WINDSOR LAW
University of Windsor

**Memo**

TO: LSUC Articling Task Force
FROM: Academic Planning Committee
DATE: March 15, 2012
RE: Articling Task Force Report

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A sub-committee of the Academic Planning Committee was struck to consider the LSUC's Articling Task Force Report dated December 9, 2011 (the "Report"). The Task Force has requested feedback from Ontario's law schools, students and the profession by March 15, 2012. Treasurer Pawlitza and other members of the Task Force visited the law school on February 16, 2012 to discuss the Report.

This memo was presented to Faculty Council on February 27th and summarizes the various views of members of the sub-committee, of other members of the Academic Planning Committee, and of administration and faculty who have offered input to date. It is not intended to set out a recommended position vis-à-vis the Report; rather, we hope it will serve as a starting point for further discussion with the LSUC Task Force.

## General Comments

1. The premise that there is an "articling crisis" requiring swift action is questionable. According to the LSUC's August 2011 Placement Report,[1] 91 out of 1748 students who graduated in 2010 were "actively seeking" articling placements; an additional 63 students who were not articling in Ontario had obtained jobs abroad or in non-legal fields. Twenty students could not be reached and their status, therefore, was unknown. At worst, therefore, the articling shortage as of last fall was about 6%. This figure is consistent with historical averages. While the LSUC and law schools collectively should continue to assist that 6% segment, it does not appear that there is a "crisis" currently warranting a sea change in our approach to the licensing process.

2. Nevertheless, the proportion of graduates without articling positions may increase over time given a number of variables: the number of law schools is increasing; there is institutional pressure to increase the size of the incoming class; the number of articling positions has not increased in step with the growing number of

[1] LSUC, Placement Report 2010 Licensing Process (August 2011), available online at http://www.lsuc.on.ca/ar50/.

law school graduates; and foreign-trained lawyers will continue to seek admission to the bar here.

3. So while there may be no true crisis, complacency is not desirable either. The current attention to the issue of articling calls for thoughtful dialogue and a principled approach to the issue. The sub-committee proposes three such principles: *competence*, *fairness* and *access to justice*.

4. It is unclear precisely what mischief the Report aims to correct. Is the overriding concern the unnecessary erection of barriers to entry to the profession? Or is the main focus on ensuring quality articling experiences (or an adequate substitute)? Or is it a perceived 'crisis' in the number of placements? If *competence* is the predominant concern, then it would be helpful for the LSUC to elucidate the competencies that it says must be afforded by way of articles. The current list of competencies set out under "Articling Goals and Objectives" and "Articling Assignments Checklist" (Appendix 3 to the Report) is too broad; for example, judicial clerks do not meet all of the requirements, yet they qualify to be called to the bar. Integral to any reform effort will be a focused and principled enunciation of the competencies to be mastered in any transitional training. Only then will it be possible to offer meaningful feedback on the adequacy and feasibility of alternatives to the articling model.

5. Any changes to the current approach to licensing must seek to be *fair* to the parties involved, including students and law schools. The brunt of reform to the articling model should not fall solely on either students or law schools or the profession. Fairness also dictates that the cost of reform be particularized and considered. Worth noting here is that the cost of the options outlined in the Report has not been calculated.

6. Finally, there is an opportunity here to improve *access to justice* that we should not squander. There is a continuing deficit of articling positions in social justice, poverty law and community legal services.[2] There are ways to respond to that particular shortage. For example, since 2005 the Law Foundation of Ontario has funded between six and 17 articling positions annually at non-profit organizations and community clinics.[3] The LSUC should consider creating funding opportunities and other incentives to place students in those settings, thereby generating new articling positions while at the same time training students to provide legal services in under-serviced communities/areas of the law. Further, the LSUC has an important role to play in lobbying the provincial government for increased funding to Legal Aid, and in this way promoting the creation of additional positions for lawyers and law students in

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[2] According to Appendix 4 of the Report, approximately 1% of all articling positions are with legal clinics, and 11% are with firms employing fewer than five lawyers. Most social justice work in the private sector would likely be found in small firms or legal clinics.

[3] Mark Sandler, "Access to justice must play a role in articling solutions" *Law Times* (Feb. 6, 2012).

some of the most under-served areas. The LSUC could similarly press the government for subsidies or other financial incentives to small firms and NGOs to help fund articling positions. The sub-committee endorses the University of Ottawa's call for greater attention to access to justice initiatives that would facilitate the placement of articling students in settings where they would provide much needed legal services to low- and middle-income Ontarians.[4]

## Specific Comments

7. There are numerous implications of a principled approach for the five options offered in the Report. We outline below the main points raised within and to our sub-committee.

### Option 1: Status Quo

8. The Report has given rise to a unique opportunity for lawyers and the LSUC to take concrete steps to improve access to justice, one of the LSUC' six priorities for the next four years,[5] and a statutory duty under the *Law Society Act*.[6] The status quo, therefore, would represent a lost opportunity.

### Option 2: Status Quo with Quality Assurance Improvements

9. There does not appear ever to have been any assessment of the quality of an articling placement, nor is there any benchmark by which to make such an assessment. There is good reason to support the LSUC's efforts in this regard, as it appropriately puts some onus on law firms to ensure students are properly trained. We encourage the LSUC, possibly with the assistance of law schools, to train articling principals. Like option 1, however, option 2 does not address the access to justice principle, nor does it fix the problem of too few articling positions for lawyers seeking to be licensed.

10. A variation of this option not discussed in the Report is to keep the Articling Program but with significant revisions. Law firms proffer two main reasons for not hiring any or more articling students: the current program is too expensive, and the job of an articling principal is too onerous. The LSUC has already signalled that it is prepared to accept as adequate a transitional training period that is less than six months (if conducted in a classroom setting with a co-op placement in a firm [Options

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[4] Submission by Ad Hoc Working Group on Articling and Access to Justice (University of Ottawa).

[5] Thomas Claridge, "Access, standards among LSUC priorities" *The Lawyers Weekly* (Jan. 20, 2012), p. 8

[6] *Law Society Act*, R.S.O. 1990, c.L.8, s. 4.2(2), which obligates the LSUC "to facilitate access to justice for the people of Ontario."

4 and 5]). A streamlined articling program with a concise set of objectives would be both more affordable and less time-consuming than the current ten-month placement.

11. In response to this proposal, law firms may say that it is not possible to recoup their investment in a student in less than ten months. Similar objections were raised when the length of articles was shortened from eleven to ten months. A streamlined, focused articling program is premised on a fundamental normative view of articles as transitional training offered by firms and lawyers in conjunction with their professional obligations to the bar and with a view to meeting specific competence objectives. Articling need not – and indeed should not – be premised on either a profit-generating or a recruitment model.

12. Firms may also object to a shorter articling period on the basis that they cannot do effective training of students in fewer than ten months. Without any empirical or qualitative data on the outcomes of articling placements, it is impossible to assess whether this claim is true. However, the current program is broad and unfocussed, with students expected to do everything from analysing a NUANS search, to drafting appropriate documents in a child protection proceedings, to attending at a custodial facility to interview a client.[7] If the LSUC were to narrow the scope, prioritize competencies and provide for proper training and marketing of the reformed articling model, articling would be more feasible for a greater number of firms.

**Option 3: Replace Articling with a Post-Licensing Transition Requirement**

13. This option targets only new lawyers entering "high risk" employment, defined as sole and small firm practice. This option focuses on the quality of training, distinguishing between those new lawyers who will be presumed to work under supervision (by virtue of being in a larger firm) and those who will not have any supervision. The latter will be required to have a mentor, complete a curriculum of some sort aimed at sole practitioners, and undergo assessment.

14. In combination with other strategies or options, a compulsory licensing exam before formal transitional training addresses (at least to some extent) both competence and fairness (in that everyone would be required to meet the requirement). Query, however, whether this option raises mobility issues for Ontario-trained lawyers who wish to be called to the bar in other provinces that continue to have an articling requirement.

15. From an access to justice perspective, this option would only be equitable if the LSUC were to absorb the costs of this post-licensing program. Failing to underwrite this program would create additional barriers to entry for young lawyers and deter

[7] Report, Appendix 3.

graduates from going to rural and other under-serviced areas.[8] This option would also have to be coupled with quality assurance benchmarks and assessment to ensure that those students deemed to be "under supervision" actually obtain adequate training.

**Option 4: Articling or Practical Legal Training Course (PLTC)**

16. Of all the options, options 4 and 5 appear to be favoured by the Task Force. Law schools are most directly affected by these two options. Both raise a significant number of important issues requiring further careful discussion

17. There is a great deal of concern that this option risks creating a two-tiered licensing scheme that would stigmatize those graduates who have no choice but to take the PLTC option. Dean Cameron's experience in Melbourne, where the two-tier model is in place, is that notwithstanding the quality of the PLTC, many people view it as a second-best option to a traditional articling program.

18. The LSUC's favoured approach appears to be that law schools would become the "third party providers" of the PLTC; in such a scenario, the market and the LSUC would expect to have (or would get de facto) control over a substantial component of legal education. Such an extensive involvement in the shaping of the law school curriculum would be met with much resistance by the academy; legal education is much more than practical training.

19. The notion of using law school as a substitute for transitional training is questionable. Academic lawyers are not best-suited to the task of transitioning students; 'transition' involves actual legal work in 'real time' as opposed to classroom teaching. The Carnegie Report,[9] cited extensively in the Task Force Report, highlighted the need for law students to undergo three apprenticeships in order to be prepared for the practice of law: legal reasoning ('thinking like a lawyer'); practical training; and the development of a moral and professional identity.[10] The Carnegie Report's recommendation that simulation, clinical experiences, and externships play a larger role in legal education arose in the specific U.S. context where formal apprenticeships have never had a place. There is no suggestion in the Carnegie Report that the long-term immersion of students in real client and firm settings, as opposed to simulations or short-term clinic work, is an inferior method of achieving the second apprenticeship. Indeed, many U.S. schools offer extensive externships with law firms

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[8] For a detailed account of the rural access to justice problem, see Jamie Baxter and Albert Yoon, *The Geography of Civil Legal Services in Ontario* (November 2011), available online at http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147486236.

[9] William M. Sullivan et al., Educating Lawyers: Preparation for the Profession of Law (Jossey-Bass 2007).

[10] Ibid. at 28.

precisely to give the very kind of practical training captured by most articling placements in Ontario.[11]

20. It is also worth noting that previous attempts by law schools to expand clinic programs have periodically met with resistance by the bar, on the basis that clinic students are in essence practicing law when not competent to do so and therefore put their clients at risk.[12] A PLTC model that relies upon an increase in clinic offerings would require not only extensive additional funding (for supervising lawyers and physical space), funding that Legal Aid Ontario is currently unable to provide, but would also need the active support of the bar and judiciary.

21. While we can all agree on the value of increasing the clinical and experiential learning opportunities in our course offerings, these are expensive, time-intensive pedagogies. It is dangerous to compare Canadian law schools to American schools which have long had very extensive clinic programs that essentially operate as mini law firms; these are heavily subsidized by large institutional funders, like the Ford Foundation,[13] which have no counterparts in Canada. A PLTC that imposes an obligation on law schools to train lawyers would have to be significantly underwritten by the LSUC (in much the same way that the former Bar Admission course was funded); the suggestion that the PLTC be undertaken on a non-profit basis is unrealistic.[14]

22. The articling period could be shortened, and the concomitant financial obligation of the principal lessened, if the LSUC were to recognize the acquisition of skills outside of the traditional articling experience. Other professions have interesting models to help document the mastery of a set number of competencies. For example, architects are required to produce a portfolio of work that may be performed for one or several 'principals', including on a pro bono basis. Law students could similarly master a number of competencies through pro bono work, clinic work, and summer employment outside of the traditional law firm setting.

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[11] Examples abound, but for only one illustration, see this recent write-up of a D.C. law firm that takes on externs as its "farm team" before hiring them as associates: http://www.wcl.american.edu/news/garygilbertstory.cfm.

[12] For an account of such resistance in the Windsor legal community, see Neil Gold, "Legal Education, Law and Justice: The Clinical Experience" (1979-80) 44 Saskatchewan L. Rev. 97 at 111 and Rose Voyvodic and Mary Medcalf, "Advancing Social Justice Through an Interdisciplinary Approach to Clinical Legal Education: The Case of Legal Assistance of Windsor" (2004) 14 Journal of Law and Policy 101 at 112.

[13] Ford Foundation, *Ford Foundation Grantees and the Pursuit of Justice*, online: http://www.fordfoundation.org/pdfs/library/grantees_justice.pdf.

[14] Report, p. 23.

23. The additional financial burden students will be forced to carry if they have no choice but to take the PLTC will be significant, particularly for already marginalized students. The psychological stress experienced by students who do not obtain articles early in the hiring cycle can affect their health and academic performance, and could be compounded by the increased debt load. It is also questionable whether the PLTC would be eligible for OSAP.

24. The reference to the Carnegie Report as a justification for PLTC in the third (some say fourth) year of law school is somewhat misleading. That report did call on law schools to do more than impart doctrinal knowledge to students. Our law school already embraces the notion of an academic degree that incorporates experiential and clinical learning. Practical training, however, should not be seen as an alternative to a third year of law school. Indeed, with very few exceptions,[15] the Carnegie Report did not result in American law schools devoting their third year curriculum to experiential learning.

25. Because the competencies to be mastered by articling students have not been elucidated, it is impossible to know either the length of the proposed PLTC or its cost. Clearly both issues are of immense importance to law students.

26. Mobility issues also arise with this option.

27. We learned in the Consultation Session on February 16th at the Windsor Law School that the LSUC Task Force envisions some "in firm" training as fundamental to any PLTC. For example, if the total length of the PLTC were four months, up to two months would be spent in firms doing actual legal work under the supervision of a lawyer. Whether students would be paid for this part of their training, and the role of the LSUC in finding sufficient co-op placements are issues that have not been worked out. Nevertheless, the LSUC's continued reliance on law firms to do at least some of the transitional training is heartening, and suggests that in principle, a streamlined articling program (as discussed above in paragraphs 10-12) is a reasonable alternative to the present licensing system.

**Option 5: PLTC Only**

28. Although the two-tier concern is avoided under this option, the same questions and concerns arise here as outlined under option 4, above. In addition, eliminating articling altogether potentially places all responsibility for transitional training on law schools. Such a scenario is not fair. Lawyers have long prided themselves on a professional identity that includes a responsibility to train and mentor young lawyers. While it may be impossible (and probably undesirable) to require law firms of a certain

[15] The only school of which we are aware that has adopted the Carnegie approach wholesale is Washington & Lee. In addition, the Carnegie Report is not without its detractors. See Mark Yates, "The Carnegie Effect: Elevating Practical Training Over Liberal Education in Curricular Reform" (2011) 17 Journal of the Legal Writing Institute 233 at note 2 (listing critical responses to the Report).

size to take on a minimum number of articling students, the LSUC should send a clear message that lawyers have an obligation to train and mentor. Further, the LSUC ought to consider creating and enhancing incentives to take on students (for example, reduction of LSUC fees, credit for the CPD requirement, shared articles, etc.), and of training programs for lawyers serious about becoming good principals.

## Possible Points of Consensus

29. Although this memo is purposely drafted to convey the spectrum of views received by the sub-committee, some points of consensus emerge:

a. Although not currently a true crisis, the shortage of articling positions may become an issue in the near future with the increase in additional law schools and foreign-trained lawyers.

b. It would be unfair and inimical to access to justice for the LSUC to outsource the articling 'problem' to law schools.

c. The third year of law school should not be viewed as the substitute for transitional training. Replacing the third year of law school with a PLTC has enormous normative, financial and logistical implications. Consensus with all Ontario law schools needs to be reached before imposing any PLTC requirement on these public institutions whose mandate is to educate future lawyers who are well-rounded, intellectually curious, and committed to promoting justice in the broader sense.[16]

d. If a PLTC model is adopted, experiential learning opportunities (such as long-term clinic placements, internships and externships) should 'count' toward any PLTC requirement.

e. A fourth year of law school is very likely to be untenable, particularly from the law students' perspective, given the increased financial burden of such a step, coupled with a one-year delay in entering the work force.

f. Other potential work placements should be considered by the LSUC in its broader approach to what constitutes practical and transitional training. For example, corporate in-house counsel groups, University lawyers, and other non-traditional articling placements should be considered.

g. The Report provides an important opportunity for the LSUC to revisit its statutory obligation to increase access to justice.

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[16] Ironically, the Carnegie Report shares this vision of a liberal education: supra, note 9.

h. Any PLTC option (whether in addition to or instead of articling) must be underwritten by the profession, instead of solely by law students or law schools.