September 29, 2017

VIA E-MAIL

Mr. Paul Schabas, Treasurer
The Law Society of Upper Canada
130 Queen Street West
Toronto, ON M5H 2N6

Dear Treasurer,

RE: LSUC Dialogue on Licensing

Further to our October 22, 2016 letter to Ms. Sophia Sperdakos, Policy Counsel of the Law Society of Upper Canada (enclosed), The Advocates' Society continues to follow the ongoing dialogue the Law Society is having with its members regarding the lawyer licensing process in Ontario. The Advocates' Society appreciates the scope of the consultations with stakeholders across Ontario, and our members have actively participated in these sessions. We have also reviewed with great interest the Discussion Group Summary Reports from the consultations.

The Discussion Group Summary Reports are consistent with our understanding that there is no clear consensus regarding the future of licensing in Ontario. The sessions were attended by strong proponents of the traditional articling system, as well as very enthusiastic champions of the Law Practice Program. The background materials and discussions also touched upon other licensing options from jurisdictions outside of Ontario, including exam-only and post-license experiential training systems. The financial unsustainability of the LPP, though less of a hot topic at the consultation sessions, is also a serious consideration of The Advocates' Society.

The Advocates' Society continues to take the following principled position regarding licensing in Ontario:

- the Law Practice Program should be maintained pending the implementation of a single, unified licensing system;
- the unified system should afford appropriate experiential training;
- the unified system should be available to all qualified licensing candidates without market-driven or discriminatory barriers to entry; and
- the lack of available law firm positions should not be a barrier to licensing.

Though our October 22, 2016 letter underscores a commitment to pre-license experiential training, a new unified licensing system could mandate further specific, supervised experiential training immediately following the licensing period.

The Advocates' Society would welcome the opportunity to comment further on any specific proposed changes to the licensing process in Ontario.

Yours truly,

Sonia Bjorkquist
President

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October 22, 2016

VIA EMAIL: policy@lsuc.on.ca / ssperdak@lsuc.on.ca

Ms. Sophia Sperdakos
Policy Counsel
Policy Secretariat
The Law Society of Upper Canada
Osgoode Hall, 130 Queen Street West
Toronto, ON M5H 2N6

Dear Ms. Sperdakos:

RE: Response to *Pathways Pilot Project Evaluation and Enhancements to Licensing Report*

The Advocates' Society, established in 1963, is a not-for-profit association of over 5,500 lawyers throughout Ontario and the rest of Canada. The mandate of The Advocates' Society includes, amongst other things, making submissions to governments and other entities on matters that affect access to justice, the administration of justice and the practice of law by advocates.

The Advocates' Society has reviewed with interest the *Pathways Pilot Project Evaluation and Enhancements to Licensing Report* of the Professional Development & Competence Committee of the Law Society of Upper Canada (the "2016 PD&C Report"). The Advocates' Society takes the following position with regard to the issues outlined in the Report:

- that the Law Practice Program ("LPP") is not, when offered as an alternative to the traditional articling program, a viable option in the long term due mainly to its significant financial costs on both students and the profession. In fact, when offered as an alternative to articling, the perception of a two-tier system appears to have been created notwithstanding evidence that the LPP is in substance a high quality program which, in some respects, may well be superior to articling;

- that, given that the LPP has provided an alternative to articling for a number of licensees (notably many who identify themselves as being from racialized communities), it should be maintained pending the Law Society developing and implementing a **single, unified system** which affords appropriate experiential training (possibly incorporating elements of the current LPP) to all qualified licensing candidates without market-driven or discriminatory barriers to entry.

With respect to the other proposed changes to the licensing process:

- The Advocates' Society does not agree with the Law Society's proposal that internationally-educated candidates licensed in a common law jurisdiction should require three years of practice instead of ten months in order to be exempt by the Law Society from the articling requirement, as such an extension appears to be unduly burdensome and arbitrary.

- The Advocates' Society supports the Law Society's proposal that licensing candidates should be restricted in the number of times that they are permitted to write the licensing examinations.

- The Advocates' Society supports the development of a practice skills examination ("PSE") to be administered at the completion of the licensing process, and that this examination should be rigorously reviewed by the Law Society. However, The Advocates' Society also believes that the proposed practice and procedure examination ("PPE") should also be subject to the same rigorous review. The Advocates' Society also believes that, in some cases, requiring a licensee to pass the PPE prior to commencing articles will pose a burden on both the licensee and his or her employer.

1. Recommendation that the Law Practice Program be Terminated Only If Another Alternative is in Place

The Advocates' Society believes that the LPP is in substance a high quality program which, in some respects, may well be superior to articling. Nonetheless, when offered as an alternative to the traditional articling program, the LPP is not a viable option. The Advocates' Society, however, does not support the recommendation of the committee that the LPP program be terminated at the completion of the 2016-2017 term – unless another alternative to address the articling crisis is in place before then.

The Advocates' Society is primarily concerned that having two separate pathways to licensing has opened the door to the perception of two separate "tiers" of licensing candidates. One of the fears in 2012 was that creating an alternative pathway to licensing would result in the profession treating the program and its graduates differently than articling candidates. There was concern that LPP candidates would be stigmatized in their career. Having two tiers of programs makes the comparison of the two pathways nearly impossible.

With only 220 students enrolled in the English program and 14 in the French program – rather than the anticipated 400 students annually – it is clear that the licensing candidates themselves are viewing the LPP as a second-tier option. This perception is regrettable, as there has been positive feedback about the LPP pathway and with the work done by Ryerson University and the University of Ottawa in developing the program, and employers who have hired LPP students and instructors who have taught them have praised the quality of the students in the LPP. In fact, it may well be that the LPP pathway has developed into a more standardized and high-quality training opportunity than articling.

In addition, the 2016 PD&C Report makes it clear that the Law Society and all licensing candidates are spending substantial resources on a program to subsidize an alternative licensing pathway for a comparatively small number of candidates. The Law Society contributes $1 million per year to the program at a cost of approximately $25 per licensee. In addition, all

candidates in the licensing process (not only LPP candidates) have been assessed an additional licensing fee of $1,900 per candidate to subsidize the LPP pathway. If this subsidy did not exist, the cost per LPP candidate could be as high as $17,000.[1] The lower than anticipated enrollment makes for a higher cost program that is only benefiting 10% of the licensee cohort. Such a significant expenditure of funds may not be warranted for such a small number of licensing candidates.

Further, the financial impact for students who enroll in the LPP is high. Many students enrolled in the LPP program do not earn income while attending the classroom sessions – in stark contrast to the majority of the students in the articling program who do earn incomes. In addition, LPP students are not currently eligible for student loan funding from the Ontario Student Assistance Program and only 70% of placements provided for the LPP students are paid. On a financial level, the LPP is not equitable.

The Advocates' Society notes that fewer LPP candidates were called to the bar in June 2015 (59% of LPP candidates versus 91% of articling candidates) and June 2016 (57% of LPP candidates versus 92% of articling candidates).[2] These figures may indicate that a number of LPP candidates may never complete the licensing process.

2. Recommendation that the Enhanced Articling Program and the LPP Both Remain in Place as an Interim Measure, Until a Single, Unified Licensing System is Created

The Advocates' Society believes that, if the LPP is to be abolished, a single, unified system of licensing (as opposed to two different pathways) should be implemented for licensees in its place.

The Advocates' Society agrees in principle with the Law Society's recommendation that the enhanced articling program remain in place, so long as the LPP itself is still in place. It is The Advocates' Society's view that the articling program has had more than sufficient time to be evaluated over the last several decades. In particular, a great deal of work was done to evaluate the articling program in 2011 and 2012 by the Law Society's Articling Task Force which led to the creation of the LPP. If the Law Society were to eliminate the LPP without having an alternative in place to deal with the articling crisis, the Law Society would simply be bringing the profession back to where it was in 2011 and 2012.

Currently, as was the case in 2012, the number of available articling positions is insufficient to accommodate the number of candidates who enter the licensing process on an annual basis. Without a solution to allow all qualified candidates to become licensed, the barrier to entry to the profession is market-driven, as opposed to driven by a candidate's qualifications. It is true that, given the number of law school graduates seeking licensing in Ontario, at some point it is likely that the market will not be able to accommodate all those that are hoping for employment. However, The Advocates' Society believes that the market for articles should not be allowed to act as a somewhat artificial and ostensibly discriminatory barrier to entry to the profession, especially when the LPP appears to provide more uniform experiential training.

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[1] Law Society of Upper Canada, Report to Convocation of the Professional Development & Competence Committee, September 22, 2016 ("2016 PD&C Report"), p. 30.
[2] 2016 PD&C Report, p. 18.

The minority of the Law Society Professional Development & Competence Committee believes that:

> To the extent there are doubts about the sustainability of the LPP they [the minority] think that as the data suggests that candidates for equality-seeking groups are continuing to encounter difficulty accessing the Articling Program, and that for some equality-seeking candidates the LPP allows them entrance to the licensing process, that it would be advisable to consider, explore and possibly put in place alternatives before ending the current pilot. They are also of the view that the positive features of the LPP pathway be given greater weight and more time to consider them.[3]

The Articling Task Force received a number of submissions from equity-seeking groups in 2011 and 2012, nearly all of which rejected the *status quo* out of concern that it failed to address shortages that they believed to disproportionately affect them.[4] As of 2010, 26.6% of the licensing candidates self-identified as aboriginal, francophone, Gay/Lesbian/Bisexual/Transgendered, a person with a disability or an individual from a racialized community. As a group, these individuals were 4% less likely to secure articles than the overall group of candidates.[5] At the time, the Law Society expressed concern about the accuracy of these statistics due to the tendency of candidates not to self-report as a member of these groups.[6]

The 2016 PD&C Report majority expresses no similar concerns about the accuracy of the statistics gathered. In fact, the report states:

> Despite the Committee's recommendations respecting the LPP, it continues to have concerns with aspects of the Articling Program, some of which the pilot has reinforced, as set out above. These relate to fairness, including the impact on equality seeking groups and the hiring process, consistency and coverage of required competencies, working conditions and the dearth of certain types of articling positions, particularly in the field of social justice. Because of low take-up of the LPP, the alternative pathway was unable to convincingly address placement shortages. Post LPP shortages will continue to be an issue.
>
> As stated above, the Committee remains concerned about the data that suggests that candidates from equality-seeking groups are continuing to encounter difficulty accessing the Articling Program. Competent candidates ready for licensing must have fair access to the licensing process, including transitional experiential training opportunities.
>
> The Law Society must also continue to monitor the Articling Program and address the issues that have emerged from the pilot respecting fairness, accessibility and objectivity.[7]

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[3] 2016 PD&C Report, p. 23.
[4] Law Society of Upper Canada, Articling Task Force Final Report, October 25, 2012 ("2012 Articling Task Force Report"), p. 34.
[5] Law Society of Upper Canada, Articling Task Force Consultation Report, December 9, 2011, p. 11.
[6] 2012 Articling Task Force Report, p. 36.
[7] 2016 PD&C Report, pp. 41-42.

There is no question that the LPP is serving more candidates than the articling program in certain demographic categories. In the first year of the LPP, 33% of the participants identified as being racialized compared to 21% in the articling program. The discrepancy increased in year two with 33% of candidates in the LPP reporting as racialized compared to only 18% of articling candidates. The LPP program also served a higher portion of candidates over the age of 40[8] and students educated outside of Canada.[9] There is also evidence presented in the report that the articling program provides barriers to entry for students interested in social justice work.[10]

In addition to the evidence obtained in the 2016 PD&C Report, important figures can also be found in the Law Society's Equity and Aboriginal Issues Committee September 22, 2016 report entitled *Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions*. In Appendix A it was reported that:

> Racial and ethnic barriers were ranked highly among the barriers to entry and advancement. Forty percent (40%) of racialized licensees identified their ethnic/racial identity as a barrier to entry to practice, while only 3% of non-racialized licensees identified ethnic/racial identity as a barrier. Racialized licensees frequently identified physical appearance, socioeconomic status, place of birth and upbringing, age, manner of speaking English/French and gender identity as barriers – more so than non-racialized licensees. Racialized licensees were also more likely to have struggled to find an articling position or training placement.[11]

The Advocates' Society is not satisfied with the majority's recommendation as to how to address these concerns about the articling program. The recommendation is outlined at page 42 of the 2016 PD&C Report and is incorporated into the motion as item number 3(d):

> The Law Society will explore, within the transitional experiential training context, the development of a fund to be used to support the priorities of a diverse profession that meets the public's varied needs and to enhance access to justice in under-serviced communities. The exploration will include an analysis of possible sources for funding, such as the Law Foundation of Ontario grants and the continuation of the lawyer licensee contribution to the licensing process, criteria for eligibility, relevant under-serviced communities and appropriate job locations.

This recommendation does not provide any concrete solutions to deal with the inequalities that have been shown to exist with the articling program. Before the LPP comes to an end there needs to be a concrete plan in place to address these inequalities.

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[8] In the first year of the program 17% of candidates were over the age of 40 compared to 2% in the articling program. In year two, 19% of LPP candidates were over the age of 40 compared to only 2% in the articling program. (2016 PD&C Report, pp. 18-19).

[9] In year one 64% of candidates did not graduate from a Canadian Law School. In year two this number was 51% (2016 PD&C Report, p. 19). Articling student focus groups in both years commented that there was a perception that out of province or out of country candidates are disadvantaged in obtaining articling positions. (2016 PD&C Report, p. 20).

[10] 2016 PD&C Report, p. 20.

[11] Law Society of Upper Canada, Equity and Aboriginal Affairs Committee, Report to Convocation, September 22, 2016, p. 39.

Accordingly, it is The Advocates' Society's position that the LPP should remain in place pending the Law Society's development of a concrete plan to develop a single, unified system in which licensing candidates may obtain experiential learning prior to licensing.

3. Other Proposed Changes to the Licensing Process

The Law Society has also proposed other changes to the licensing process. These proposed changes are premised on the Law Society maintaining the enhanced articling program. As explained above, The Advocates' Society recommends the implementation of a single, unified licensing system for all candidates. In the event, however, that the enhanced articling program, or the current two pathways for that matter, are maintained in the short term, The Advocates' Society makes the following comments.

First, the Law Society proposes that, beginning in the year 2017-2018, internationally-educated candidates licensed in a common law jurisdiction will require three years of practice instead of ten months in order to be exempt by the Law Society from the articling requirement. It is The Advocates' Society's view that the Law Society has provided no evidence as to why this increase is necessary or desirable. The increase appears to be arbitrary in that it creates an unnecessary barrier to entry to the profession for lawyers from other common law jurisdictions who already have one to three years of experience in practice. The 2016 PD&C Report does not outline any risk to the public interest or stated concern with the current requirements that would provide a rationale for this change. In fact, there may be a countervailing consideration: foreign-trained lawyers who have practised for one to three years may have experience practising in underserviced areas which could benefit the public interest and enhance access to justice in Ontario. Requiring these individuals to secure an articling position would delay these contributions. The Advocates' Society believes that the *status quo* should be maintained.

Second, The Advocates' Society supports the Law Society's proposal that licensing candidates should be restricted in the number of times that they are permitted to write the licensing examinations. The Advocates' Society is of the view that this recommendation is reasonable. The Law Society has established that these rules will be subject to the enumerated grounds provided for under the *Human Rights Code* and will be reflected in the Law Society's Policy and Procedures for Accommodations for Candidates in the Lawyer and Paralegal Licensing Processes. The Advocates' Society understands that the Law Society is required to balance a minimum standard of competency with fairness in the licensing process. It is in the public's interest to ensure that only qualified, competent candidates are entering the profession.

Third, The Advocates' Society has the following comments regarding the new proposed practice and procedure examination ("PPE") and practice skills examination ("PSE"). The Committee is recommending that in place of the current Barrister and Solicitor Examination, the PPE be established. In addition to this, the Committee is recommending that the PPE must be passed prior to the commencing of experiential training but that the Law Society should schedule two opportunities to write the test prior to traditional starting dates for experiential training.

The Committee does not identify any substantive issues with the current Barrister and Solicitor Examinations and states only that the "Committee considers that it is now appropriate to evolve the assessment approach." The Committee states that it is satisfied that a "refined assessment

will be even more sophisticated and better assess relevant material" in response to suggestions that a single examination may be too simple or less effective.[12] It appears from the wording of this recommendation that the Committee does not intend to assess the content of this new PPE examination to the same magnitude as the PSE that is recommended in the next aspect of the motion. The additional funding for the 2017 and 2018 budgets that is suggested in the 2016 PD&C Report also only makes reference to the development of the PSE examination, and not the refinement of the PPE.

The Advocates' Society's position is that if the Law Society is creating an examination that is to serve as a barrier prior to licensing candidates commencing their experiential learning, the PPE examination should receive the same rigorous assessment as the PSE. In particular, The Advocates' Society does not believe that simply combining and reducing the content of the current Barrister and Solicitor Examinations into one Examination is an appropriate test to require candidates to pass prior to commencing their experiential learning. Equal thought should be given into the content of this Examination and whether the content is appropriate as a barrier to entry into the next phase of the licensing process. If an appropriate examination can be developed, then this test may be beneficial to the profession.

Further, The Advocates' Society can foresee two practical issues with requiring licensing candidates to pass the PPE prior to commencing experiential learning.

First, if the two sittings of the PPE are planned close together in May and July it is conceivable that a licensing candidate may have a personal emergency during that time period which may impact their ability to write the PPE during one or both sittings. The impact could be that the licensing candidate may not be able to commence the experiential learning period until the following licensing year. This would be an unduly harsh result for students who rely on articling income after completing their legal education.

Second, the majority of articling employers in Toronto, Ottawa, Middlesex and Hamilton participate in the Law Society of Upper Canada's recruitment process.[13] The articling recruitment process results in articling students being offered articling positions well in advance of articling. Firms will now need to make their offers conditional on students passing the PPE examination. Further, there will likely be a second round of recruitment generated that would commence in July of a licensing year as employers scramble to find replacement articling students for students who they had hired that did not pass the PPE examination.

The Advocates' Society believes that the proposed PSE examination at the end of the experiential learning period would be a positive development to the licensing process as it will assess whether candidates have acquired the skills to complete complex multi-dimensional legal work.[14] Licensing candidates are not currently tested in this area. The proposed PSE will therefore assess candidates on skills that they would presumably learn through their experiential learning and will also serve as one final assessment prior to being called to the bar. These goals are laudable and are certainly in the public interest.

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[12] 2016 PD&C Report, pp. 44-45.
[13] The Law Society of Upper Canada, 2017-2018 Articling Recruitment Procedures. Online: http://www.lsuc.on.ca/licensingprocess.aspx?id=2147497188.
[14] 2016 PD&C Report, p. 45.

Thank you for providing The Advocates' Society with the opportunity to make these submissions. I would be pleased to discuss these submissions with you at your convenience.

Yours very truly,

Bradley Berg
President

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