



October 25, 2018

## **TORONTO LAWYERS' ASSOCIATION SUBMISSIONS RELATING TO THE OPTIONS FOR LAWYER LICENSING - CONSULTATION PAPER**

The Toronto Lawyers' Association ("TLA") is the voice of its 3,700 members who practice law in all disciplines across the Greater Toronto Area. The TLA is pleased to provide comment to the Law Society of Ontario ("LSO"), Professional Development & Competence Committee (the "**Committee**"), in regard to the consultation paper relating to the Options for Lawyer Licensing (the "**Consultation Paper**").

TLA has been an active participant in the Dialogue on Licensing (the "**Dialogue**") thus far, and it looks forward to continuing to collaborate with the LSO through this process.

The TLA, once again, commends the LSO for instigating the Dialogue and preparing the Consultation Paper. As a self-regulated industry, it is important that our profession carry out a periodic and careful review of its licensing regime.

For context, we refer the Committee to the TLA's letter dated September 15, 2017 relating to the Dialogue (the "**September 2017 Letter**"), a copy of which is enclosed.

### **Summary**

As is discussed further below, the TLA continues to consider Articling to be an effective and important educational tool in our existing licensing regime. While it is not a perfect system, it is a valuable one that should be maintained, with some enhancements.

For the reasons discussed below, the TLA supports Option #2, as outlined in the Consultation Paper.

### **Support for Option #2: Current Model With Enhancements**

The TLA recognizes the long and important history of our Articling regime, and it should be maintained (with enhancements).

Articling continues to be the most common pathway to obtaining the required experiential training in order to be licensed to practice law in Ontario. As discussed in the September 2017 Letter, there is good reason for this. The practical and real life experiences that candidates gain during their ten months of work is generally invaluable. Furthermore, Articling allows candidates to develop working relationship within the profession, which assists Articling students in their career advancement. Moreover, Articling allows candidates to gain real-life experience in order to assist them to determine whether they want to continue with the practice of law.

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As we stated in the September 2017 Letter, the fact that Articling cannot be offered to each candidate who wishes to be licensed to practice law in Ontario is not, in and of itself, a reason to consider cancelling the Articling regime. Rather, we encourage the LSO to evaluate the Articling regime with a view to determining whether it is doing a good job of training candidates, while protecting the public interest and promoting access to justice. In our view, Articling achieves these objectives.

In summary, our view is that Articling provides the best opportunity for candidates to obtain the necessary real life experiential training. As a result, our profession should be enhancing the Articling model, not seeking to abolish it.

Below we discuss the five challenges identified within the Consultation Paper:

#### A. Supply of Articling Positions

As discussed in the Consultation Paper, there is a gap between the number of available Articling positions and the increasing number of candidates who are seeking to become licensed. Much of this growth is coming from internationally trained candidates who have completed the National Committee on Accreditation of the Federation of Law Societies of Canada (“**NCA**”), where there has been a 250% growth in the number of candidates to the NCA over the past decade. We refer you to the September 2017 Letter for our ongoing concerns relating to the current NCA process.

The gap in the number of Articling positions when compared to the growing number of licensing candidates is an important consideration. The Law Practice Program (the “**LPP**”) may be a reasonable alternative for those candidates who are unable to find Articling positions, though we are not in favour of the LPP replacing the Articling regime. As noted in the September 2017 Letter, the TLA has been supportive of continuing the LPP for a further piloted period such that its effectiveness in preparing candidates for the practice of law can be better assessed.

We encourage the LSO to engage in a strategy for the purpose of identifying and motivating additional legal firms, departments and lawyers who are prepared to offer Articling jobs to candidates.

#### B. Viability of the LPP

The Consultation Paper states that the enrollment to the LPP “*has been more modest than was anticipated*”. One inference we draw from this statement is that, among licensing candidates themselves, Articling is the preferred way of obtaining transitional, experiential training than the LPP, such that given the choice, they would choose to Articling over completing the LPP. It may also be that more candidates than expected are ultimately finding Articling opportunities, albeit after an extended search. From a financial perspective, the LPP appears to be the least viable option as its implementation for all candidates could result in a total licensing fee of \$13,500 to \$15,000 (plus HST) per candidate, which is triple the current fee of \$4,710. It is foreseeable that some candidates may not be able to afford such fees, especially with significant tuition debts coming due and the lack of remuneration for the entire duration of the LPP. For some candidates, the financial barrier may foreclose them from the licensing process.

### C. Fairness in Remuneration

As outlined in these submissions, the TLA supports Option #2, including the requirement that Articling candidates be paid, at least at the statutory minimum wage.

We note that the evidence relating to Articling candidates not being paid is limited. The Articling Experience Survey administered by Dr. A. Sidiq Ali (the “**Survey**”), found that 4% of those who responded to the Survey did not receive any pay. While the Survey acknowledges that it is not “*statistically reliable or representative of the targeted population*”, a reasonable inference can be drawn that the proportion of Articling candidates who are unpaid is relatively low. If so, the steps that would need to be taken by the LSO to ensure that candidates are paid appears to be manageable, and these steps would not appear to impact a significant number of Articling jobs.

Apart from this, there will be variances in how licensing candidates are paid during their Articling term, which is inevitable in a legal profession that operates within a free market economy.

### D. Fairness and Power Imbalance

The question posed within the Consultation Paper in this section is: “[D]oes this inherent power imbalance support the suggestion that articling should be replaced by a new licensing system?”

The TLA recognizes that there is an inherent power imbalance between an Articling candidate and the firm or principal employing that candidate. The TLA commends the LSO for recently adopting new measures to combat any discriminatory conduct, including amending the *Rules of Professional Conduct* (in particular Section 6.3 – Sexual Harassment and Section 6.3.1 – Discrimination), to ensure they are up to date.

The noted inherent power imbalance is not unique to Articling. There is an inherent power imbalance in any employer-employee relationship. Regardless of Articling, candidates are going to experience such inherent power imbalance at some point in their careers.

The TLA does not support replacing the current Articling system on this basis.

### E. Consistency in Transitional Training

While candidates can receive varying experiences while Articling, it is important to recognize that 85% of respondents to the Survey indicated that a majority *of the work they had completed during their articling terms enabled them to develop legal skills.*”

Articling certainly results in varying levels of exposure and different training experiences, which is inevitable in a system where over 2,000 candidates are seeking to join our legal profession each year.

One practical outlook is to ask (1) does Articling improve the competencies of the candidate; and (2) does Articling provide for, on balance, a more qualified and experienced candidate than someone who did not Article. In our view, the answer is yes to both. A further question to

consider is whether Articling is the best process to provide the experiential training to ensure adequate entry level competence and protection of the public interest. In our view, the answer is yes.

## **Summary**

The TLA supports the proposed enhancements contemplated by Option #2.

As discussed above, the TLA supports candidates being paid at least the statutory minimum wage during their Articling period.

The TLA further supports there being greater oversight of Articling and work placements. While it is unclear where the funding will come from to support this greater oversight, it is a worthwhile objective.

The TLA also supports the proposed requirement that candidates be required to pass the barrister and solicitor examinations as a prerequisite to transitional training, and then pass a new skills examination in order to become licensed, assuming sufficient resources are in place to ensure for timely results of these exams. One of the benefits of requiring candidates to pass the barrister and solicitor examinations as a pre-requisite to transitional training, is that this could free up Articling spots (which are currently in short supply), from those who may never pass these examinations.

However, one of the risks associated with requiring candidates to pass the barrister and solicitor examinations as a prerequisite to Articling is that a candidate may miss Articling with his/her cohort and/or lose an Articling opportunity if they fail one of both of these examinations prior to the start of Articling. In order to mitigate the risk of this occurring, we recommend that the LSO give such candidates the opportunity to re-write a failed exam in time before the start of Articling. For example, if Articling commences in August of each year, a re-write period should be permitted between the initially-failed exam and August.

## **Comparison of the other Options**

### **Option 1: Articling**

As discussed above, the TLA supports the Articling regime. However, it is persuaded that the enhancements proposed by Option #2, will improve the existing licensing process.

### **Option 3: Examination Based Licensing**

With respect to Option #3, the TLA does not support an Examination only based licensing process. Such a regime would not provide for the experiential training that candidates want and expect. Moreover, as discussed above, experiential training, such as Articling, allows candidates to develop working relationships in the profession, and it also assists to protect the public interest.

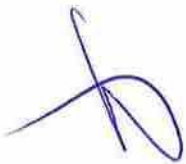
#### Option 4 – LPP/PDD for all Candidates

The TLA sees this Option as impractical due to the cost and administrative burden on the LSO, licensed lawyers and licensing candidates. The practice component of the LPP or any similar program involves short term placements of all candidates (currently approximately 2,400) in law offices. An Articling position is at least ten months, and this time provides a learning curve which, at its best, allows the candidate to gain a level of proficiency, see a file from opening to closing, or at least the completion of a significant stage, and be of value to the firm. The current LPP model of short-term placement requires a law office to set up the work space, technological support, and teaching/mentoring for a period that involves disruption to the office routine, and is often too short to allow candidates to follow a file through meaningful steps in the process. Furthermore, the cost appears to be prohibitive from the LSO's perspective, and that cost would be borne, ultimately, through additional fees paid by the licensing candidates – estimated in the range of \$13,500 - \$15,500 + HST.

The TLA therefore does not support this Option.

The TLA appreciates the opportunity to comment on the important issues and options raised within the Consultation Paper. The TLA looks forward to a continuing discussion with the LSO throughout the Dialogue.

Sincerely and on behalf of the Toronto Lawyers Association,



Dirk M. Derstine  
President  
Toronto Lawyers Association

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#### **Dialogue of Licensing Task Force Members:**

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