of the loss in respect of which a grant may be made is the difference between the amount received by the paralegal and the actual amount returned or otherwise accounted for to the claimant;</i></p>	
9.	<p><i>Dishonest conduct:</i> The loss must result from a lawyer’s or paralegal’s dishonest conduct. Dishonest conduct includes wrongful acts committed by a lawyer or paralegal, such as theft or embezzlement of money that ought to be held in trust for a client, or the wrongful taking or conversion of money or property. It can also include wrongfully failing to return a retainer that has been paid by a client but not earned.</p>	<p>There is no direct equivalent to this provision in either the lawyer or paralegal guidelines.</p>	<p>The Committee wishes to reinforce the principles also contained in the Preface to these Guidelines. The examples given are by far the most common circumstances in which a claimant will be eligible to receive a grant from the Compensation Fund. The provision is deliberately not exhaustive of all potential types of licensee dishonesty.</p> <p>As noted above, the concept of “dishonest conduct” in the ABA Model Rules. In addition those Rules provide for a definition of dishonest conduct. R.10C</p>

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			<p>states, in part: “As used in these Rules, dishonest conduct means wrongful acts committed by a lawyer in the nature of theft or embezzlement of money or the wrongful taking or conversion of money, property, including but not limited to: (1) Failure to refund unearned fees received in advance ...;”</p>
10.	<p><i>Lawyer-client, paralegal-client or fiduciary relationship:</i> The loss must arise in the context of a lawyer-client or paralegal-client relationship or other similar fiduciary relationship between the lawyer and client or paralegal and client. Such a relationship generally involves the provision of legal advice, legal representation and/or legal services by a lawyer or paralegal to a client.</p>	<p>Guidelines 1(a) and (b) of the lawyer guidelines state: <i>It must be shown that, at the time the lawyer licensee received funds or property of a claimant,</i> a) <i>a solicitor and client relationship existed between the claimant and the lawyer, and that</i> b) <i>the lawyer received funds or property of the claimant in his or her capacity as a lawyer, ...</i></p> <p>Guideline 1(a) and (b) of the paralegal guidelines state: <i>In order to qualify for a grant from the Compensation Fund, it must be shown that,</i> a) <i>the paralegal licensee received funds or property of a claimant, in his or her</i></p>	<p>The Committee wishes to stress the core principles that provide the basis for compensation – in this instance the nature of the relationship that must exist between the person claiming compensation and the person whose dishonesty is the basis for the claim.</p>

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		<p><i>capacity as a person licensed to provide legal services, and that</i></p> <p><i>b) the claimant's loss was in consequence of dishonesty, on the part of the paralegal, in connection with the paralegal's professional business. Professional business means the provision of legal services and the business operations relating to it, as set out in the Law Society Act.</i></p>	
11.	<p><i>Practice of law / provision of legal services: Apart from exceptions contained in these guidelines, the loss must be connected to the practice of law or the provision of legal services. Any funds or property alleged to have been lost must have been received by the lawyer or paralegal in his or her capacity as a lawyer or paralegal. If a lawyer or paralegal has acted dishonestly in a matter that is not connected to the practice of law or provision of legal services,</i></p>	<p>Guideline 1(c) of the lawyer guidelines states:</p> <p><i>It must be shown that, at the time the lawyer licensee received funds or property of a claimant,</i></p> <p>...</p> <p><i>c) the claimant's loss was in consequence of dishonesty, on the part of the lawyer, in connection with such lawyer's professional business*.</i></p> <p><i>*Professional business means the practice of law and the business operations relating to it.</i></p>	<p>This is again intended to discourage claims for losses in which the dishonest person happens to be a lawyer or licensed paralegal, but the loss itself is generally unconnected to the practice of law or provision of legal services – for instance, a pure investment scheme in which a trust account is used for flow-through purposes. (See also new Guideline 18, below.)</p>

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	<p>compensation will not be available.</p>	<p>Guideline 3 of the lawyer guidelines states: <i>Money left with a lawyer to be used in a venture, in which the lawyer and the person advancing the money are both participants, is not money received by the lawyer in connection with his or her professional business, or in his or her capacity as a lawyer, despite the fact that the lawyer performs legal services in connection with the venture.</i> <i>Misappropriation by the lawyer of money left with the lawyer to participate in a venture with the lawyer, or failure to properly account by the lawyer, is not conduct for which relief from the Fund is available.</i></p> <p>Guideline 1(b) of the paralegal guidelines states: <i>In order to qualify for a grant from the Compensation Fund, it must be shown that, ...</i></p> <p><i>b) the claimant's loss was in consequence of dishonesty, on the part of the paralegal, in connection with the paralegal's professional business.</i></p>	

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		<p><i>Professional business means the provision of legal services and the business operations relating to it, as set out in the Law Society Act.</i></p> <p>Guideline 3 of the paralegal guidelines states:</p> <p><i>Money left with a paralegal to be used in a venture, in which the paralegal and the person advancing the money are both participants, is not money received by the paralegal in connection with his or her professional business, or in his or her capacity as a paralegal, despite the fact that the paralegal provides legal services in connection with the venture. Misappropriation by the paralegal of money left with the paralegal to participate in a venture with the paralegal, or failure to properly account by the paralegal, is not conduct for which relief from the Fund is available.</i></p>	
12.	<p><i>Legal entitlement:</i> The claimant must be legally or beneficially entitled to the money or property for which he or she</p>	<p>Guideline 9 of the lawyer guidelines states:</p> <p><i>Where the dealings with the lawyer have</i></p>	<p>The Committee recommends a simpler and more straightforward formulation. The intent is to capture a number of situations</p>

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	NEW GENERAL GUIDELINES	CURRENT GUIDELINE EQUIVALENT, IF ANY (LAWYER GUIDELINES AND PARALEGAL GUIDELINES)	EXPLANATION
	is seeking compensation.	<p><i>been conducted by a trustee or agent for or on behalf of another person, the merits of the claim, the decision to make a grant and the amount of the grant should be determined as though the trustee or agent had been dealing with his or her own funds. If a grant is made, care should be taken that it reaches and thereafter will be preserved for the person beneficially entitled. If the formal written claim is not made in the name of the person entitled to benefit from any grant made in respect of that claim, the record should be corrected to meet the circumstances and to ensure that the proper person receives the benefit of the grant.</i></p> <p>Guideline 8 of the paralegal guidelines states: <i>Where the dealings with the paralegal have been conducted by a trustee or agent for or on behalf of another person, the merits of the claim, the decision to make a grant and the amount of the grant should be determined as though the trustee or agent had been dealing with his or her own funds. If a grant is made,</i></p>	in which a claim might be made by someone whose entitlement is not immediately apparent.

	NEW GENERAL GUIDELINES	CURRENT GUIDELINE EQUIVALENT, IF ANY (LAWYER GUIDELINES AND PARALEGAL GUIDELINES)	EXPLANATION
		<i>care should be taken that it reaches and thereafter will be preserved for the person beneficially entitled. If the formal written claim is not made in the name of the person entitled to benefit from any grant made in respect of that claim, the record should be corrected to meet the circumstances and to ensure that the proper person receives the benefit of the grant.</i>	
D.	DETERMINING THE AMOUNT OF COMPENSATION THAT IS PAYABLE		
13.	<i>Amount of loss:</i> The Fund will consider the value of work performed by the lawyer or paralegal and the cost of disbursements, whether or not the claimant received an account for the work or the disbursements. The fact that work was performed may cause the Fund to reduce a grant or deny one altogether.	Guideline 11 of the lawyer guidelines states: <i>Where the lawyer would appear to have a valid claim against the claimant for fees and disbursements in respect of services that have been rendered to the claimant, the approximate amount thereof, can, in the discretion of the Referee, be deducted from the amount of the grant that would otherwise be made.</i> Guideline 10 of the paralegal guidelines	The Committee recommends a simpler and more straightforward formulation. The situation addressed in this guideline arises frequently at the Compensation Fund, particularly in the case of allegedly unearned retainers.

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	NEW GENERAL GUIDELINES	CURRENT GUIDELINE EQUIVALENT, IF ANY (LAWYER GUIDELINES AND PARALEGAL GUIDELINES)	EXPLANATION
		states: <i>Where the paralegal would appear to have a valid claim against the claimant for fees and disbursements in respect of services that have been rendered to the claimant, the approximate amount thereof can be deducted from the amount of the grant that would otherwise be made.</i>	
14.	<i>Maximum grant:</i> Convocation will, from time to time, determine the maximum amount payable by the Fund. For losses resulting from funds given to a lawyer after April 22, 2008, the maximum grant is \$150,000. Grants for such losses originating prior to April 22, 2008 are subject to the maximum in place at the time funds were advanced. The maximum grant is \$10,000 for a loss resulting from dishonesty on the part of a paralegal licensee.	Compensation Fund limits are set from time to time by resolution of Convocation, on the recommendation of the Compensation Fund Committee, but are not currently included in the Guidelines.	This provision incorporates Convocation's most recent resolution with respect to the per claimant limit in the Guidelines. It would be amended by motion of Convocation in the event the per-claimant limit is increased.
15.	<i>Risk and carelessness:</i> The Compensation Fund will consider the extent to which the claimant was	Guideline 7 of the lawyer guidelines states: <i>The amount of a grant may be reduced in</i>	This guideline combines two guidelines into one. In many cases that come to the Fund, the distinction between risk and

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	<p>careless or took unreasonable risks. Risk and carelessness on the part of the claimant may reduce or eliminate a grant. In assessing risk and carelessness, the Fund may consider, for example:</p> <p>(a) whether it was reasonable for the claimant to trust the lawyer or paralegal concerned without, for example, considering other sources of professional advice (accounting, legal or otherwise);</p> <p>(b) whether the claimant was reckless in entrusting the money to the lawyer or paralegal; and</p> <p>(c) whether the claimant was careless in protecting his or her own interest after having a reasonable opportunity to suspect that a loss due to dishonesty might be occurring.</p>	<p><i>circumstances where the claimant expected or should reasonably be considered as having expected that the funds entrusted to the lawyer were to be invested in a risky investment that might not be recovered in full.</i></p> <p>Guideline 8 of the lawyer guidelines states: <i>Carelessness, on the part of the claimant, which causes or contributes to a loss, is a factor which may be considered in making a grant from the Fund. It is not feasible to attempt to exhaustively define what constitutes carelessness. Each claim for a grant depends on its particular facts. It may be considered to be carelessness where a claimant advances or continues to advance money to a lawyer, if the claimant has knowledge of facts which reasonably should cause the claimant to doubt the integrity, or the financial reliability of the lawyer.</i></p> <p>The concepts of risk and carelessness are already combined in the paralegal</p>	<p>carelessness is not readily apparent. In addition to simplifying and combining the two existing guidelines, which are conceptually related, the new version also provides more specific examples, to guide staff, Committee members and claimants.</p> <p>Much of the content of the examples is borrowed from the Alberta guideline, as adopted in 2008.</p>

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		<p>guidelines, in Guideline 7: <i>Carelessness on the part of the claimant, or risk undertaken by the claimant, which cause or contribute to a loss, may be considered in making a grant from the Fund. Each claim for a grant depends on its particular facts. While it is not feasible to attempt to exhaustively define what constitutes carelessness, it may be considered to be careless where a claimant advances or continues to advance money to a paralegal, if the claimant has knowledge of facts that reasonably should cause the claimant to doubt the integrity, or the financial reliability of the paralegal.</i></p>	
E.	LOSSES FOR WHICH COMPENSATION IS NOT PAYABLE		
16.	<p><i>General:</i> The following losses will not result in compensation from the Fund: (a) Losses by spouses, children, parents, grandparents, siblings, partners, associates and employees</p>	<p>Most of this is new, although it reflects standard and longstanding practice at the Fund. The last sentence of Guideline 13 of the lawyer guidelines already prohibits claims by financial institutions, as set out above in the context of new Guideline 7.</p>	<p>This guideline is intended to incorporate standard practice at the Compensation Fund. It is influenced to some extent by the ABA Model Rules. R10D (the actual formulation or extent of which varies from state to state), proposes the following</p>

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	<p>of the lawyer(s) or paralegal(s) causing the loss</p> <p>(b) Losses covered by a bond, surety agreement, or insurance contract to the extent to which coverage applies</p> <p>(c) Losses by any business entity controlled by the lawyer or paralegal</p> <p>(d) Losses by any governmental entity or agency</p> <p>(e) Losses by banks or other financial institutions</p> <p>(f) Interest, damages, expenses, costs and other consequential or incidental losses</p>	<p>In addition, Guideline 6 of the lawyer guidelines provides, in part: <i>Payment of interest to the claimant, or costs ... , expenses or damages incurred or suffered by the claimant will not be made out of the Fund.</i></p> <p>Guideline 12 of the paralegal guidelines prohibits claims by financial institutions, as set out above. Guideline 6b of the paralegal guidelines states, in part: <i>[P]ayment of interest to the claimant, or costs ... , expenses or damages incurred or suffered by the claimant will not be made out of the Fund.</i></p>	<p>exclusions:</p> <p>“(1) Losses incurred by spouses, children, parents, grandparents, siblings, partners, associates and employees of lawyer(s) causing the losses;</p> <p>(2) Losses covered by a bond, surety agreement, or insurance contract to the extent covered thereby, including any loss to which any bonding agent, surety or insurer is subrogated, to the extent of that subrogated interest;</p> <p>(3) Losses incurred by any financial institution that are recoverable under a ‘banker’s blanket bond’ or similar commonly available insurance or surety contract;</p> <p>(4) Losses incurred by any business entity controlled by the lawyer(s), any person or entity described in Subparagraph D(1), (2) or (3) of this Rule’</p> <p>(5) Losses incurred by any government entity or agency;</p> <p>(6) Losses arising from business or personal investments not arising in the course of the lawyer-client relationship [NB, see proposed</p>

	NEW GENERAL GUIDELINES	CURRENT GUIDELINE EQUIVALENT, IF ANY (LAWYER GUIDELINES AND PARALEGAL GUIDELINES)	EXPLANATION
			Guideline 18, below]; and (7) Consequential or incidental damages, such as lost interest, or lawyer’s fees or other costs incurred in seeking recovery of a loss.”
17.	<p><i>Loans:</i> The Compensation Fund will not compensate for a loss resulting from a loan to a lawyer or paralegal unless the claimant was persuaded to lend money by the lawyer or paralegal because of an ongoing lawyer-client or paralegal-client relationship. Such a relationship must exist separate and apart from the loan itself.</p>	<p>Guideline 4 of the lawyer guidelines states: <i>a) There shall be no recovery of money advanced to the lawyer if the purpose of such advance was known by the claimant to be a loan to the lawyer or in circumstances where the claimant should have known that the advance was a loan to the lawyer. It is deemed that the advance was to the lawyer, if it was for the lawyer personally or to the lawyer's spouse or a corporation, syndicate or partnership in which the lawyer or lawyer's spouse or both of them directly or indirectly, have a substantial interest.</i> <i>b) Notwithstanding the foregoing, if a claimant is induced to lend money to a lawyer because of a solicitor and client relationship, consideration can be given to making a grant when the loan is not repaid.</i></p> <p>Guideline 4 of the paralegal guidelines states: <i>a) There shall be no recovery of money advanced to the paralegal if the purpose</i></p>	<p>The new formulation is intended to more simply express the key concepts embedded in both the existing prohibition against compensation for loans and the exception thereto. As with Guideline 18, below, the focus is on the inducement that flows from a pre-existing lawyer-client or paralegal-client relationship.</p>

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		<p><i>of such advance was known by the claimant to be a loan to the paralegal or in circumstances where the claimant should have known that the advance was a loan to the paralegal. It is deemed that the advance was to the paralegal, if it was for the paralegal personally or to his or her spouse or a corporation, syndicate or partnership in which the paralegal or the paralegal's spouse or both of them directly or indirectly, have a substantial interest.</i></p> <p><i>b) Notwithstanding the foregoing, if a claimant is induced to lend money to a paralegal because of a paralegal and client relationship, consideration can be given to making a grant when the loan is not repaid.</i></p>	
18.	<p><i>Investments:</i> The Compensation Fund will not compensate for a loss resulting from an investment solicited or facilitated by a lawyer unless the claimant was persuaded to make the investment because of an ongoing lawyer-client or paralegal-client relationship. Such a relationship must</p>	<p>Compensation for investment-related losses, where the investment flows through the lawyer's trust account, is theoretically available because of Guideline 2(a) of the lawyer guidelines: <i>Notwithstanding the requirements of guideline 1(a) a solicitor and client relationship between the claimant and</i></p>	<p>The new formulation is again intended to reinforce a key principle underlying the Compensation Fund: that claims must arise on the basis of some type of lawyer-client relationship, even where the loss itself is tangential to that relationship. As with Guideline 18, below, the focus is on the inducement that flows from a pre-</p>

	NEW GENERAL GUIDELINES	CURRENT GUIDELINE EQUIVALENT, IF ANY (LAWYER GUIDELINES AND PARALEGAL GUIDELINES)	EXPLANATION
	<p>exist separate and apart from the investment itself.</p>	<p><i>the lawyer is not required, a) when it can be shown that the claimant relied on the lawyer and the loss was in consequence of dishonesty by the lawyer in connection with any trust related to the lawyer's professional business where the lawyer is or was a trustee; ...</i></p> <p>Investment claims involving the lawyer as a participant in the venture are also addressed by current Guideline 3, as set out above in the context of new Guideline 11.</p> <p>Guideline 2 of the paralegal guidelines states:</p> <p><i>Notwithstanding the requirements of guideline 1(a) a paralegal and client relationship between the claimant and the paralegal is not required, when it can be shown that the claimant relied on the paralegal and the loss was in consequence of dishonesty by the paralegal in connection with any trust related to the paralegal's professional business where the paralegal is or was a trustee.</i></p> <p>Similarly, Guideline 3 of the paralegal</p>	<p>existing lawyer-client or paralegal-client relationship.</p>

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	NEW GENERAL GUIDELINES	CURRENT GUIDELINE EQUIVALENT, IF ANY (LAWYER GUIDELINES AND PARALEGAL GUIDELINES)	EXPLANATION
		guidelines also speaks to investment claims, again as set out above.	

TAB 7.1.4

**CONCORDANCE OF EXISTING GUIDELINES WITH NEW GUIDELINE AND
POLICIES AND PROCEDURES EQUIVALENTS**

A. General Guidelines for the Determination of Grants from the Compensation Fund

Existing Guideline	Closest New Guideline and/or Policies and Procedures Equivalent
<p>1. It must be shown that, at the time the lawyer licensee received funds or property of a claimant,</p> <p>a) a solicitor and client relationship existed between the claimant and the lawyer, and that</p> <p>b) the lawyer received funds or property of the claimant in his or her capacity as a lawyer, and that</p> <p>c) the claimant's loss was in consequence of dishonesty, on the part of the lawyer, in connection with such lawyer's professional business*.</p>	<p><u>Guidelines</u></p> <p>5. <i>Lawyer-client / paralegal client relationship</i>: Subject to the exceptions set out in these guidelines, the claimant must be a person who had a lawyer-client or paralegal-client relationship or other similar fiduciary relationship with the person whose dishonesty is the reason for the loss.</p> <p>10. <i>Lawyer-client, paralegal-client or fiduciary relationship</i>: The loss must arise in the context of a lawyer-client or paralegal-client relationship or other similar fiduciary relationship between the lawyer and client or paralegal and client. Such a relationship generally involves the provision of legal advice, legal representation and/or legal services by a lawyer or paralegal to a client.</p> <p>11. <i>Practice of law / provision of legal services</i>: Apart from exceptions contained in these guidelines, the loss must be connected to the practice of law or the provision of legal services. Any funds or property alleged to have been lost must have been received by the lawyer or paralegal in his or her capacity as a lawyer or paralegal. If a lawyer or paralegal has acted dishonestly in a matter that is not connected to the practice of law or provision of legal services, compensation will not be available.</p>
<p>2. Notwithstanding the requirements of guideline 1(a) a solicitor and client relationship between the claimant and the lawyer is not required,</p> <p>a) when it can be shown that the claimant</p>	<p><u>Guidelines</u></p> <p>6. <i>Exception – estate beneficiaries</i>. A beneficiary of an estate may claim for compensation, where a loss from the estate is because of the dishonesty of a lawyer who has</p>

*Professional business means the practice of law and the business operations relating to it.

Existing Guideline	Closest New Guideline and/or Policies and Procedures Equivalent
<p>relied on the lawyer and the loss was in consequence of dishonesty by the lawyer in connection with any trust related to the lawyer’s professional business where the lawyer is or was a trustee; or</p> <p>b) when the claimant is a beneficiary of an estate of a deceased person whose personal representative has a solicitor and client relationship with the lawyer. Beneficiaries of an estate will be allowed to make claims to the Fund on their own account and separate per claimant limits will apply to each individual claim.</p>	<p>acted as solicitor for the estate or estate trustee or both.</p> <p>The major type of claim anticipated by Guideline 2 a) is partially addressed, in a more restrictive form, by the following: <i>18. Investments:</i> The Compensation Fund will not compensate for a loss resulting from an investment solicited or facilitated by a lawyer unless the claimant was persuaded to make the investment because of an ongoing lawyer-client or paralegal-client relationship. Such a relationship must exist separate and apart from the investment itself.</p>
<p>3. Money left with a lawyer to be used in a venture, in which the lawyer and the person advancing the money are both participants, is not money received by the lawyer in connection with his or her professional business, or in his or her capacity as a lawyer, despite the fact that the lawyer performs legal services in connection with the venture. Misappropriation by the lawyer of money left with the lawyer to participate in a venture with the lawyer, or failure to properly account by the lawyer, is not conduct for which relief from the Fund is available.</p>	<p>See Guidelines 11 and 18, reproduced above.</p>
<p>4. a) There shall be no recovery of money advanced to the lawyer if the purpose of such advance was known by the claimant to be a loan to the lawyer or in circumstances where the claimant should have known that the advance was a loan to the lawyer. It is deemed that the advance was to the lawyer, if it was for the lawyer personally or to the lawyer's spouse or a corporation, syndicate or partnership in which the lawyer or lawyer's spouse or both of them directly or indirectly, have a substantial interest.</p> <p>b) Notwithstanding the foregoing, if a claimant is induced to lend money to a lawyer</p>	<p><u>Guidelines</u> <i>17. Loans:</i> The Compensation Fund will not compensate for a loss resulting from a loan to a lawyer or paralegal unless the claimant was persuaded to lend money by the lawyer or paralegal because of an ongoing lawyer-client or paralegal-client relationship. Such a relationship must exist separate and apart from the loan itself.</p>

Existing Guideline	Closest New Guideline and/or Policies and Procedures Equivalent
<p>because of a solicitor and client relationship, consideration can be given to making a grant when the loan is not repaid.</p>	
<p>5. There must be satisfactory proof that money or money's worth was received by the lawyer from or on behalf of the claimant and equivalent money or money's worth has not been returned or accounted for to the claimant.</p>	<p><u>Guidelines</u> 3. <i>Proof:</i> To make a grant, the Compensation Fund must have satisfactory proof of loss. What is satisfactory proof will vary, depending on the nature of the claim and the evidence that is reasonably available. Proof that funds were given to a lawyer or paralegal could include, for example:</p> <ul style="list-style-type: none"> • Receipts issued by the lawyer or paralegal • Statements of account from the lawyer or paralegal • Bank records of the claimant • Cancelled cheques issued by the claimant or on the claimant's behalf. <p><u>Policies and Procedures</u> 10. <i>Satisfactory proof:</i> The claimant is responsible for furnishing satisfactory proof of the claim. What is satisfactory proof will vary from case to case, depending on the nature of the allegations against the lawyer or licensed paralegal, as well as the degree of difficulty involved in obtaining evidence. Proof that funds were advanced to a lawyer or paralegal could include, for example:</p> <ul style="list-style-type: none"> • Receipts issued by the lawyer or paralegal • Statements of account from the lawyer or paralegal • Bank records of the claimant • Cancelled cheques issued by the claimant or on the claimant's behalf
<p>6. Ordinarily, a) the amount of the loss in respect of which a grant may be made is the difference between the amount received by the lawyer</p>	<p><u>Guidelines</u> 8. <i>Loss:</i> For the purposes of the Compensation Fund, loss is defined as the difference between what the lawyer or licensed paralegal received from the claimant or on the claimant's behalf, and the amount that was earned and accounted</p>

Existing Guideline	Closest New Guideline and/or Policies and Procedures Equivalent
<p>and the actual amount returned or otherwise accounted for to the claimant; and</p> <p>b) all amounts paid to the claimant, even though purporting to be interest, or on account of interest, should be deducted in determining the amount of the grant, less the amount of any income tax paid on that interest.</p> <p>Payment of interest to the claimant, or costs (except counsel fees set out below), expenses or damages incurred or suffered by the claimant will not be made out of the Fund. Counsel fees may be allowed as follows: \$500. (may be increased in complicated cases) for preparation of claim documents and final resolution of the claim plus \$800. per day in the discretion of the Referee if a hearing is held.</p>	<p>for, and/or returned to the claimant.</p> <p>Regarding interest, expenses and damages, new Guideline 16 provides in part: The following losses will not result in compensation from the Fund: ... (f) Interest, damages, expenses, costs and other consequential or incidental losses.</p> <p><u>Policies and Procedures</u> Following the example in other jurisdictions, in which costs and counsel fees are generally not paid out of the Fund except in rare circumstances, and also noting the recent amendment of By-Law 12 to effectively replace external Referees with Claims Officers, the Committee has elected to adopt a different approach to the issue of costs, as follows: I. Costs 29. <i>General:</i> The Compensation Fund will not generally compensate claimants or their representatives for the expenses involved in submitting a claim. 30. <i>Exception:</i> In rare circumstances, and at its sole discretion, the Fund may consider a small payment, not to exceed \$500, to a claimant’s counsel where that person has provided <i>pro bono</i> assistance to the claimant in preparing the claim. 31. <i>Costs in Claims Officers matters:</i> At his or her sole discretion, a Claims Officer who conducts an oral or other form of hearing may, upon receiving and considering submissions from the parties, recommend that the Compensation Fund Committee pay the costs of the hearing out of the Fund. In such circumstances, the Claims Officer shall not recommend that the Compensation Fund make payment of an amount that exceeds the tariff stipulated for costs in Law Society Tribunal matters, as set out in the pertinent Rules of</p>

Existing Guideline	Closest New Guideline and/or Policies and Procedures Equivalent
	Practice and Procedure.
<p>7. The amount of a grant may be reduced in circumstances where the claimant expected or should reasonably be considered as having expected that the funds entrusted to the lawyer were to be invested in a risky investment that might not be recovered in full.</p>	<p><u>Guidelines</u> <i>15. Risk and carelessness:</i> The Compensation Fund will consider the extent to which the claimant was careless or took unreasonable risks. Risk and carelessness on the part of the claimant may reduce or eliminate a grant. In assessing risk and carelessness, the Fund may consider, for example:</p> <ul style="list-style-type: none"> (a) whether it was reasonable for the claimant to trust the lawyer or paralegal concerned without, for example, considering other sources of professional advice (accounting, legal or otherwise); (b) whether the claimant was reckless in entrusting the money to the lawyer or paralegal; and (c) whether the claimant was careless in protecting his or her own interest after having a reasonable opportunity to suspect that a loss due to dishonesty might be occurring.
<p>8. Carelessness, on the part of the claimant, which causes or contributes to a loss, is a factor which may be considered in making a grant from the Fund. It is not feasible to attempt to exhaustively define what constitutes carelessness. Each claim for a grant depends on its particular facts. It may be considered to be carelessness where a claimant advances or continues to advance money to a lawyer, if the claimant has knowledge of facts which reasonably should cause the claimant to doubt the integrity, or the financial reliability of the lawyer.</p>	<p>See Guideline 15, reproduced above.</p>
<p>9. Where the dealings with the lawyer have been conducted by a trustee or agent for or on behalf of another</p>	<p><u>Guidelines</u> <i>12. Legal entitlement:</i> The claimant must be legally or beneficially entitled to the money or property for which he or she is seeking</p>

Existing Guideline	Closest New Guideline and/or Policies and Procedures Equivalent
<p>person, the merits of the claim, the decision to make a grant and the amount of the grant should be determined as though the trustee or agent had been dealing with his or her own funds. If a grant is made, care should be taken that it reaches and thereafter will be preserved for the person beneficially entitled. If the formal written claim is not made in the name of the person entitled to benefit from any grant made in respect of that claim, the record should be corrected to meet the circumstances and to ensure that the proper person receives the benefit of the grant.</p>	<p>compensation.</p>
<p>10. Where a claimant has a reasonable cause of action against some other person, which would reimburse the claimant or reduce the amount of his or her loss, and would not be recoverable by such other person from the Fund, the claimant, as a general rule, should be required to take all reasonable steps to effect recovery from such other person before a grant is made from the Fund. It is in the discretion of the Committee whether all reasonable steps have been taken, but such discretion should be exercised primarily in the interests of the claimant rather than the protection of the Fund.</p>	<p><u>Guidelines</u> <i>4. Fund of last resort:</i> The Compensation Fund is a fund of last resort. The Fund will determine, at its discretion, whether all reasonable steps, in the circumstances, have been taken to recover a loss through other means, for example through litigation.</p> <p><u>Policies and Procedures</u> <i>14. Fund of last resort:</i> The Compensation Fund is a fund of last resort. Before considering a claim for compensation, the Fund may ask for proof that other reasonably available avenues for recovery have been exhausted. The Fund will sometimes postpone a decision on a claim until the conclusion of external legal proceedings, for instance a civil lawsuit against a lawyer or paralegal licensee.</p>
<p>11. Where the lawyer would appear to have a valid claim against the claimant for fees and disbursements in respect of services that have been rendered to the claimant, the approximate amount thereof, can, in the discretion of the</p>	<p><u>Guidelines</u> <i>13. Amount of loss:</i> The Fund will consider the value of work performed by the lawyer or paralegal and the cost of disbursements, whether or not the claimant received an account for the work or the disbursements.</p>

Existing Guideline	Closest New Guideline and/or Policies and Procedures Equivalent
<p>Referee, be deducted from the amount of the grant that would otherwise be made.</p>	<p>The fact that work was performed may cause the Fund to reduce a grant or deny one altogether.</p>
<p>12. Where a claim arises out of circumstances that strongly suggest criminal conduct on the part of the lawyer, the claimant shall report the facts to the relevant police authority for investigation. The claimant must then satisfy the Fund that he or she has done so failing which the claim may not be entertained.</p>	<p><u>Policies and Procedures</u> 15. <i>Criminal conduct:</i> Where a claim arises in circumstances suggesting criminal conduct on the part of a lawyer, paralegal or any other individual, the Law Society may, before considering the claim, require proof that the matter has been reported to law enforcement. Such proof might include, for example, a copy of a formal police report.</p>
<p>13. The financial circumstances of the person actually suffering the loss and the degree of hardship suffered by that person as a result of the loss are factors to be taken into account when determining any grant. No grant shall be made to a bank or other financial institution engaged in the business of lending money.</p>	<p><u>Guidelines</u> 7. <i>Financial institutions and insurers:</i> The Compensation Fund will not pay grants to banks or other financial institutions that are in the business of lending money, nor will it compensate for losses covered by a contract of insurance, including title insurance.</p> <p>The Committee has opted not to replicate the financial hardship provision. It is implicit in the exercise of overriding discretion.</p>
<p>14. Ordinarily, a claimant who elects to take steps to recover the loss in pursuit of a private agreement with an apparently dishonest lawyer will not be entitled to a grant unless the Law Society Compensation Fund and Discipline Departments have been informed before any such steps are taken.</p>	<p>There is no equivalent to this provision in either the new Guidelines or the Policies and Procedures. Its meaning is ambiguous in relation to the purpose of the Fund, and it has not been applied in recent memory.</p>
<p>15. In the case of a lawyer who conducts the practice of law in a jurisdiction outside Ontario, other than a practice within Canada that complies with the provisions of the Inter-Jurisdictional Practice Protocol, no grant shall be paid</p>	<p><u>Policies and Procedures</u> 4. Apart from claims made pursuant to the National Mobility Agreement, as specified in that Agreement, the Compensation Fund does not deal with claims where the lawyer or licensed paralegal is practising outside Ontario</p>

Existing Guideline	Closest New Guideline and/or Policies and Procedures Equivalent
<p>out of the Fund when the funds or property of the claimant were received by or on behalf of the lawyer in connection with a matter that originated in that jurisdiction or in connection with a trust of which the lawyer was or is a trustee that originated outside Ontario.</p>	<p>and the loss resulting from that person's dishonesty happened outside Ontario.</p>

B. Guidelines for the Determination of Grants from the Compensation Fund Relating to Paralegals

Existing Guideline	Closest New Guideline and/or Policies and Procedures Equivalent
<p>1. In order to qualify for a grant from the Compensation Fund, it must be shown that,</p> <ul style="list-style-type: none"> a. the paralegal licensee received funds or property of a claimant, in his or her capacity as a person licensed to provide legal services, and that b. the claimant's loss was in consequence of dishonesty, on the part of the paralegal, in connection with the paralegal's professional business. Professional business means the provision of legal services and the business operations relating to it, as set out in the <i>Law Society Act</i>. 	<p><u>Guidelines</u></p> <p><i>5. Lawyer-client / paralegal client relationship:</i> Subject to the exceptions set out in these guidelines, the claimant must be a person who had a lawyer-client or paralegal-client relationship or other similar fiduciary relationship with the person whose dishonesty is the reason for the loss.</p> <p><i>10. Lawyer-client, paralegal-client or fiduciary relationship:</i> The loss must arise in the context of a lawyer-client or paralegal-client relationship or other similar fiduciary relationship between the lawyer and client or paralegal and client. Such a relationship generally involves the provision of legal advice, legal representation and/or legal services by a lawyer or paralegal to a client.</p> <p><i>11. Practice of law / provision of legal services:</i> Apart from exceptions contained in these guidelines, the loss must be connected to the practice of law or the provision of legal services. Any funds or property alleged to have been lost must have been received by the lawyer or paralegal in his or her capacity as a lawyer or paralegal. If a lawyer or paralegal has acted dishonestly in a matter that is not connected to the practice of law or provision of legal services, compensation will not be available.</p>
<p>2. Notwithstanding the requirements of guideline 1(a) a paralegal and client relationship between the claimant and the paralegal is not required, when it can be shown that the claimant relied on the paralegal and the loss was in consequence of dishonesty by the paralegal in connection with any trust related to the paralegal's professional business where the paralegal is or was a trustee.</p>	<p><u>Guidelines</u></p> <p>The major type of claim anticipated by Guideline 2 is partially addressed, in a more restrictive form, by the following:</p> <p><i>18. Investments:</i> The Compensation Fund will not compensate for a loss resulting from an investment solicited or facilitated by a lawyer unless the claimant was persuaded to make the investment because of an ongoing lawyer-client or paralegal-client relationship. Such a relationship must exist separate and apart from the investment itself.</p>
<p>3. Money left with a paralegal to be used</p>	<p>See Guidelines 11 and 18, reproduced above.</p>

Existing Guideline	Closest New Guideline and/or Policies and Procedures Equivalent
<p>in a venture, in which the paralegal and the person advancing the money are both participants, is not money received by the paralegal in connection with his or her professional business, or in his or her capacity as a paralegal, despite the fact that the paralegal provides legal services in connection with the venture. Misappropriation by the paralegal of money left with the paralegal to participate in a venture with the paralegal, or failure to properly account by the paralegal, is not conduct for which relief from the Fund is available.</p>	
<p>4.</p> <ul style="list-style-type: none"> a. There shall be no recovery of money advanced to the paralegal if the purpose of such advance was known by the claimant to be a loan to the paralegal or in circumstances where the claimant should have known that the advance was a loan to the paralegal. It is deemed that the advance was to the paralegal, if it was for the paralegal personally or to his or her spouse or a corporation, syndicate or partnership in which the paralegal or the paralegal's spouse or both of them directly or indirectly, have a substantial interest. b. Notwithstanding the foregoing, if a claimant is induced to lend money to a paralegal because of a paralegal and client relationship, consideration can be given to making a grant when the loan is not repaid. 	<p><u>Guidelines</u> 17. <i>Loans</i>: The Compensation Fund will not compensate for a loss resulting from a loan to a lawyer or paralegal unless the claimant was persuaded to lend money by the lawyer or paralegal because of an ongoing lawyer-client or paralegal-client relationship. Such a relationship must exist separate and apart from the loan itself.</p>
<p>5. There must be satisfactory proof that</p>	<p><u>Guidelines</u></p>

Existing Guideline	Closest New Guideline and/or Policies and Procedures Equivalent
<p>money or money's worth was received by the paralegal from or on behalf of the claimant and equivalent money or money's worth has not been returned or accounted for to the claimant.</p>	<p>3. <i>Proof:</i> To make a grant, the Compensation Fund must have satisfactory proof of loss. What is satisfactory proof will vary, depending on the nature of the claim and the evidence that is reasonably available. Proof that funds were given to a lawyer or paralegal could include, for example:</p> <ul style="list-style-type: none"> • Receipts issued by the lawyer or paralegal • Statements of account from the lawyer or paralegal • Bank records of the claimant • Cancelled cheques issued by the claimant or on the claimant's behalf. <p><u>Policies and Procedures</u></p> <p>10. <i>Satisfactory proof:</i> The claimant is responsible for furnishing satisfactory proof of the claim. What is satisfactory proof will vary from case to case, depending on the nature of the allegations against the lawyer or licensed paralegal, as well as the degree of difficulty involved in obtaining evidence. Proof that funds were advanced to a lawyer or paralegal could include, for example:</p> <ul style="list-style-type: none"> • Receipts issued by the lawyer or paralegal • Statements of account from the lawyer or paralegal • Bank records of the claimant <p>Cancelled cheques issued by the claimant or on the claimant's behalf</p>
<p>6. Ordinarily,</p> <ol style="list-style-type: none"> a. the amount of the loss in respect of which a grant may be made is the difference between the amount received by the paralegal and the actual amount returned or otherwise accounted for to the claimant; and b. payment of interest to the claimant, or costs (except counsel fees set out below), expenses or damages incurred 	<p><u>Guidelines</u></p> <p>8. <i>Loss:</i> For the purposes of the Compensation Fund, loss is defined as the difference between what the lawyer or licensed paralegal received from the claimant or on the claimant's behalf, and the amount that was earned and accounted for, and/or returned to the claimant.</p> <p>Regarding interest, expenses and damages, new Guideline 16 provides in part: The following losses will not result in compensation from the Fund:</p>

Existing Guideline	Closest New Guideline and/or Policies and Procedures Equivalent
<p>or suffered by the claimant will not be made out of the Fund. Counsel fees may be allowed as follows: \$500. (may be increased in complicated cases) for preparation of claim documents and final resolution of the claim plus \$800. per day in the discretion of the Referee if a hearing is held.</p>	<p>... (f) Interest, damages, expenses, costs and other consequential or incidental losses.</p> <p><u>Policies and Procedures</u> Following the example in other jurisdictions, in which costs and counsel fees are generally not paid out of the Fund except in rare circumstances, and also noting the recent amendment of By-Law 12 to effectively replace external Referees with Claims Officers, the Committee has elected to adopt a different approach to the issue of costs, as follows:</p> <p>I. Costs 29. <i>General:</i> The Compensation Fund will not generally compensate claimants or their representatives for the expenses involved in submitting a claim. 30. <i>Exception:</i> In rare circumstances, and at its sole discretion, the Fund may consider a small payment, not to exceed \$500, to a claimant’s counsel where that person has provided <i>pro bono</i> assistance to the claimant in preparing the claim. 31. <i>Costs in Claims Officers matters:</i> At his or her sole discretion, a Claims Officer who conducts an oral or other form of hearing may, upon receiving and considering submissions from the parties, recommend that the Compensation Fund Committee pay the costs of the hearing out of the Fund. In such circumstances, the Claims Officer shall not recommend that the Compensation Fund make payment of an amount that exceeds the tariff stipulated for costs in Law Society Tribunal matters, as set out in the pertinent Rules of Practice and Procedure.</p>
<p>7. Carelessness on the part of the claimant, or risk undertaken by the claimant, which cause or contribute to a loss, may be considered in making a grant from the Fund. Each claim for a grant depends on its particular facts.</p>	<p><u>Guidelines</u> 15. <i>Risk and carelessness:</i> The Compensation Fund will consider the extent to which the claimant was careless or took unreasonable risks. Risk and carelessness on the part of the claimant may reduce or eliminate a grant. In</p>

Existing Guideline	Closest New Guideline and/or Policies and Procedures Equivalent
<p>While it is not feasible to attempt to exhaustively define what constitutes carelessness, it may be considered to be careless where a claimant advances or continues to advance money to a paralegal, if the claimant has knowledge of facts that reasonably should cause the claimant to doubt the integrity, or the financial reliability of the paralegal.</p>	<p>assessing risk and carelessness, the Fund may consider, for example:</p> <p>(a) whether it was reasonable for the claimant to trust the lawyer or paralegal concerned without, for example, considering other sources of professional advice (accounting, legal or otherwise);</p> <p>(b) whether the claimant was reckless in entrusting the money to the lawyer or paralegal; and</p> <p>(c) whether the claimant was careless in protecting his or her own interest after having a reasonable opportunity to suspect that a loss due to dishonesty might be occurring.</p>
<p>8. Where the dealings with the paralegal have been conducted by a trustee or agent for or on behalf of another person, the merits of the claim, the decision to make a grant and the amount of the grant should be determined as though the trustee or agent had been dealing with his or her own funds. If a grant is made, care should be taken that it reaches and thereafter will be preserved for the person beneficially entitled. If the formal written claim is not made in the name of the person entitled to benefit from any grant made in respect of that claim, the record should be corrected to meet the circumstances and to ensure that the proper person receives the benefit of the grant.</p>	<p><u>Guidelines</u></p> <p>12. <i>Legal entitlement:</i> The claimant must be legally or beneficially entitled to the money or property for which he or she is seeking compensation.</p>
<p>9. Where a claimant has a reasonable cause of action against some other person, including the paralegal, which would reimburse the claimant or reduce the amount of his or her loss, and would not be recoverable by such other person from the Fund, the claimant, as a general rule, should be required to</p>	<p><u>Guidelines</u></p> <p>3. <i>Fund of last resort:</i> The Compensation Fund is a fund of last resort. The Fund will determine, at its discretion, whether all reasonable steps, in the circumstances, have been taken to recover a loss through other means, for example through litigation.</p>

Existing Guideline	Closest New Guideline and/or Policies and Procedures Equivalent
<p>take all reasonable steps to effect recovery from such other person before a grant is made from the Fund. It is in the discretion of Fund counsel and/or the Committee whether all reasonable steps have been taken, but such discretion should be exercised primarily in the interests of the claimant rather than the protection of the Fund.</p>	<p><u>Policies and Procedures</u> 14. <i>Fund of last resort:</i> The Compensation Fund is a fund of last resort. Before considering a claim for compensation, the Fund may ask for proof that other reasonably available avenues for recovery have been exhausted. The Fund will sometimes postpone a decision on a claim until the conclusion of external legal proceedings, for instance a civil lawsuit against a lawyer or paralegal licensee.</p>
<p>10. Where the paralegal would appear to have a valid claim against the claimant for fees and disbursements in respect of services that have been rendered to the claimant, the approximate amount thereof can be deducted from the amount of the grant that would otherwise be made.</p>	<p><u>Guidelines</u> 13. <i>Amount of loss:</i> The Fund will consider the value of work performed by the lawyer or paralegal and the cost of disbursements, whether or not the claimant received an account for the work or the disbursements. The fact that work was performed may cause the Fund to reduce a grant or deny one altogether.</p>
<p>11. Where a claim arises out of circumstances that strongly suggest criminal conduct on the part of the paralegal, the claimant shall report the facts to the relevant police authority for investigation. The claimant must then satisfy the Fund that he or she has done so failing which the claim may not be entertained.</p>	<p><u>Policies and Procedures</u> 15. <i>Criminal conduct:</i> Where a claim arises in circumstances suggesting criminal conduct on the part of a lawyer, paralegal or any other individual, the Law Society may, before considering the claim, require proof that the matter has been reported to law enforcement. Such proof might include, for example, a copy of a formal police report.</p>
<p>12. The financial circumstances of the person actually suffering the loss and the degree of hardship suffered by that person as a result of the loss are factors to be taken into account when determining any grant. No grant shall be made to a bank or other financial institution engaged in the business of lending money.</p>	<p><u>Guidelines</u> 7. <i>Financial institutions and insurers:</i> The Compensation Fund will not pay grants to banks or other financial institutions that are in the business of lending money, nor will it compensate for losses covered by a contract of insurance, including title insurance.</p> <p>The Committee has opted not to replicate the financial hardship provision. It is implicit in the exercise of overriding discretion.</p>
<p>13. Ordinarily, a claimant who elects to take steps to recover the loss in pursuit of a private agreement with an</p>	<p>There is no equivalent to this provision in either the new Guidelines or the Policies and Procedures. Its meaning is ambiguous in</p>

Existing Guideline	Closest New Guideline and/or Policies and Procedures Equivalent
<p>apparently dishonest paralegal will not be entitled to a grant unless the Compensation Fund has been informed before any such steps are taken.</p>	<p>relation to the purpose of the Fund, and it has not been applied in recent memory.</p>
<p>14. In the case of a paralegal who provides legal services in a jurisdiction outside Ontario, no grant shall be paid out of the Fund when the funds or property of the claimant were received by or on behalf of the paralegal in connection with a matter that originated in that jurisdiction.</p>	<p><u>Policies and Procedures</u> 4. Apart from claims made pursuant to the National Mobility Agreement, as specified in that Agreement, the Compensation Fund does not deal with claims where the lawyer or licensed paralegal is practising outside Ontario and the loss resulting from that person's dishonesty happened outside Ontario.</p>

COMPENSATION FUND – POLICIES AND PROCEDURES AS OF FEBRUARY 2014

A. GENERAL

1. These Policies and Procedures describe how claims for compensation will be reviewed and decided at the Compensation Fund. They should be read in conjunction with the Guidelines, which assist in the exercise of the Fund's discretion pursuant to the *Law Society Act*, R.S.O. 1990, c.L.8, s.51, as amended.

B. NOTICE TO THE COMPENSATION FUND

2. *General two-year limitation:* Any person who believes that they may be eligible for compensation for a loss due to dishonesty by a lawyer or licensed paralegal should contact the Compensation Fund in writing, as soon as possible after the loss is discovered. The *Law Society Act* says that notice must be given within a maximum of two years after the loss came to the knowledge of the person suffering it.

3. *Deemed notice:* Notice is deemed to be given to the Compensation Fund when information about a potential claim is received by the Law Society. This could be in the context of a complaint about a lawyer's or licensed paralegal's alleged misconduct

C. LIMITED TO ONTARIO

4. Apart from claims made pursuant to the National Mobility Agreement, as specified in that Agreement, the Compensation Fund does not deal with claims where the lawyer or licensed paralegal is practising outside Ontario and the loss resulting from that person's dishonesty happened outside Ontario.

D. INQUIRIES AND POTENTIAL CLAIMS

5. *Determining jurisdiction:* The first step in assessing a potential claim is to determine if the claim falls within the Compensation Fund's mandate, or jurisdiction. If so, the Fund will send the claimant an application form which must be completed and sworn in front of a Commissioner for Oaths and Affidavits. If not, staff will send a letter explaining why not. Sometimes staff will ask for additional information from the claimant to help determine whether or not the claim is within the Fund's mandate.

6. *Deadline for returning application form:* An application form sent to a claimant should be completed and returned to the Compensation Fund within six (6) months. The Fund reserves the

right to refuse to consider a claim after the six-month period has expired, unless the claimant provides a satisfactory, written explanation for the delay and requests an extension.

E. APPLICATION FORM

7. *Completion of application form:* The claimant must complete the application form truthfully and thoroughly, to the best of his or her ability. The application is a sworn document. Any deliberate falsehood or misrepresentation will automatically result in the denial of the claim.

8. *Proof of authority to apply on behalf of another:* A person applying for a grant on behalf of another person or on behalf of an estate is expected to provide proof of his or her authority to do so. Such proof could include a copy of a will naming a personal representative, a power of attorney, a court order, etc.

9. *Licensee's opportunity to comment on application:* Where feasible, the Fund will give a copy of the application form to the lawyer or paralegal whose alleged dishonesty is the subject of the claim. That person will be given an opportunity to comment on the application.

F. EVIDENCE

10. *Satisfactory proof:* The claimant is responsible for furnishing satisfactory proof of the claim. What is satisfactory proof will vary from case to case, depending on the nature of the allegations against the lawyer or licensed paralegal, as well as the degree of difficulty involved in obtaining evidence. Proof that funds were advanced to a lawyer or paralegal could include, for example:

- Receipts issued by the lawyer or paralegal
- Statements of account from the lawyer or paralegal
- Bank records of the claimant
- Cancelled cheques issued by the claimant or on the claimant's behalf

11. *Lack of cooperation:* Because the Compensation Fund is discretionary, the Law Society reserves the right to refuse to consider a claim if the evidence requested is not provided in a timely fashion or if a claimant is otherwise uncooperative.

12. *Evidence from other Law Society activities:* In considering a claim to the Compensation Fund, staff may obtain and consider evidence assembled by the Law Society in the course of other regulatory proceedings involving the same licensee, including complaints, investigations, discipline proceedings and trusteeships.

G. DECISIONS

13. *Basis for exercising discretion:* The Law Society will apply its discretion to pay or refuse to pay a grant in a manner consistent with the *Law Society Act* and the Guidelines. A decision to pay or not pay is final.

14. *Fund of last resort:* The Compensation Fund is a fund of last resort. Before considering a claim for compensation, the Fund may ask for proof that other reasonably available avenues for recovery have been exhausted. The Fund will sometimes postpone a decision on a claim until the conclusion of external legal proceedings, for instance a civil lawsuit against a lawyer or paralegal licensee.

15. *Criminal conduct:* Where a claim arises in circumstances suggesting criminal conduct on the part of a lawyer, paralegal or any other individual, the Law Society may, before considering the claim, require proof that the matter has been reported to law enforcement. Such proof might include, for example, a copy of a formal police report.

16. *Timing of grant decision in relation to other proceedings:* The timing of when a claim will be decided will vary from case to case. In some situations, there will be enough persuasive evidence to justify a grant even before an investigation or formal discipline has finished. In other situations, the Compensation Fund will have to wait for the completion of an investigation and possibly the conclusion of formal discipline before a claim can be decided. This is likely to happen, for example, when there are serious disputes as to the credibility of the claimant or the lawyer or paralegal licensee, or both. It can also happen when the Compensation Fund needs to rely on a formal finding by a Hearing Panel that the lawyer or paralegal was dishonest before making a grant.

17. *Staff and Committee roles:* Staff counsel have discretion to authorize the payment of grants of \$5000 or less in respect of lawyer dishonesty and \$1500 or less in respect of paralegal dishonesty. Grants in excess of these amounts must be approved by the Compensation Fund Committee on the written recommendation of staff. The Committee has the discretion to accept or reject a staff recommendation, to refer certain issues to a Claims Officer, as set out below, or to send a claim back to staff for further review and/or analysis.

18. *Licensee's opportunity to comment on recommendation:* Where feasible, the Fund will give a copy of a draft decision or recommendation to pay a grant to the lawyer or paralegal whose dishonesty is the basis for the grant. That person will have a reasonable opportunity to comment on the recommendation.

19. *Claimant's opportunity to comment:* A staff decision not to recommend payment of a grant will be communicated to the claimant in writing. The claimant will have a reasonable opportunity to respond and explain the basis for any objection to the decision not to recommend a grant. The claimant's response will be reviewed and considered by the Fund and the claimant will be informed of the outcome of the review.

20. *Releases, waivers and assignment:* Before a claimant can receive a grant, he or she must fill out and sign the releases, waivers and assignments that the Fund supplies. If a judgement or right of action is assigned to the Fund, this means that the claimant will give up some of his or her own rights to recover from the lawyer or paralegal in exchange for the grant from the Fund.

H. CLAIMS OFFICERS

20. *Roster of Claims Officers:* Pursuant to section 4.2 of By-Law 12, the Compensation Fund Committee will, from time to time, appoint a roster of persons eligible to serve as Claims Officers and will specify the term for which each Claims Officer will serve.

21. *Selection of Claims Officer:* The Committee may, at its sole discretion, appoint a Claims Officer from the roster to assist with the Committee's determination of any claim for compensation, the estimated potential value of which exceeds five thousand dollars (\$5000) for a claim involving a lawyer licensee or fifteen hundred dollars (\$1500) for a claim involving a paralegal licensee.

22. *Basis for appointment:* The Committee may appoint a Claims Officer either on its own initiative or at the recommendation of staff.

23. *Appointment decision is final:* The Committee's decision to appoint or not appoint a Claims Officer to assist with the determination of a claim is final and not subject to further review.

24. *Issues that may be referred:* The Committee may refer any question, other than a question of law, to the Claims Officer to assist the Committee in determining a claim for compensation. The following are examples of issues that could be referred to a Claims Officer:

- a. An issue with respect to whether the claimant has in fact suffered a loss.
- b. An issue with respect to whether the claimant's loss is the result of the licensee's dishonesty, and/or some other factor(s).
- c. An issue with respect to the claimant's credibility.
- d. An issue with respect to whether a licensee has been "dishonest" in his or her handling of funds advanced by *this* claimant.
- e. A discrete factual issue with respect to the applicability of one or more guidelines (for instance, was the claimant careless? was this an investment scheme? etc.)
- f. An issue as to when the loss came to the attention of the claimant, i.e., was the Fund notified outside the limitation specified in section 51 of the *Law Society Act*
- g. Any other issue requiring a Claims Officer to receive and consider oral testimony by a claimant, licensee or other person, or receive oral and/or written submissions from parties, including the Law Society, and make recommendations for the Committee's consideration

25. *Referral memorandum:* Where a Claims Officer is appointed the Committee will set out in a written memorandum to the Claims Officer, with copies to the claimant, the licensee whose alleged dishonesty is the subject of the claim, and the representative of the Law Society :

- a. The specific issues of fact and/or mixed law and fact to be considered by the Claims Officer
- b. The mode of procedure and process to be followed by the Claims Officer including whether an oral or other form of hearing is required
- c. The deadline for the Claims Officer to report to the Committee
- d. Any other instructions that the Committee considers relevant to the work of the Claims Officer and to its ultimate determination of the claim for compensation.

26. *Further instructions:* The Claims Officer may, at any time, ask for further instructions from the Committee or for clarification of existing instructions.

27. *Hearings in accordance with SPPA:* Where a Claims Officer has instructions from the Committee to conduct a hearing, the hearing shall be conducted in accordance with the *Statutory Powers and Procedures Act*, as amended.

28. *Opportunity to comment on report:* Prior to submitting a report to the Committee, the Claims Officer shall provide the report to the claimant, to the representative of the Law Society, and to the lawyer or paralegal licensee whose dishonesty is the subject of the claim for compensation. The Claims Officer shall invite the parties to make written submissions on the Claims Officer's report within three (3) weeks or such longer time as the Claims Officer may stipulate. Any such submissions shall accompany the report when it is submitted to the Committee by the Claims Officer.

I. COSTS

29. *General:* The Compensation Fund will not generally compensate claimants or their representatives for the expenses involved in submitting a claim.

30. *Exception:* In rare circumstances, and at its sole discretion, the Fund may consider a small payment, not to exceed \$500, to a claimant's counsel where that person has provided *pro bono* assistance to the claimant in preparing the claim.

31. *Costs in Claims Officers matters:* At his or her sole discretion, a Claims Officer who conducts an oral or other form of hearing may, upon receiving and considering submissions from the parties, recommend that the Compensation Fund Committee pay the costs of the hearing out of the Fund. In such circumstances, the Claims Officer shall not recommend that the Compensation Fund make payment of an amount that exceeds the tariff stipulated for costs in Law Society Tribunal matters, as set out in the pertinent Rules of Practice and Procedure.

CITATION: Tarek El-Hennawy et al. v. The Law Society of Upper Canada, 2014 ONSC 375
DIVISIONAL COURT FILE NO.: 59/13
DATE: 20140128

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT
THEN R.S.J., HIMEL AND SACHS JJ.

2014 ONSC 375 (CanLII)

BETWEEN:)
)
TAREK EL-HENNAWY, REEM EL-) *Victor L. Freidin, Q.C., for the Applicants*
HENNAWY, SUZAN FARESS,)
MOHAMED FARESS, SIHAM EL-)
HENNAWY, DALIA MOHAMED, AND)
FARES EL-HENNAWY (INFANT) AND)
OMAR EL-HENNAWY (INFANT) BY)
THEIR LITIGATION GUARDIAN DALIA)
MOHAMED)
)
Applicants)
)
- and -)
)
THE LAW SOCIETY OF UPPER)
CANADA)
)
Respondent)
)
M. Jill Dougherty and Jordan S. Glick, for
) *the Respondent*
)
) **HEARD:** December 3, 2013

HIMEL J.:

[1] The applicants apply for judicial review of a decision of the Compensation Fund Committee (the “Committee”) of the Law Society of Upper Canada (“LSUC”) dated May 9, 2012. In the decision, the Committee awarded compensation to two claimants, but denied compensation for the remaining claimants (the “applicants”). The applicants request that the Committee’s decision be quashed, and that the court order the payment of grants as

recommended by the Law Society's Referee. Alternatively, the applicants request that the matter be referred back to the Committee with directions. They also seek an increase in the costs recommended by the Referee and ordered by the Committee, or alternatively, to have the issue of costs referred back to the Committee with directions. The respondent LSUC opposes the application for judicial review and asks that it be dismissed.

Factual Background

The Nature of the Claims

[2] The applicants are all members of the same extended family. They lost money as a result of lawyer Mariano Mazucco's ("Mazucco") dishonesty. For many years, he had been the lawyer for the family patriarch, Hussein El-Hennawy ("El-Hennawy"), and Lakefront Star ("LFS"), a corporation controlled by El-Hennawy. Mazucco's practice was seized by the LSUC on March 27, 2008. El-Hennawy says that between November 14, 2007 and February 29, 2008, he assigned a total of approximately \$930,000 to Mazucco. The reason for this was that he was experiencing delays and having difficulty in his dealings with conventional banks since the terrorist attacks on September 11, 2001, following which regulations were enacted to curb the international transfer of large amounts of cash. El-Hennawy claims that he assigned much of these funds (which remained on deposit with Mazucco) to his family members.

[3] The assignments were documented and had acknowledgment letters signed by the adult assignees and Mazucco. The letters confirmed the amounts assigned, and stated that Mazucco was holding the funds in trust for specified applicants. They contained a description of the type of transaction intended for the funds, as well as the planned involvement of Mazucco as the assignee's solicitor on each transaction. For example, the funds held for Reem El-Hennawy and Walid Darwish were for a house purchase, while Mohamed Faress, Suzan Faress, Siham El-Hennawy, Tarek El-Hennawy and Dalia Mohammed were looking for an income-producing property.

[4] The LSUC received information from the Royal Bank following an investigation that revealed that Mazucco had engaged in mortgage fraud activities and other improprieties. The LSUC obtained a trusteeship order over Mazucco's practice on March 26, 2008. By this time, the applicants' monies were gone.

[5] Mazucco had signed promissory notes acknowledging he was holding the money in trust, that he was acting as solicitor and that the monies were to be used for legal transactions. The employee of the LSUC who was charged with carrying out the terms of the trusteeship order went to the office of Mazucco and took possession of it. She testified that she located hundreds of promissory notes in his office and located 45 to 50 files dealing with the applicants, but these files did not contain any promissory notes. It was only after the trusteeship order was made on March 26, 2008, and after the removal of the documents and files from the lawyer's office, that the promissory notes signed by him in favour of the applicants began to appear.

The Compensation Fund

[6] The applicants filed separate claims under s. 51 of the *Law Society Act*, R.S.O. 1990, c. L. 8 (the “*Act*”) to recover their losses from the LSUC’s Compensation Fund (the “Fund”). The Fund is intended to provide compensation to individuals for losses sustained as a result of a lawyer’s dishonesty. Each claimant for compensation can claim a maximum of \$100,000. Section 51(5)(a) of the *Act* provides as follows:

Grants

(5) Convocation in its absolute discretion may make grants from the Fund in order to relieve or mitigate loss sustained by a person in consequence of,

(a) dishonesty on the part of a person, while a licensee, in connection with his or her professional business or in connection with any trust of which he or she was or is a trustee.

[7] Convocation has delegated its discretion to make grants in excess of \$5,000 to the Committee. Convocation has also issued “General Guidelines for the Determination of Grants from the Compensation Fund” to ensure consistency in the administration of the Fund. The Guidelines provide as follows:

1. It must be shown that, at the time the lawyer licensee received funds or property of a claimant,
 - (a) a solicitor and client relationship existed between the claimant and the lawyer, and that
 - (b) the lawyer received funds or property of the claimant in his or her capacity as a lawyer, and that
 - (c) the claimant’s loss was in consequence of dishonesty, on the part of the lawyer, in connection with such lawyer’s professional business.

The Report of the Referee

[8] The claims were assigned to Referee C. Anthony Keith, Q.C. (the “Referee”) to conduct an inquiry and deliver a report with non-binding recommendations to the Committee. After a ten-day hearing, the Referee recommended payment to each applicant. In his report, he outlined the relevant statutory provisions and Guidelines that apply to payment of grants from the Fund. He accepted the validity of the claims that El-Hennawy had assigned money to each of his family members, and found that the applicants’ uses of Mazzucco’s services were related to the practice of law. Given the difficulties that El-Hennawy had with conventional banks, the Referee found it was reasonable for the applicants to keep their money in trust with Mazzucco for use in future transactions. The Referee described this practice as using Mazzucco as a “bank of convenience”. While he mentioned the Guidelines, the Referee did not analyze whether the applicants had satisfied them.

[9] The Referee noted that an LSUC employee gave evidence that none of the promissory notes documenting the assignment of money from El-Hennawy were recovered from Mazzucco's office, and that this was a departure from Mazzucco's practice of keeping related documents together. The Referee characterized the LSUC as having an "underlying suspicion...that the claims...had been carefully arranged so as to avoid the per claimant limits for payments out of the Fund." However, the Referee concluded that he was unable to make that finding, and that he must accept the evidence supporting the claims and recommend that the grants be paid as claimed. The Referee recommended payment of the full amount of the claims up to the \$100,000 limit of the Fund. He recommended that a total of \$905,000 be paid to the various claimants.

The Compensation Fund Committee's Decision

[10] The Committee did not have the entire transcript of the inquiry conducted by the Referee before it. It received his report and gave the parties an opportunity to make written submissions with references to the transcript and exhibits. In its decision, the Committee did not accept all of the Referee's recommendations. The Committee began by noting that the Referee's recommendations were non-binding, but that it owed the Referee's findings of fact a degree of respect and deference. It also noted that Convocation had "absolute discretion" as to whether a grant is issued, and was therefore entitled to issue guidelines that narrowed the scope of that discretion. The Committee also said that it has exclusive jurisdiction to make awards from the Fund over \$5,000, and that it was at liberty to accept or reject the Referee's recommendations in whole or in part. The Committee noted that it was free to depart from the Guidelines if warranted in the circumstances.

[11] The Committee accepted the Referee's recommendation regarding Hussein El-Hennawy and LFS, and awarded each \$100,000. The Committee did not accept the Referee's recommendation to pay the claims of the other claimants. It held that the Referee had failed to adequately consider the requirements and implications of the Guidelines adopted by Convocation. The Committee's decision was based on its finding that the applicants' misappropriated monies were not received by Mazzucco "in his capacity as a lawyer", and that their loss was not a result of Mazzucco's dishonesty "in connection with his professional business", as described in the Guidelines.

[12] The Committee held that most of the cash deposited by El-Hennawy was not deposited in anticipation of Mazzucco performing any specific legal services. The monies were deposited simply for safekeeping. On that basis, it held that Mazzucco was receiving money in his capacity as a bank or banker, and not as a lawyer. The Committee found that the funds assigned were not sufficiently connected to Mazzucco's practice of law, but rather in connection with his unorthodox business of acting as a custodian or banker. They were never part of his trust account, not received as a retainer and not delivered for any specific professional engagement. The funds were not given to Mazzucco with any specific instructions, such as to invest them; Mazzucco was simply told to hold them pending further instructions. While the losses of LFS and El-Hennawy were in connection with Mazzucco's practice of law, the Committee held that

the losses of the other applicants were not. The Committee dismissed the claims of the other applicants.

The Supplementary Report of the Referee and the Committee's Decision on Costs

[13] Section 51(12) of the *Act* allows the payment of costs of administering the Fund, including the costs of “investigations and hearings and all other costs, salaries and expenses necessarily incidental to the administration of the Fund” to be paid out of the Fund. The Guidelines provide that ordinarily, the payment of interest or costs, expenses or damages to claimants will not be made out of the Fund. There are some exceptions. The Guidelines allow for a discretionary payment for counsel fees of \$500. This amount may be increased in complicated cases for preparation of claim documents and final resolution of the claim. The Guidelines also allow payment of \$800 per day in the discretion of the Referee if a hearing is held.

[14] The applicants requested disbursements of \$40,576.33, of which \$33,934.98 was paid for an expert report prepared by an accountant. They requested a significantly larger amount for their legal costs. In a Supplementary Report, the Referee held that he had no jurisdiction to recommend compensation for disbursements in preparing the claims. This was despite the fact that the Referee had questioned during the hearing whether anyone had thought about having an independent accountant review the situation.

[15] The Referee noted that the applications and the hearing were “complicated” and warranted an increase from the suggested limit of \$500 for counsel fees. He recommended \$41,250 in counsel fees to the applicants for the preparation of claim documents. This amount was based on the Referee’s recommendation that counsel be compensated for 275 hours at a rate of \$150 per hour. Although the applicants had requested approximately 550 hours at a rate of \$395 per hour, the Referee noted that the upper limit for the claims was \$100,000 regardless of the loss, and that standard rates paid to referees by the LSUC are modest. He also recommended a further \$7,600 for 9.5 days of hearing at \$800 per day. He held that he had no discretion to change the \$800 counsel fee. The total amount recommended was \$48,850. The applicants allege that this effectively represents a rate of \$75 per hour, and only 17% of the total amount claimed.

[16] The Committee adopted the Referee’s analysis, but reduced the award for fees to \$6,875 to reflect its decision to deny 5/6 of the claims (10 of 12 claimants). The Committee did not disturb the counsel fee award of \$7,600, and did not comment on the Referee’s statement that he did not have jurisdiction to award disbursements. The total costs award made by the Committee was \$14,475 (\$7,237.50 for each successful claimant).

Issues on this Application

[17] The issues raised in this application are as follows: (1) whether Convocation had jurisdiction to establish Guidelines to structure the Committee’s exercise of discretion in making

grants from the Compensation Fund; and (2) whether the Committee acted properly in deciding to apply the Guidelines in this case.

Positions of the Parties

[18] The applicants submit that the Guidelines are *ultra vires* because they are inconsistent with the *Act*. In this regard, the applicants argue that the Guidelines impose stricter requirements for obtaining compensation than required by the *Act*.

[19] The applicants also argue that the money they gave to Mazzucco was for specific transactions. They intended Mazzucco to act as their solicitor on these transactions. They argue that they left money with him because they trusted him as a lawyer. Moreover, they could not earn interest on money put into a bank and they thought it best to leave the monies with him. Mazzucco signed a “global” promissory note for \$425,000 on March 26, 2008, because the applicants were going to purchase an income producing property—they were close to buying something and wanted to make sure that all the investors were 100% committed to the purchase.

[20] The applicants submit that the conclusion of the Committee did not meet the standard of correctness, nor did it fall within the range of acceptable outcomes. The conclusion did not give effect to the intent and purpose of the Fund of providing compensation to persons harmed by a lawyer’s dishonesty. They argue that not only is this a personal loss to the applicants, the public’s confidence in the Compensation Fund and the legal system will be adversely affected if the decision is not quashed and the costs award is not increased.

[21] The respondent takes the position that Convocation was entitled to establish the Guidelines to structure the exercise of its broad discretion to make grants from the Compensation Fund. It did not require express statutory authority to do so. It argues that the Guidelines are consistent with the provisions of the *Act*, and more broadly with the purpose and intent of the *Act* and the Fund. The Guidelines contemplate that there must be some nexus between the dishonesty of the lawyer and his or her capacity as a lawyer and legal practice before access to the Fund may be granted. The Fund is not designed to provide complete compensation to persons harmed by the dishonesty of anyone who happens to be a lawyer in whatever capacity. Rather, it is intended to enable Convocation to relieve or mitigate on a discretionary basis certain losses that are a consequence of a lawyer’s dishonesty in connection with his or her professional business, being the practice of law. Requiring such a nexus is consistent with the statutory framework, the purpose of the Fund and the fact that there are limited resources with respect to the Fund.

Standard of Review

[22] The applicants acknowledge the presumptive standard of review applicable to a decision of a tribunal is reasonableness when it is interpreting its home statute. However, where the matter involves questions of law that are of central importance to the legal system and outside the adjudicator’s expertise, the correctness standard applies. They argue that the Committee

does not have any greater expertise than a court on the issues of whether Mazzucco was acting in his capacity as a lawyer, whether the Guidelines are *ultra vires*, whether the loss sustained was in connection with the lawyer's professional business and whether the decision is inconsistent with the intent and purpose of the *Act*. Therefore, the Committee's decision is subject to review on a standard of correctness.

[23] The respondent asserts that the validity of the *Guidelines* is a question of law concerning statutory interpretation and alleged unlawful fettering of discretion. They agree that that aspect of the Committee's decision is reviewable on the correctness standard. All other aspects of the Committee's decision are reviewable on the reasonableness standard. The respondent submits that considerable deference should be given to the Committee's decision in its exercise of discretion. This includes deciding whether to apply the Guidelines, whether to make or decline grants from the Fund, whether to award costs, as well as the Committee's interpretation of the *Act* and the Guidelines.

[24] We agree with the respondent that when the Committee is interpreting its home statute, its decisions are reviewable on a reasonableness standard. Considerable deference should be given to the Committee's exercise of discretion and application of the *Act* to the decision-making function: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. For the correctness standard to apply, the question has to be not only of central importance to the legal system, but also outside the adjudicator's specialized area of expertise: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paras. 39, 46. We conclude that the matters before the Committee (other than the issue of alleged unlawful fettering of discretion) fell within its area of expertise and that the appropriate standard of review of its decision is one of reasonableness.

[25] We further conclude that the appropriate standard of review of the Committee's decision on costs is reasonableness. The question of costs falls within the core function and expertise of the Committee relating to the interpretation and application of its enabling statute: see *Dunsmuir* at para. 54; and *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at paras. 25-27.

Decision

Does Convocation have jurisdiction to pass Guidelines, and does the Guidelines' requirement for a nexus between the loss and the lawyer's professional business fetter the discretion of the Committee?

[26] Section 51(5) of the *Act* provides as follows:

Convocation in its absolute discretion may make grants from the Fund in order to relieve or mitigate loss sustained by a person in consequence of,

- (a) dishonesty on the part of a person, while a licensee, in connection with his or her professional business or in connection with any trust of which he or she was or is a trustee;

[27] Pursuant to section 51(10) of the *Act*, Convocation may delegate any of those powers to a committee of Convocation. Convocation has delegated the discretion to make grants from the Fund in amounts over \$5,000 to the Compensation Fund Committee. The Committee is authorized by LSUC By-law No. 12 to “make such arrangements and take such steps as it considers advisable to carry out its responsibilities”: see Law Society of Upper Canada, By-law No. 12, *Compensation Fund* (May 1, 2007), s. 4.1. Grants are discretionary. The *Act* contemplates that to be eligible for compensation from the Fund, the claimant’s loss must arise from the lawyer’s dishonesty in connection with his or her legal practice and related business operations. The *Rules of Professional Conduct* and the by-laws contemplate that lawyers are only to use their trust accounts for purposes related to the provision of legal services, and thus the references to a trust in the Guidelines and the *Act* also require a nexus with the lawyer’s professional business.

[28] The intent of the Compensation Fund is to protect the public in its dealings with members of the LSUC. The Guidelines are reflective of the policy requiring a nexus between the dishonesty and the lawyer’s professional business.

[29] Guideline 1(b) states that:

It must be shown that, at the time the lawyer licensee received funds or property of a claimant, the lawyer received funds or property of the claimant in his or her capacity as a lawyer.

[30] Convocation’s authority to establish these Guidelines is derived from its absolute discretion to make grants from the Fund. The Guidelines are a way of structuring the exercise of that discretion and providing some consistency. We agree that Convocation was entitled to establish these Guidelines and required no express statutory authority to do so. The Guidelines recognize that there must be some nexus between the lawyer’s dishonesty and his or her capacity as a lawyer and legal practice before there will be access to the Fund. The Fund is not unlimited, and outlining this nexus is consistent with the statutory framework. We respectfully disagree with the applicants’ position that the Guidelines are *ultra vires* because they apply an additional and stricter requirement than the *Act* concerning the nexus between the dishonesty of the lawyer and his or her professional business. The Guidelines expand on the criteria regarding eligibility for grants from the Fund. They are not inconsistent with the *Act* because the *Act* does not provide that any claimant is *entitled* to receive a grant if they meet the threshold criteria in s. 51(5). We find that the provisions of the statute and the Guidelines are consistent.

[31] Further, the Guidelines are non-binding and do not fetter the Committee’s discretion. Guidelines are helpful by allowing applicants to know in general terms what the policy and practices are. The case law recognizes the authority of statutory tribunals to pass guidelines

governing their broad exercise of discretion so long as these guidelines are recognized as being non-binding.: see *Maple Lodge Farms v. Canada* [1982], 2 S.C.R. 2, at pp. 4-5; and *Ainsley Financial Corp. v. Ontario (Securities Commission)* (1994), 121 D.L.R. (4th) 79 (Ont. C.A.), at pp. 83-86. In this case, the Committee accepted that it was free to depart from the Guidelines and the Committee properly considered the relationship of the Guidelines to the *Act* and the manner in which they were to be applied.

Was the decision to decline a grant of funds to the Applicants reasonable?

[32] The applicants argue that the Committee's decision that Mazzucco was not acting in his capacity as a lawyer is unreasonable. According to the applicants, the fact that the recipient of the funds was a licensed solicitor should satisfy any capacity issue. Alternatively, the issue should be determined based upon the belief of the parties. The applicants submit that the only reasonable conclusion is that Mazzucco was acting in his capacity as a lawyer given that accepting money from an individual for investment purposes is regarded as a traditional function of a lawyer by the LSUC. The applicants submit that the Committee's conclusion is not in keeping with the jurisprudence, and reliance on the case of *Patchett v. Law Society of B.C.* (1979), 92 D.L.R. (3d) 12 (BCSC) is not justified.

[33] The applicants further argue that the Committee erred in characterizing Mazzucco's function as a "banker", and that the claimants used Mazzucco as a "bank of convenience." They submit that the Referee was only referring to Hussein El-Hennawy in this regard because he deposited cash with the lawyer for the purpose of avoiding difficulties encountered with Canadian banks. They further argue that even if Mazzucco was holding the funds as a banker, the Committee failed to consider whether a lawyer could hold trust funds in the capacity of both a banker and a lawyer. They submit that Mazzucco received the money in this dual capacity. They argue that it is unfair and unreasonable to prejudice the applicants' claims because Mazzucco did not deposit the trust funds in his trust account.

[34] The respondent argues that the Committee's conclusion that Mazzucco did not receive funds in his capacity as a lawyer or in connection with his professional business is reasonable. It submits that the finding is consistent with the jurisprudence, and should not be disturbed.

[35] The standard of reasonableness is a deferential standard that "shows respect for an administrative decision-maker's experience and expertise": see *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)* at para. 29. The Supreme Court explained that "[d]eference to an administrative tribunal reflects recognition of interpretive choices. Such a recognition makes it possible to ask whether the tribunal or the court is better placed to make the choice (*Macklin*, at p. 205)."

[36] The Committee applied the Guideline concerning the nexus between the loss and the dishonesty of the lawyer acting in his professional capacity, as contained in the *Act*. It found that the nexus did not exist in the case of the applicants, but did exist in the case of Hussein El-Hennawy and LFS. It based its conclusion on the evidence before it concerning the relationships

between Mazzucco and the parties, as well as the nature of the legal services provided to Hussein and LFS. The Committee determined that Mazzucco did not receive the funds from the applicants in his capacity as a lawyer or in connection with his professional business.

[37] This conclusion is consistent with other jurisprudence that recognizes the different capacities in which a lawyer may act, and that the capacity in which the lawyer received the money is the relevant question in deciding whether compensation should be granted: see *Singh v. Law Society (Alberta)*, 2008 ABCA 260, [2001] 3 W.W.R. 419, at para. 36; *Riviera Development Corporation v. Law Society (Saskatchewan)* (1992), 91 D.L.R. (4th) 417, at pp. 431-432. In *Patchett*, the Supreme Court of British Columbia outlined, at p. 45, circumstances where funds could be regarded as being received in the solicitor's capacity as a lawyer. That the person receiving the funds was a lawyer at the time of receipt is not the determining factor. Rather, the question is whether the funds were received in connection with the provision of "professional services": see *Cassels Brock & Blackwell LLP v. LawPRO* (2007), 85 O.R. (3d) 318 (C.A.), at paras. 7-8.

[38] The Committee analyzed all of the appropriate factors in coming to its decision. It considered whether Mazzucco had provided legal services to the applicants, whether the funds were provided in connection with any particular transaction and the capacity in which Mazzucco received the funds. It noted that he had not been retained to perform legal services, or retained with respect to a specific legal transaction, nor was he retained to assist with or advise on an investment process. He was merely told to hold the funds pending further instruction, and he never provided any investment or legal services concerning the funds. They were not deposited to a trust account, were not received as a retainer and were not earmarked for any particular transaction. The Committee found that the applicants' intended uses of the lawyer's services following the assignments were "extremely vague". The Committee concluded that the claimants' losses were not in consequence of dishonesty in connection with the lawyer's professional business. Given the long standing relationship between Hussein and Mazzucco, the Committee refused to find that his practice of depositing cash with the lawyer in trust was careless. In light of the history of legal services that Mazzucco had provided to Hussein and Lakefront (in contrast to the lack of legal services that Mazzucco had provided to the other applicants), the Committee upheld the grants to Hussein and Lakefront Star and dismissed the other applications.

[39] In reaching this conclusion, the Committee considered factors that were consistent with the jurisprudence. While the term "in connection with" is to be given a "plain but expansive meaning": see *725410 Ontario Inc. v. Gertner*, 2011 ONSC 6121, at para. 32, the term is not so broad as to include the deposit of funds not related to a legal transaction or to the provision of some legal service. Accordingly, the Committee's decision was reasonable. It was justified, transparent and intelligible, and fell within a range of possible and acceptable outcomes that are defensible in respect of the facts and law: see *Dunsmuir*, at para. 47. We see no basis to interfere with that conclusion.

Was the decision of the Committee on costs reasonable?

[40] Section 51(12) of the *Act* provides:

There may be paid out of the Fund the costs of its administration, including the costs of investigations and hearings and all other costs, salaries and expenses necessarily incidental to the administration of the Fund.

[41] In his report, the Referee wrote that he did not have jurisdiction under the *Act* to award disbursements to a party. The Committee did not disagree with that conclusion. Section 51(12) does not contemplate an award of disbursements incurred by the parties. Rather, it refers to costs that are “necessarily incidental to the administration of the fund”. Neither the *Act* nor the Guidelines refer to the payment of disbursements. The Guidelines do provide for the payment of counsel fees, but state that the payment of “costs, expenses or damages incurred or suffered by the claimant will not be made out of the Fund”. Counsel fees may be allowed up to a total of \$500, and this may be increased in complicated cases for preparation of claim documents and final resolution of the claim. An additional \$800 per day in the discretion of the referee may be paid for attendance at a hearing.

[42] The Committee’s decision not to interfere with the Referee’s recommendation concerning the lack of jurisdiction to award disbursements is a conclusion that falls within the range of possible and acceptable outcomes.

[43] With reference to the Committee’s decision on costs, the Committee was not bound to accept the Referee’s report. It considered appropriate factors in exercising its discretion, including the success of the parties, the legislation and the Guidelines, the amount of money at issue and the purpose and spirit of the Fund. It exercised its discretion to award costs higher than the Guidelines because of the complicated nature of the case. The Guidelines contemplate modest counsel fees and costs for preparing documents. The Committee accepted the Referee’s view that enhanced costs were justified by awarding \$6,875 instead of the \$500 contemplated by the Guidelines, for a total of \$14,475 to El-Hennawy and LFS. The Committee reasonably reduced the amount recommended by the Referee to reflect the success of the applicants. That decision was reasonable and should not be disturbed.

Result

[44] For the reasons outlined above, the application for judicial review of the Compensation Fund Committee’s decision refusing the applicant’s claims is dismissed. The application for judicial review of the Compensation Committee’s decision concerning the issue of costs is also dismissed.

[45] If the parties are unable to agree on the issue of costs, they may file written submissions according to the following timetable: the LSUC shall file submissions by February 20, 2014, and the applicants by February 28, 2014.

THEN R.S.J.

HIMEL J.

SACHS J.

Released: January 28, 2014

CITATION: Tarek El-Hennawy et al. v. The Law Society of Upper Canada, 2013 ONSC 375
DIVISIONAL COURT FILE NO.: 59/13
DATE: 20140128

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

THEN R.S.J., HIMEL AND SACHS JJ.

BETWEEN:

TAREK EL-HENNAWY, REEM EL-HENNAWY,
SUZAN FARESS, MOHAMED FARESS, SIHAM EL-
HENNAWY, DALIA MOHAMED, AND FARES EL-
HENNAWY (INFANT) AND OMAR EL-HENNAWA
(INFANT) BY THEIR LITIGATION GUARDIAN
DALIA MOHAMED

Applicants

– and –

THE LAW SOCIETY OF UPPER CANADA

Respondent

REASONS FOR JUDGMENT

Himel J.

Released: January 28, 2014

TAB 7.2

FOR INFORMATION
GRANTS PAID FROM THE FUND

Since the last report to Convocation in April 2013, grants have been paid from the Fund in the amounts shown in the attached chart. This report covers the period from April 17, 2013, to January 31, 2014. (Licensees whose discipline proceedings are completed, or who are not subject to discipline, are identified by name). Additional information about specific claims is made available to the Committee on request.

Convocation - Compensation Fund Committee Report

Lawyers	Number of Claimants	Total Grants Paid
Solicitor #233 (Suspended December 2010)	1	\$ 5,000.00
Solicitor #237 (Suspended November 2012)	3	\$ 161,984.93
Solicitor #239 (Suspended June 2012)	3	\$ 10,020.00
Solicitor #238 (Suspended June 2012)	1	\$ 10,000.00
Solicitor #234 (Suspended March 2011)	1	\$ 3,000.00
Solicitor #230 (Associate August 2010)	1	\$ 145,214.89
Campbell, Colin (Licence Revoked September 2011)	1	\$ 90,000.00
Cohen, Stephen (Deceased February 2012)	1	\$ 2,825.00
Deane, Robert (Deceased May 2009)	1	\$ 3,900.39
Gray, William (Licence Revoked September 2011)	2	\$ 55,979.47
Harris, David (Licence Revoked September 2011)	2	\$ 4,500.00
Hatcher, Ron (Licence Revoked November 2012)	2	\$ 69,120.00
Jones, Donna (Licence Revoked October 2011)	1	\$ 1,000.00
Kwaw, Edmund (Licence Revoked July 2010)	1	\$ 100,000.00
Line, John (Licence Revoked January 2014)	1	\$ 4,500.00
MacKay, Michael (Licence Revoked June 2013)	1	\$ 21,238.78
Mazzucco, Mariano (Licence Revoked November 2010)	2	\$ 165,000.00
Mossman, Ronald (Licence Revoked January 2012)	1	\$ 150,000.00
Mundulai, Aliamisse (Licence Revoked February 2012)	1	\$ 4,000.00
Slocombe, Paul (Licence Revoked November 2011)	1	\$ 5,500.00
White, Jennifer (Licence Revoked July 2013)	2	\$ 99,569.48
Wilson, Graham (Licence Revoked May 2013)	5	\$ 16,589.00
Sub-total (Lawyers)	35	\$1,128,941.94
Paralegals		
Paralegal #11 (Suspended April 2012)	1	\$ 250.00
Gowling, Allison (Licence Revoked October 2013)	1	\$ 1,500.00
Jackson, Donna (Deceased December 2011)	4	\$ 5,750.00
Kryvenko, Oleg (Licence Revoked March 2011)	1	\$ 800.00
Oostwoud, Gerard (Deceased January 2012)	1	\$ 250.00
Sub-total (Paralegals)	8	\$ 8,550.00
TOTAL GRANTS PAID	43	\$ 1,137,491.94