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FOLA's Commentary on the Dialogue on Licensing

Submitted to:

Dialogue on Licensing
The Law Society of Upper Canada
130 Queen Street West
Toronto, ON M5H 2N6

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Introduction:

Thank you for the opportunity to provide written submissions on this very important issue, and thank you for providing a few extra days to make these submissions so that we could consult our membership more broadly.

The Federation of Ontario Law Associations (FOLA) is an organization that represents the associations and members of the 46 local law associations found across Ontario. Together with our associate member, the Toronto Lawyers’ Association, we represent approximately 12,000 lawyers, most in private practice in firms across the province as they provide service to the public and operate their businesses. These lawyers are on the front-lines of the justice system and see its triumphs and shortcomings every day.

We are an advocate for a better justice system that recognizes the crucial role competent and professional lawyers play in that system. In that context, we see the Licensing Process, ongoing accreditation and continuing education of lawyers as matters of critical importance. In our submissions to the Policy Secretariat on the Pathways Pilot Project Evaluation & Enhancements to Licensing, we recommended that a wide-reaching consultation with members of the profession throughout the Province was needed and are pleased that the Benchers of the Law Society have heeded this call. Many of our members attended the Dialogue Sessions across the province and we are pleased to provide our written comments as well.

An organization of our breadth and size, with members in diverse practices throughout Ontario, cannot hope to provide a consensus position on what changes, if any, are needed to our existing Licensing Process. What is clear from discussions that we have had at our own meetings – both formal and informal - as well as the dialogue that took place at the various venues throughout this consultation process - is that the issue of Licensing is one that elicits passionate responses and particular opinions. It is also clear that the needs of the students entering into the profession diverge from those already licensed by the system. Of course, the viewpoints of the citizens of Ontario – our clients and potential clients, the people we serve – need to be understood and respected as well.

What our members have told us:

Two points of broad consensus have emerged from the discussions we have participated in and that has been expressed to us by our members. The first is that the legal profession in Ontario is under unprecedented stress. This stress is manifested in growing economic pressure on fees and increased competition from non-lawyer professionals and lawyers alike. The stress is also manifested in the steady erosion, in the opinion of many practitioners, away from the practice of law as a profession toward that of a commodity service provider. Add to that the disintermediating effect of technology and for many lawyers, they are finding it more difficult to make a living in the practice of law.



The second point of consensus is that our members believe we must hold onto the high standards of professionalism and competence that have shaped our profession over centuries. Our members tell us consistently to resist any perceived erosion to these standards, be they erosions of civility, accreditation, ongoing professional development or in the business structures that we operate in, if those structures might erode or diminish the central role of professional standards in the day-to-day decisions lawyers make.

Market Context:

Into that milieu is the fact that Ontario has seen, in recent years, an enormous increase in applicants to the licensing process, with 400 more applications annually in 2015 than in 2010, and these numbers show no indication of decreasing. Law Schools – both foreign and domestic - not regulated by the Law Society, are releasing increasing numbers of graduates into the marketplace, placing more pressure on a Licensing Process and legal services market that, in the view of many, is already saturated. Further complicating the market are the steady increases in the number of licensed paralegals and other non-lawyer professionals who provide services that have traditionally been offered by licensed lawyers.

Looking at this situation in a positive light, the good news is that the practice of law remains highly coveted and is seen by most of society as an honourable vocation. This positive view, however, masks a number of challenges embodied by the higher rates of unemployment, lower incomes for many practising lawyers and the growing challenges of mental health and addictions to be found in the legal profession. The profession also struggles with overcoming racial and gender biases and with the challenge of serving a lower-income population that demands and deserves legal representation.

We would also like to point out – and perhaps re-state the obvious – that Ontario is somewhat unique in the challenges posed by geography and diversity. A conclusion reached about the state of the legal profession in the Greater Toronto Area, or any of the other more urban centres in southern Ontario, does not necessarily apply to the practical realities on the ground in many of Ontario’s more rural and remote communities. For example, the greying of the bar remains a challenge in many communities, especially in the North, but the same cannot be said in many GTA communities where there is an abundance of young, qualified lawyers in the marketplace. The challenges in the GTA, on the other hand, are often in finding enough lawyers to serve multicultural and multi-lingual populations in their mother-tongue. Whatever solutions, programs or initiatives put forward by the Law Society to reform or change the licensing process must account for this diversity and geography. Simply stated: one size won’t fit all.



FOLA’s View: A re-statement of our principles

Over the last few years there have been many discussions at the Law Society and throughout the profession on how best to address these changes to the profession and the challenges we collectively face. The Law Practice Program, for example, was implemented in large part to respond to this increase in applicants, by creating an alternative pathway to the articling program, to serve those students that were not able to obtain articling positions. And while the LPP may yet prove to be an excellent alternative pathway for training for various reasons, this perceived lack of availability of articling positions to meet the demand should not, in our view, alone be permitted to drive changes to the overall Licensing Process.

FOLA maintains its position that all efforts should be made to remove any barriers that might prevent or disadvantage certain segments of the population, ***but these efforts to remove barriers cannot diminish the high standards demanded of access to the profession. Standards of competence and integrity must remain the impetus behind the design and implementation of the Licensing System, as it is only well educated, well trained and well-prepared lawyers that serve the interest of the public.***

The Labour Market Trends and Outlooks for Regulated Professions in Ontario report estimated that over the next 10 years, there will be 1.6 new licensed lawyers for every new practicing position. It is clear from these numbers, that there is no shortage of licensed lawyers. Once licensed, many of those new lawyers who are unable to find a position with an established firm, will simply hang up their own “shingle”. Increasing the availability of articling positions, expanding the LPP program, or accepting more foreign-trained lawyers through the NCA process does nothing to address the real issue: that increasing numbers of lawyers entering the market at a young age and with very little experience without the proper training, and practicing with little, if any, supervision and monitoring, holds a high degree of risk for the public.

The Law Society has conducted a comprehensive study of how other provinces and other jurisdictions throughout the world both test and train its licensing candidates. FOLA understands that very few of these jurisdictions deal with the sheer volume of applicants with which the Law Society must contend. It would be prohibitively expensive, and unwieldy to introduce many of the suggested changes, such as introducing essay questions into the bar exam, or guaranteeing an articling position to every licensure candidate. FOLA urges the Law Society not to go the way of some of the larger jurisdictions, such as Washington State and California, who have no transitional training requirements.



Specific Recommendations:

A few ideas have consistently come up from amongst our members that we believe are worthy of further exploration in the next round of consultation and discussion on this topic.

Bar Exam Enhancements:

- FOLA relies on the Law Society’s expertise in the design and implementation of the bar exams. However, given the availability of new technologies and new teaching methods, it may be time to consider a return to a type of combined bar school and exam, which could be administered using interactive and innovative online tools that reflect how business is increasingly being done and will be into the future. FOLA’s main consideration is that the bar exam standards remain rigorous.

Support for lawyers who support transitional training:

- Many of FOLA’s members are involved in transitional training, from offering Articling Positions to participating as mentors or providing placements for the LPP program. Providing this service is an important way of passing on an individual’s experience, not just in subject matter training, but in the practice of law and management of a law firm. Many lawyers feel that it is their responsibility to help nurture the next generation, and many look to these programs to assist with succession planning in solo, small and rural firms. However, the provision of this service can be quite daunting, and there are many ways the Law Society could help to encourage more lawyers in solo, small and rural practices to take on this task. Promotion of the Articling Registry, pre-screening and interviewing of candidates, matching services for those lawyers able to provide a partial placement, and access to funding to assist with the payment of salaries are only some of the ways that the Law Society could assist in creation of additional articling positions.

Reform of the NCA Process:

- We strongly endorse the Law Society’s efforts to reform the NCA process, to ensure that all students who enter the workforce in Ontario are fully competent and able to practice immediately. For those obtaining their transitional training in Ontario, all efforts must be made to ensure that each individual receives training that meets the high standards required of the profession, irrespective of where that training is obtained.

We recognize that reform of the NCA requires national consensus and this consensus is difficult to reach and the path to reform is long and tedious. That said, a reform that we believe could be implemented immediately by the Law Society of Upper Canada, and without the input of the Federation of Law Societies, is a function of communication. The Law Society in partnership with Ontario-based organizations such as FOLA, the OBA, Advocates Society and other representatives



of the Bar should be communicating with students thinking of law school, either in Canada or in another country, about the realities of the legal marketplace in Ontario. This communication should emphasize the high standards these students will be expected to achieve in the licensing process and the realities of finding employment in this marketplace. This communication and message must strike a fine balance between dissuading and encouraging qualified candidates who we want to see enter the profession and those on the margin who might be looking at the profession among many career options. No matter the message, however, the Law Society has in its data-bases the information that students looking to enter the profession need to make informed decisions for their own future. This data should be made readily available.

Maintain Articling as a core program – but enhance its reach and effectiveness:

- FOLA maintains that the Articling program should be viewed as a core element of the licensing process. It is only hands-on training with real clients in a long-term placement that can hope to provide the training and experience that a candidate will need to practice. However, it must be that each placement is as varied as the many practices of law throughout this province, and that a candidate with a placement for a solo criminal defense lawyer will have a very different experience from a candidate working for a “seven sister” firm, or clerking at the Court of Appeal. The lessons learned from the LPP should be drawn upon to design a system that combines a rigorous work placement with a more consistently applied training program. Ultimately, the Law Society must not lose sight of the cost of whatever system is created to ensure that all those proceeding through the pathways bear a proportionate level of the financial burden of the system.

Whatever program is designed for transitional training, the Law Society must ensure that all candidates receive consistent training with high standards of evaluating competence. While the system is only designed to ensure entry-level competence, entry-level competence is not sufficient for the continued practice of law. The Law Society should strive to ensure that each candidate emerges from the Licensing Process with the tools required to continue to learn and improve, and with the connections and networks that ensure access to more experienced colleagues.

The Role of Local Law Associations & Practice Resource Centres in Maintaining Professional Competence

- Finally, FOLA would urge the Law Society – and all lawyers - to recognize the importance of local law associations and practice resource centres (managed by local law associations) to the critical mentorship and continuing education of licensed private practice lawyers. Having access to other practicing lawyers with a



wealth of experience is an incredible asset to all new and recently licensed candidates. All members of the bar should be encouraged to participate in their local law association and recognize its role in the lifelong professional development of competent lawyers.

On a related note, many of our members and especially staff in our practice resource centres, have long lamented the steady erosion in research skills of new calls that enter the profession. Too many new calls believe that their research is sufficient if they "Google" cases or rely on their own notes from Law School. Too many young lawyers are befuddled by what they find in a practice resource centre law library. We believe the Law Society should add more elements to the experiential learning systems (be they in articling, bar admission exams, LPP, etc.) that focus on research skills that will be with these lawyers for the remainder of their career. Simply put, if it's not tested, it's not taught or learned.

Conclusions:

FOLA understands and appreciates the daunting task that the Law Society has undertaken in its review of the existing Lawyer Licensing Process and the challenges presented by any potential changes to this process. FOLA commends the Law Society on its comprehensive review and urges the Law Society to continue to seek input from lawyers practicing throughout the province on any proposed changes, but we encourage that this consultation continue to operate in the context of every other challenge facing the profession. Striving for a "perfect" licensing process that ends up hurting the long-term economic viability of practising lawyers by licensing too many lawyers, or is so costly that it adds to the regulatory burden and cost borne by practising lawyers will "solve" one problem and cause many others.

We also believe that FOLA and our network of local law associations across Ontario provide a great forum for the Law Society to reach front-line practising lawyers across the province and in your next-steps, please be mindful of this. Consider this an open invitation to access practising lawyers across Ontario through our network of local Associations.

Thank you for the opportunity to provide these submissions.

Sincerely and on behalf of the Federation of Ontario Law Associations,

Jaye Hooper, Chair
Federation of Ontario Law Associations

Brigid Wilkinson, Northeast Regional
Representative

cc. FOLA Executive
FOLA Presidents