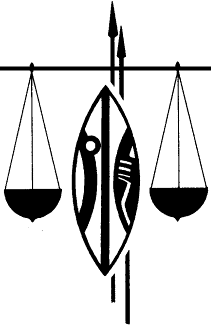

Written Submissions of the African Canadian Legal Clinic to the Law Society of Upper Canada Articling Task Force

March 2012

Moya Teklu
Policy Research Lawyer
Email: teklum@lao.on.ca
Phone: 416-214-4747 ext. 23

Roger Love
Advice Counsel
Email: lovero@lao.on.ca
Phone: 416-214-4747 ext. 25

African Canadian Legal Clinic
18 King Street, Suite 901
Toronto ON, M5C 1C4

Preface

Established in 1994, the ACLC is a not-for-profit organization incorporated under the laws of the Province of Ontario. The primary mandate of the ACLC is to engage in test case litigation in the areas of racial discrimination and anti-Black racism. The Clinic also acts as an advocacy agency and as a resource centre for individuals and other organizations dealing with racial discrimination.

The ACLC represents and advocates on behalf of the African Canadian community by: (i) addressing systemic racism and racial discrimination through a test case litigation and intervention strategy; (ii) monitoring significant legislative, regulatory, administrative and judicial developments, and (iii) engaging in advocacy, law reform and legal education aimed at eliminating racism in general and anti-Black racism in particular. In this capacity, the ACLC has made submissions to provincial, national, and international bodies on issues such as employment equity, access to justice and racial representation in the legal profession.[1]

[1] See, for example, African Canadian Legal Clinic, *Anti-Black Racism in Canada: A Report on the Canadian Government's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination,* (Toronto: African Canadian Legal Clinic, 2002) at 55-65.

Law Society of Upper Canada Articling Task Force

Introduction

In its Consultation Report, the 2011/2012 Articling Task Force identified what it considers to be the five best options for articling reform: (1) the status quo; (2) the status quo with a quality assurance improvement; (3) the replacement of a pre-licensing transition requirement with a post-licensing transition requirement; (4) a choice of either an articling requirement or a practical legal training course (PLTC) requirement; and (5) only a practical legal training course.

The ACLC is aware that the Task Force has proposed a number of questions for consideration.[2] Given the mandate and expertise of the Clinic, however, the following submissions will focus primarily on the issue of whether the proposed options are fair and ensure equality of access to all candidates, with particular regard to those of African descent. Considering the long-recognized exclusion of otherwise competent African Canadians from the legal profession, the ACLC is encouraged by the inclusion of this consideration in the Articling Task Force's consultation and trusts that the concerns and recommendations proposed in this brief will be reflected in the Task Force's final report and recommendations to Convocation in May 2012.

As explained further below, many of the options proposed by the Task Force will not serve to ameliorate the disadvantaged position of African Canadians in the legal profession, and may in some cases exacerbate the problem. As a result, the ACLC proposes that the best option is one that has not in fact been presented for review; that is, in addition to a quality assurance improvement, the Law Society must make a concerted effort to ensure that articling positions are available to all competent licensing candidates. In the alternative, the ACLC submits that fairness requires that the articling requirement be abolished altogether in favour of a practical legal training course (Option 5).

The Racialization of the Articling Shortage

In 1886, Delos Rogest Davis became one of the first African Canadian lawyers in Canada. While Davis completed his legal studies in the early 1870s, for years, prevailing racist attitudes prevented him from finding a lawyer to supervise his articles and satisfying the articling requirements of the Law Society of Upper Canada. Instead, for eleven years, Davis studied and practiced law at the level of legal clerk and was prohibited from handling most legal matters. His call to the Bar required two special acts of the Ontario Legislature (which were opposed by the Law Society of Upper Canada); the first, in 1884, allowed Davis to practice as a solicitor provided that he passed the requisite Law Society examination and paid the standard fee, and the second, in 1886, admitted Davis as a barrister, again on the condition that he pass the requisite examination. Delos Davis successfully completed both

[2] Does the option address the competency requirements of the licensing process? Does the option provide measurable standards? Is the option fair? Does it ensure equality of access to all candidates? Can the option be reasonably implemented?

written examinations. He was called to the Ontario Bar on November 15, 1886,[3] and on November 10, 1910, was appointed as King's Counsel.[4]

In 2012, almost 130 years later, two dissenting panellists in the disciplinary proceeding of an African Canadian lawyer, Mr. Selwyn McSween, recognized that "racialized lawyers continue to face barriers not experienced by their colleagues."[5] Mr. McSween, for example, had made countless failed attempts to secure an articling position before settling for a position that included carrying bags and picking up laundry but did not include any practical legal experience.[6]

Also, as noted by the 2011/2012 Articling Task Force, licensing process candidates from racialized communities continue to face disproportionate challenges in securing an articling placement.[7] The statistics are somewhat startling. In February 2011, 10% (128 out of 1,257) of licensing process candidates who did not identify as being from an equality-seeking community were unplaced, compared to nearly double that amount -- 19% (63 out of 332) -- of candidates who self-identified as coming from racialized communities. In June 2011, the disparity continued with approximately 8% of candidates who did not identify as being from an equality-seeking community being unplaced compared to approximately 15% of racialized candidates.[8]

The shortage of articling positions is a significant issue that will have implications for the legal profession across the country. It is of particular importance, however, to those racialized licensing candidates that will, *through no fault of their own*,[9] and due instead to systemic racial discrimination in the legal profession, bear the brunt of this shortfall.

This will also have important implications beyond the legal community. It is widely accepted that the nature, quality and effectiveness of the legal system are greatly dependent on the racial and socio-economic diversity of the individuals that practice law. "Access to justice is

---

[3] Charles C. Smith, "Who is Afraid of the Big Bad Social Constructionists? Or Shedding Light on the Unpardonable Whiteness of the Canadian Legal Profession" (2008) 45 Alberta L. Rev. 55 at 60 ["Unpardonable Whiteness"]; and Owen Thomas, "Davis, Delos Rogest" *Dictionary of Canadian Biography Online* (2000), online: Dictionary of Canadian Biography Online <http://www.biographi.ca/009004-119.01-e.php?id_nbr=7322>.
[4] Walkville Publishing, "First Black Lawyer in Canada" *The Times Magazine*, online: The Times Magazine <http://www.walkervilletimes.com/black-lawyer.htm>.
[5] *Law Society of Upper Canada v. Selwyn Milan McSween*, 2012 ONLSAP 0003 at para. 73 [*McSween*].
[6] Kendyl Sebesta "Ruling tackles racism in legal profession: Lawyer blames troubles on disadvantages of articling experience" *Law Times News"* (30 January 2012), Vol. 23, No.4. Perhaps not surprisingly, Mr. McSween's licence to practice law was revoked for professional misconduct shortly thereafter.
[7] Law Society of Upper Canada, *Articling Task Force: Consultation Report*, (Toronto: The Law Society of Upper Canada, 2011) at 11 [*Articling Task Force*].
[8] *Ibid.* at 6.
[9] *Ibid.* at 11 and Appendix 6 ("Unplaced Candidates Grade Values – Licensing Year 2010-2011"). The system is not merit based. The licensing candidates that cannot find articles are no less qualified than those that can. The overrepresentation of equity-seeking groups among those licensing candidates that are unable to secure articling positions is in no way reflective of the relative competence or any other objectively measurable criteria of these articling students. As noted by the Task Force, the group of unplaced individuals includes those with good grades; the majority of which fall in the B- to B+ range. Rather, success in finding an articling position is based more on "fit" with a particular firm culture and other highly subjective and problematic criteria.

enhanced by a legal profession that reflects the public it serves."[10] If otherwise capable and qualified racial minorities are prevented from entering the practice, access to justice for their respective communities will also be negatively affected.

The exclusion of otherwise capable racialized persons from the legal profession is not new. Further, the problem of systemic racism in the legal profession has long been recognized. In 1999, for example, *Racial Equality in the Canadian Legal Profession*, a report published by the Working Group on Racial Equality in the Legal Profession of the Canadian Bar Association, revealed that students from racialized communities have fewer opportunities to secure articling positions and first jobs. Similarly, in 2008, the Licensing & Accreditation Task Force acknowledged the importance of monitoring the challenges that candidates from Aboriginal, Francophone, racialized, disabled and other communities face.[11]

While the ACLC is encouraged by the Articling Task Force's recognition of the disproportionate impact that the articling shortage is having on members of racialized communities,[12] it notes with concern that "[t]he legal profession has made no concerted effort to rid itself of the racism inherent in the practice."[13] For example, while the challenges faced by equity-seeking groups were acknowledged by the 2008 Licensing & Accreditation Task Force, this appears to be one of the only issues that was not directly addressed in the Law Society's Motion on the issue.

Under Options 1 and 2, the market acts as a gatekeeper to otherwise qualified licensing candidates, preventing them from completing an essential component of the licensing process. The ACLC submits that any recommendation of the Task Force that does not address the growing shortage of articling positions and the disproportionate impact of this shortage on otherwise qualified and capable racialized licensing candidates cannot be considered fair or equitable to all candidates.

For these reasons, the ACLC cannot recommend Options 1 or 2.

The Two-Tiered System for Licensing Candidates at Small and Large Firms

Under Option 3, licensing candidates entering "higher risk" practice structures (i.e. sole or small firm practices) would be required to complete a "rigorous curriculum focussing on sole and small firm practice issues, have a mentor, and be assessed during their first year."[14] Lawyers practicing in firm structures of six or more lawyers, on the other hand, would not be required to meet any additional requirements.

---

[10] Michael Ornstein, *Statistical Snapshot of Lawyers in Ontario: From 2009 Lawyer Annual Report*, (Toronto: The Law Society of Upper Canada, 2009) at 1 [*Statistical Snapshot*].
[11] *Articling Task Force, supra* note 7 at Appendix 7 ("2008 Licensing & Accreditation Task Force) at 3. See also "Unpardonable Whiteness", *supra* note 3.
[12] Persons who self-identified as coming from a "racialized community" accounted for 16.4% of the total 26.6% of equity-seeking groups.
[13] *McSween, supra* note 5 at para. 73.
[14] *Articling Task Force, supra* note 7 at iv.

The ACLC recognizes that sole practitioners and firms of five or fewer make up the majority (approximately 52%) of lawyers in private practice in Ontario and 94% of all firms in the province.[15] The ACLC also notes that 31% of racialized lawyers practice in firms of five or less.[16]

Given the "challenging nature of sole and small firm practice and the higher risks for complaints and negligence claims that those challenges engender,"[17] the ACLC welcomes the introduction of additional safeguards and supports through training and mentoring opportunities for this group. However, the ACLC submits that any measure that increases the exposure of licensees in sole and small firm practice structures to "regulatory implications" must be viewed with concern.

While the Law Society does not record the race of disbarred lawyers or track the racial or ethnic backgrounds of the lawyers who are investigated for regulatory compliance or charged with professional misconduct, it has been noted that "Benchers see a quite disproportionate number of African Canadian lawyers before them in disciplinary hearings."[18] Similarly, a 2008 report of the Solicitors Regulation Authority, which is the British equivalent of the Law Society of Upper Canada, found that

> the regulatory body had been discriminating against black and minority lawyers and had been inappropriately subjecting them to potentially damaging investigations and penalties. According to the report, firms whose lawyers were predominantly of African and Caribbean descent were six times more likely to be closed down than those whose lawyers are mainly white. Firms of predominantly Asian lawyers were three times more likely to be closed down.[19]

Disproportionate rates of discipline are not unique to the legal profession. As a result of the systemic anti-Black racism that is entrenched at all levels of Canadian society, African Canadians are also overrepresented among, *inter alia*, prison populations,[20] suspension and expulsion rates in educational institutions,[21] and occurrences of discrimination in the employment context; i.e., "excessive performance monitoring" or being more seriously blamed for a common mistake.[22] Given reports of the disproportionate rate of discipline of African Canadian lawyers, it is submitted that any measure that subjects lawyers that practice in smaller firms to a higher level of scrutiny will inevitably have an unfair impact on racialized members of the legal profession.

---

[15] Law Society of Upper Canada, *Sole Practitioner Task Force,* (Toronto : The Law Society of Upper Canada, 2005) at 6.
[16] *Statistical Snapshot, supra* note 10 at 3.
[17] *Articling Task Force, supra* note 7 at 21.
[18] *McSween, supra* note 5 at para. 77.
[19] *Ibid.* at para. 74-76.
[20] Alison Crawford, "Prison watchdog probes spike in number of black inmates" *CBC News* (15 December 2011), online: http://www.cbc.ca/news/politics/story/2011/12/14/crawford-black-prison.html.
[21] Ontario Human Rights Commission, "Backgrounder - Human Rights Settlement Reached with Toronto District School Board", online: http://www.ohrc.on.ca/en/resources/news/Nov142005Backgrounder.
[22] Ontario Human Rights Commission, *Policy and Guidelines on Racism and Racial Discrimination*, (9 June 2005), online: <http://www.ohrc.on.ca/en/resources/Policies/RacismPolicy/pdf>.

For these reason, the ACLC cannot support Option 3 as fair and equitable to all candidates.

The Added Barrier Caused by Increased Costs

Under Option 4, the current articling shortage would be addressed through a practical legal training course ("PLTC") requirement, either after law school or during the law school program. The PLTC program would provide a viable alternative for those who are unable to secure a paid articling placement. This option addresses the articling shortage and does not expose a certain class of licensing candidates or legal professionals to a higher level of scrutiny. However, because PLTC students would be required to pay for their training (approximately $7,600) while articling students would be paid,[23] this option raises several serious concerns with respect to accessibility.

First, racialized lawyers tend to graduate with higher debt loads and have significantly lower earnings than their white counterparts. In 2004, it was reported that African Canadian students were twice as likely as their cohorts to leave law school with an accumulated debt of over $70,000 and that significant numbers of South Asian students had similar debt loads.[24] In 2010, it was reported that

> There is strong evidence that racialized lawyers have significantly lower earnings than White lawyers the same age. The difference in the median earnings of racialized and White lawyers, just $4,000 per year for lawyers between 25 and 29, grows to more than $40,000 by ages 40 to 44.[25]

Second, there is evidence to suggest that accumulated student debt impacts job preference. In 2003, for example, the Canadian Bar Association ("CBA"), while not coming to a conclusive determination, noted that the decline in students taking articling positions in small firms occurred most dramatically from 1997 (48%) to 2000 (38%), at a time when tuition fees were climbing. The CBA also noted a corresponding increase of students who accepted articling positions in large firms during the same period – from 31% in 1997 to 47% in 2000. The CBA noted that these "quite dramatic" shifts in student choices could support the contention that increasing tuition fees influenced career choice.[26] The CBA also noted that "it seems obvious that debt burdens make it impossible for students to choose legal aid as their path of choice."[27]

---

[23] *Articling Task Force, supra* note 7 at 25.

[24] Alan J.C. King, Wendy K. Warren, Sharon R. Miklas, *Social Program Evaluation Group: Study of Accessibility to Ontario Law Schools*, (Toronto: Queen's University, October 2004) at 133.

[25] Michael Ornstein, *Racialization and Gender* (Toronto: The Law Society of Upper Canada, 2010) at ii.

[26] Canadian Bar Association, *Response to the Provost Study of Accessibility and Career Choice in the University of Toronto Faculty of Law*, (Ottawa: The Canadian Bar Association, April 2003) at 14 [*Study of Accessibility and Career Choice*].

[27] *Ibid.* at 15. See also Lynn Schultz-Writsel, "From Paper Chase to Money Chase: Law School Debt Diverts Road to Public Service" *LSC Resource Information* (8 October 2007), online: LSC Resource Information <http://lri.lsc.gov/paper-chase-money-chase-law-school-debt-diverts-road-public-service>. This article provides some discussion on the critical question of whether accumulated student debt leads to job preference or job preference leads to willingness to accumulate debt.

Third, equality-seeking groups remain under-represented in medium and large firms. In 1998, Michael St. Patrick Baxter suggested, "Here is the reality. Based on the 1997 Canadian Law List, there are about 23 Bay Street firms in Toronto. These firms represent a total of about 3,117 lawyers. Of these 3,117 Bay Street lawyers, about 20 are Black."[28] There is little evidence to suggest that this situation has dramatically improved in the last fifteen years. In 2010, it was reported that only 19% of racialized lawyers practice in firms of six or more lawyers.[29] In September 2010, the Canadian Association of Black Lawyers celebrated those African Canadian lawyers that achieved partnership status at Toronto's largest corporate firms. Seventeen individuals were honoured. There are more than 2,000 partners at work in "Bay Street" firms.[30]

Taken together, African Canadian law students leave law school with more debt, have significantly lower earnings than their white counterparts, and face more limited practice opportunities at the larger firms whose level of pay might compensate for the high cost of acquiring a license to practice law.[31] "For those who will have just completed three years of law school, preceded in most cases by three to four years of undergraduate education, additional debt might seem onerous."[32] For African Canadian law students this is a certainty.

In 2004, the Canadian Centre for Policy Alternatives suggested that higher tuition fees result in lower rates of participation in higher education.[33] Similarly, researchers at the University of Guelph found that 40% fewer students from low-income families were attending university after tuition fees rose.[34] In 2003, the CBA, in response to the increased tuition fees at the University of Toronto, Faculty of Law, stated:

> It is also our contention that the increase in tuition fees will erode efforts to create a legal educational environment and legal practice that is reflective of the population it serves, or indeed a profession that has the capacity to meet the service needs of a diverse community. The least that can be said is that increasing tuition fees at this time will contribute in no way to increasing the racial and cultural diversity of the legal profession or the numbers of those interested in seeking careers in smaller or less urban law firms or in public interest law.[35]

---

[28] Michael St. Patrick Baxter, "Black Bay Street Lawyers and Other Oxymora," (1998) 30 Can. Bus. L.J. 267 at 270. See also Michael St. Patrick Baxter, "Black Bay Street Lawyers: Looking Back, Looking Ahead," (1994) 20 *Law Society Gazette.*
[29] *Statistical Snapshot, supra* note 10 at 3.
[30] Jeff Gray, "Each of you has blazed a trail that has not existed before" (28 September 2010), online: < http://www.weirfoulds.com/files/6535_Articles_Globe_FEW_10Sept28-2.PDF>.
[31] **All of these problems would likely be exacerbated by the possibility that the PLTC will create two classes of lawyers, those who article, who could be perceived as the "preferred" graduates, and those who complete the PLTC.** *Articling Task Force, supra* note 7 at 26.
[32] *Ibid.* at 26.
[33] Denise Doherty-Delorme & Erika Shaker, ed., "Missing Pieces V: An Alternative Guise to Canadian Post Secondary Education" *Canadian Centre for Policy Alternatives*, (Ottawa: Albert Street, 2004) at 75.
[34] Charles C. Smith, "Comments on Methodologies for Law School Accessibility Studies: A Background Paper for the Standing Committee on Equality/Canadian Bar Association" at 1-4.
[35] *Study of Accessibility and Career Choice, supra* note 26 at 2-3.

Given the relationship between debt loads and areas of specialization, any added cost must also be considered in light of its impact on broader issues of access to justice; i.e. pushing a larger number of recently licensed lawyers away from areas of public interest and poverty law. It is also possible that increasing the cost of practicing law for candidates that cannot find placements in larger and higher-paying firms will distort the cost-benefit analysis and dissuade these individuals from pursuing a legal career in the first place.

> It is … difficult to assess whether or not potential students will be willing to invest in an educational career at such a high cost if their career opportunities are, or even are merely perceived to be, dramatically limited as is the case for women, Aboriginal peoples, persons with disabilities and individuals from subordinate racialized groups.[36]

The inevitable result of any additional cost without a corresponding gain for this group will be that large numbers of individuals from racially and socio-economically disadvantaged groups will be deterred from pursuing a legal education or career.[37]

For these reasons, the ACLC cannot support Option 4 as fair or equitable to all candidates.

The Importance of Objective Criteria to Monitor Articling Experiences

The ACLC notes with concern the long-standing recognition that even when African Canadian licensing candidates are able to obtain articles, their experiences are not equal in quality to those of their counterparts. In 1999, for example, the *Racial Equality in the Canadian Legal Profession*, a report published by the Working Group on Racial Equality in the Legal Profession of the Canadian Bar Association, revealed that students from racialized communities did not benefit from the same articling experience as their non-racialized colleagues who were introduced to more clients, assisted more senior lawyers on important or more complex cases, and conducted research on a broader range of files.[38] Also, due to a lack of hiring by medium and large firms, African Canadian law students often find themselves completing their articles with sole practices and small firms. As noted by the Articling Task Force, smaller practice structures are “higher risk” while students “under supervision in larger practice settings are less likely to run into difficulty, often receiving transitional training within the firm structure.”[39]

The quality of the articling experience should not vary according to the practice structure in which one articles or according to one’s racial background. The Law Society must ensure quality control. As such, whichever option is adopted, the ACLC supports the formulation and adoption of objective, impartial and fair criteria to measure whether the goals of articling are

[36] *Study of Accessibility and Career Choice, supra* note 26 at 8.
[37] *Ibid.* at 9. See also Vilko Zbogar, *Challenging Tuition Fee Policy: Discussion Paper*, December 22, 1998. See also “Unpardonable Whiteness”, *supra* note 3 at 66.
[38] Council of the Canadian Bar Association by the Working Group on Racial Equality in the Legal Profession, *Racial Equality in the Canadian Legal Profession*, (Ottawa: The Canadian Bar Association, 1999).
[39] *Articling Task Force, supra* note 7 at 22.

being achieved and to ensure that the articling experience is reasonably consistent for all articling students.

The Importance of Articles and Other Considerations

Option 5 -- the Practical Legal Training Course for all students– appears to be the only option presented by the Articling Task Force that addresses the Clinic's concerns with respect to the disadvantaged position of African Canadian law students and lawyers, the racialization of the articling shortage, the ghettoization of African Canadian lawyers into certain practice structures, the disproportionate rates of discipline of African Canadian legal practitioners, the effect of increased costs on accessibility, and the need for quality assurance.

However, the ACLC submits that a practical legal training course cannot adequately provide practical, hands-on legal training. As noted by the Articling Task Force, articling seeks to achieve a number of very important goals. It provides law school graduates with orientation to the "real world" of the legal profession; assists them to understand the role of lawyers in representing clients and officers of the court; provides guidance on the ethical responsibilities they must address as they navigate their way through professional situations; facilitates mentoring and other networks; and provides exposure to the practice of law as a business enterprise.[40] For these and other reasons, the ACLC feels strongly that articling is a valuable and essential part of the legal learning process and should not be abolished.

Rather, the ACLC proposes that the Articling Task Force address both access to justice and barriers to entering the profession by adopting the following measures:

1. Address the articling shortage; and
    a. Subsidize certain types of firms to hire articling students; or
    b. Cap all articling salaries so small firms and legal aid clinics become more attractive options and large firms can hire more students for the same amount of money; or
    c. Provide funding to augment the number of articling students working in not-for-profit organizations and clinics.
2. Articulate standards and systemic development measurement tools against which students and articling placements are assessed.

Conclusion

Given the overrepresentation of equality-seeking groups among unplaced licensing candidates, it is imperative -- for reasons of fairness, equity, and access -- that any proposal put forward by the Articling Task Force address the articling shortage. As demonstrated by

[40] *Ibid.* at i.

these submissions, however, the problems facing African Canadians in the legal profession go beyond the articling shortage to unequal articling experiences, higher debt loads, lower earnings, more limited practice opportunities, and disproportionate rates of discipline. These problems must also be reflected in the Task Force's final recommendation.

In addition, the ACLC urges the Articling Task Force and the Law Society to look beyond the numbers and consider how it is possible that after 130 years, the same problems that befell Delos Rogest Davis continue to confront African Canadians in the legal profession. The options presented by the Articling Task Force provide a short-term solution to the problem but if there is to be meaningful and long-lasting change, the larger underlying issues of marginalization and systemic discrimination must also be addressed through such things as anti-racist education, a review of hiring policies and practices, and active encouragement of racially diverse hiring and retention practices. All of this must be coupled with the tools to monitor the results and effects of any adopted measures.

The ACLC thanks the Task Force for the opportunity to raise the particular concerns of the African Canadian community and trusts that the concerns and recommendations proposed in these submissions will be reflected in the Task Force's ultimate recommendations and motion to Convocation in May 2012. We are available for any questions, comments or concerns that the members of the Task Force may have.