May 31, 2008

Thank you for providing the opportunity to provide comments to the Law Society of Upper Canada's Licensing and Accreditation Task Force. I will be focusing my thoughts on the three options being considered by the Task Force with respect to the articling requirement, namely, providing students with no guarantee of an articling placement, offering practical legal training as an alternative to articling or abolishing articles altogether. While I am writing this submission on my own behalf, many of my comments reflect the hundreds of conversations that I have had with students and lawyers through my role as Executive Director of Canadian Lawyers Abroad (CLA).

I. EXECUTIVE SUMMARY

- The Law Society should be assessing the merits of the three options in light of its mandate to govern the legal profession in the public interest.
- The problems with the articling requirement goes far beyond the serious shortage of positions, which in any event is likely underestimated.
- More serious concerns with the articling program include:
  i. It is not facilitating the transition to sole or small firm practice
  ii. There are few positions with public interest organizations
  iii. The consequence of (i) and (ii) likely impacts negatively on access to justice
  iv. It is not merit based and discriminates against certain groups
  v. There is no quality assurance
  vi. It appears to act as an unreasonable barrier to admission to the profession.
- More quantitative and qualitative study is needed to fully understand the scope of the problem with the articling requirement as this will impact on the determination of which option is most suitable.
- In terms of the three options:
  i. simply telling graduates that they have no guarantee of an articling position is unacceptable unless all of the weaknesses in the system set out above can be addressed;
  ii. far more study is needed to assess the merits of creating a practical legal training course (i.e., cost, structure, ability to achieve goals of articling requirement, whether it will create second-tier lawyers, etc.) and this option should not be considered unless either option (i) above (assuming weaknesses in system corrected) or (iii) below are discarded;
  iii. assuming the weaknesses in the articling system cannot be corrected the articling component should be abolished and different mechanisms should be reinforced (e.g., more practical courses and increased clinical experiences at law school) or introduced (e.g., co-op placements, mentoring, mandatory continuing legal education, etc.) to ensure that graduates have the requisite skills, knowledge and tools at their disposal for their initial years of practice.
- In conclusion, the Law Society should:
  i. commission further study to property understand the magnitude of the problems with the current articling requirement; and
  ii. abolish the articling requirement assuming all of the significant problems cannot be addressed and focus instead on reinforcing and establishing

mechanisms that develop the skills, knowledge and sense of professional responsibility necessary for the practice of law.

II. INTRODUCTION

The question of how best to prepare law graduates for a legal career is of critical importance. It is not simply a matter of numbers. The direction that the Law Society takes will determine the future of the legal profession. The Law Society should assess the merits of the three options in light of its mandate to govern the legal profession in the public interest to advance the cause of justice and the rule of law. Ontario lawyers must demonstrate to the public that as a self-regulating profession, we are in the best position to regulate our profession in the public interest, including and especially with respect to how lawyers are trained.

Legal aid is on life support. The poor and increasingly the middle class cannot afford lawyers. Minorities and women continue to be underrepresented at the top of law firms. Women are leaving private practice in droves. Canadian lawyers lag far behind their colleagues in US and the UK in providing pro bono legal assistance. Many lawyers are burnt out from trying to meet client demands and billing as many hours as possible. And if this isn't bad enough, the legal profession has a serious image problem with the public. In a December 2006 Ipsos-Reid poll, Canadians ranked lawyers at the bottom quarter of the most trusted professions (tied with auto mechanics at 22nd out of 29).

The decision that is ultimately taken by the Law Society in terms of how to best prepare graduates for the practice of law can either exacerbate these problems or fix them.

III. CURRENT PROBLEMS WITH THE ARTICLING REQUIREMENT

1. The number of unplaced students is likely significantly underestimated

The Law Society estimates that in the past 6 years approximately 55 to 75 candidates have failed to find articling positions after entry into the licensing period (not including candidates from previous years who are still searching).

This number underestimates the number of unplaced students, likely significantly. The Consultation Report estimates the number of unplaced candidates based on the number of applications to the Law Society bar licensing process. This does not capture students who are unsuccessful in finding articling positions and as a result don't bother to register for the bar licensing process. The licensing process is expensive and, not surprisingly, many students will not invest in the process (or simply cannot afford to) unless and until they know that they have an articling position. These graduates would not be reflected in these numbers. A much more accurate assessment of the problem would be to study the rate of placement for all law school graduates.

Why is it important to get accurate numbers? Based on actual registrations, the Consultation Report estimates a daunting deficit of 430 articling positions in 2009 (assuming 1730 candidates and 1300 position). However, if one includes students who are looking for articling positions but do not register for the Law Society bar licensing course, the number is clearly higher. More study is clearly needed to understand the true magnitude of the numbers problem.

2. The bulk of the positions are with large firms in Toronto or Ottawa

The Consultation Report sets out that the bulk of articling positions are with large firms (60% in firms with 11 or more lawyers) and are located in the Greater Toronto area (71% in 2007) or Ottawa (16.7% in 2007). This is a problem for a number of reasons.

(a) Not facilitating the transition to sole or small firm practice

The Task Force identified one of the goals of the articling program as facilitating the transition to sole or small firm practice. It is unlikely that students at large firms in Ottawa or Toronto are receiving the necessary skills for small firm practice. While they may be receiving a useful articling experience, they are being groomed for practice in a big firm which is extremely different from practice as a sole practitioner or with a small firm.

(b) Very few public interest law positions

There is a significant number of students that are looking for a career in public interest law. They are looking to use their legal training in a way that directly serves the public or community by focusing on a pressing social justice issue and/or a disadvantaged group. They are not interested in a traditional career in a law firm or in government. Once again, there is a dearth of statistics in this regard. However, as any career office at a law school knows, there is much greater demand than supply. The Law Society should be looking to foster the interests of these students who are looking to advance the cause of justice and the rule of law rather than have them channeled into traditional articling positions.

(c) Exacerbating access of justice issues

As identified in the 2003 LSUC Task Force looking at challenges faced by Ontario sole practitioners and small firm lawyers, most people cannot afford to hire big firm lawyers so they rely on lawyers working on their own or with small firms. Sole practitioners and lawyers in small firms handle most of the legal aid cases and legal services to the ethnic community. Also, sole practitioners or small firm lawyers are likely your only option in a small town. The articling requirement is not preparing a significant number of lawyers who will provide legal assistance to your average member of the public or who will spend their career advancing public interest causes or issues.

4. No quality assurance

One of the complaints made by lawyers who have been through the articling program is that the positions vary greatly in terms of the quality of the experience. Two of the goals of articling as outlined in the Consultation Report involve providing graduates with exposure to certain practice skills and professional responsibility and ethical issues in a professional environment, in a consistent manner across positions. However, worryingly, the Consultation Report says that in the quest to increase the number of positions, the Law Society is not able to ensure the quality of the positions. The Report states:

> "Given the need to hold on to as many placements as possible and continue to seek out others, there is a limit to what can be imposed upon principals in an effort to improve the program quality, thus potentially limiting the ability to enhance the program."

The increased trend to focus on quantity over quality of positions will continue assuming the need to find increasing numbers of positions.

A study should be undertaken of students after they finish their articles (assuming this is not currently undertaken) to assess whether or not they are receiving the necessary skills and experience.

5. Not merit-based/discriminates against certain groups

The current articling process is not merit based. Also, it appears to discriminate against certain groups rather than treat everyone equally.

Whether or not a graduate obtains an articling position is based more on fit than on merit. Supreme Court Justice Rosalie Abella referred to the process as "the humiliating beauty pageant that is the gatekeeper to articling". The lack of focus on legitimate competency requirements has the effect of disproportionately keeping certain categories of students out.

As the Consultation Report sets out, there is evidence that candidates from different groups (Aboriginal, Francophone, racialized communities, mature students - particularly women and NCA candidates) make up a disproportionate number of the students who cannot obtain articling positions. Approximately half of the students that the Law Society identified as not being able to find articling positions were self-identified equity seeking students. Once again, these numbers are likely understated assuming there is a significant number of students who do not register for the licensing process because they do not have an articling position. While very troubling, these findings should not come as a surprise. These groups remain under-represented in medium and large firms.

6. Unreasonable barrier

The lack of focus on legitimate competency requirements raises the spectre that the articling requirement acts an unreasonable barrier to admission, including violating the *Fair Access to Regulated Professions Act*. The Competition Bureau raised a related concern in its recent report on the Self-Regulating Professions where it stated that: "(l)aw societies should justify the duration of the professional legal training course and articling as the minimum necessary to properly and effectively practise law while protecting the public interest."

IV. RECOMMENDATION

In order to better understand the issues relating to the current articling requirement, the Law Society should undertake more quantitative and qualitative study as this information will help determine which of the three options is most suitable. For example: (1) How

many students are unable to find articling positions and how many of those are students from historically disadvantaged groups (based on real numbers not on number of students registered in the licensing program)? (2) What are students looking to do after they graduate and are opportunities available? (3) Are the current articling positions meeting a minimum quality requirement? Does the articling requirement raise an unreasonable barrier to entry into the profession?

V. OPTIONS UNDER CONSIDERATION

1. No guarantee of an articling placement

This is the most absurd option. Simply informing students that the Law Society makes no guarantee of an articling placement does not address the myriad of problems with the articling requirement set out above. Unless and until all these serious flaws are addressed, this solution should not even be considered. Further, while it may help relieve the guilt associated with a situation where hundreds of law graduates are never able to practice law, it is not at all clear how this fits within the Law Society's mandate of governing the legal profession in the public.

2. Offering practical legal training as an alternative to articling

While the idea of a practical legal training course has some merit, the potential downsides of this option would have to be more carefully assessed.

It may be useful to have an alternative stream. Currently, many graduates article with a firm simply in order to get called to the Bar. They have no intention of practicing. This option may be attractive to these graduates and, as a result, free up articling positions for graduates who are more interested in the traditional practice of law. Also, it could be designed to ensure training that is more applicable for practice as a sole or small firm lawyer than the majority of the current articling positions.

While there are practical considerations related to establishing a centre for this training (cost, finding instructors, ensuring proper training, etc.), the most serious concern is that this option may simply ghettoize students from different groups who have a disproportionately more difficult time finding articling positions. This may serve to exacerbate this already serious problem.

Far more study is needed to assess the pros and cons of creating a practical legal training course (i.e., cost, structure, ability to achieve goals of articling requirement, whether it will create second-tier lawyers, etc.). This option should not be considered unless it can be shown that either (i) the articling requirement as it exists can't be fixed or (ii) that there is no way to ensure that graduates have the necessary skill, knowledge and professional responsibility to practice law should the articling requirement be abolished.

3. Abolishing the articling requirement

This option is not as radical as it seems. Hundreds of Canadian students already take this route each year when they make the decision to study for an American state bar

exams and practice in the United States or abroad. (In the interest of full disclosure, this is in fact, the route I chose before returning to Canada and articling in Ontario).

Numerous studies by the Law Society have come to the same conclusion: The articling system is broken and there is no obvious fix. Simply increasing the number of positions or advising students that there is no guarantee of placement isn't going to make articling a merit-based system that does not discriminate and ensures that students are obtaining the necessary skills and training (including to practice as a sole practitioner, with a small firm or in the area of public interest law) while ensuring a minimum quality of experience.

The question is whether there is a way to ensure that without the articling component lawyers will still be equipped with the skills, knowledge and sense of professional responsibility. There are a number of ways. Most, if not all, law schools have already introduced clinical work. Law schools could also introduce unpaid co-op placements where students could work for part of the school year with host firms, government or organizations with little cost or paperwork to the host. Additional courses through the law schools or the Law Society focusing on topics particularly relevant for sole practitioners or small firm lawyers (such as how to run a business) could be established. A real mentoring system where recent graduates are matched with an experienced lawyer in their chosen area would be extraordinarily helpful. Mandatory continuing education courses for students in their first three years of practice could also be introduced. There are a variety of different tools that would be far more flexible than the articling requirement and that would better ensure that lawyers are properly prepared for their initial years of practice.

VI. RECOMMENDATION

The Law Society should commission further study to properly understand the magnitude of the problem associated with the current articling requirement. Assuming all of the significant problems cannot be addressed, the articling requirement should be abolished. In this case, the Law Society (in conjunction with law schools) should focus instead on reinforcing and establishing mechanisms that develop the skills, knowledge and sense of professional responsibility necessary for the practice of law.

VII. CONCLUSION

I conclude with remarks made by Justice Abella in a speech about professionalism that she gave in her opening address to the Bencher's retreat in 1999. Although almost ten years have passed, the critical questions she raises apply equally to today's debate. They should be kept top of mind when the Task Force and the Benchers consider which option to take.

> "In his masterful 1991 diagnostic study on how we teach lawyers to be professionals, Professor Brent Cotter reactivated the haunting and persistent refrain sung by decades of young lawyers - why do we have articling and Bar Admission courses. Whose interests does this pedagogical gauntlet really serve? It has for too long survived the establishment of the university law schools whose absence was the original rationale for its existence. Is there really an evidentiary foundation for concluding that this is the most reasonable way for the Law Society to

ensure that people entering the profession have the requisite educational arsenal of knowledge and skill? Has anyone taken a survey to gauge the utility of, or consumer satisfaction with the humiliating beauty pageant that is the gatekeeper to articling, or with the Bar Ad's income- delaying months which either repeat the job the law schools were doing, or teach the courses few graduates will ever need. How positively can a newly emerging lawyer be expected to feel about a Law Society which imposes either the frenzy of the match programme or the irrelevance of an accounting exam. Are the gains really worthy of the financial burdens these educational enhancements impose on students?"

Yours Sincerely,

Catherine McKenna