



March 1, 2015

BY EMAIL: jbouchar@lsuc.on.ca

Josée Bouchard
Director, Equity Initiatives Department
The Law Society of Upper Canada
Osgoode Hall
130 Queen Street West
Toronto, Ontario

Dear Ms. Bouchard:

Re: *LSUC Consultation on Developing Strategies for Change: Addressing Challenges Faced by Racialized Licensees* (“Consultation Paper”)

INTRODUCTION

- [1] The Indigenous Bar Association (IBA) was not specifically invited to participate in this consultation, but makes this submission in response to LSUC’s general request for input from the legal profession.
- [2] At the outset, the IBA would like to commend the LSUC for its efforts in addressing issues of discrimination facing racialized licensees, particularly systemic discrimination. The IBA supports this initiative and also supports the LSUC’s overarching strategy of access to justice.
- [3] The IBA also supports the special initiatives underway within the LSUC to engage Indigenous/Aboriginal licensees in a special process of consultation aimed at addressing some of the unique needs and interests of Indigenous peoples. However, the IBA is disappointed that Indigenous licensees appear to have been excluded from the scope of the consultation on challenges faced by racialized licensees.
- [4] The IBA acknowledges the rationale for the differential treatment of Indigenous licensees: Indigenous peoples have a unique history and collective rights and interests that are different from those of other Canadians, including members of racialized groups. However, the LSUC needs to keep in mind that individual Indigenous licensees are also “racialized licensees”, who face many of the same

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challenges as other racialized licensees, in terms of discrimination within the profession and the legal system overall.

- [5] Indeed, arguably because of the history and impacts of colonialism, legislated assimilationist policies and Indian Residential Schools, Indigenous people and licensees face much bigger and more complicated challenges because of the historic disadvantages that tend to be perpetuated by the status quo inherent in the legal system. The discrimination is systemic.
- [6] In addressing the challenges that face Indigenous licensees, the LSUC will need to employ an approach that addresses both the unique and collective challenges as well as the individual challenges facing Indigenous licensees.
- [7] This submission will begin with a brief background on the IBA. This will be followed by some preliminary comments on the issues put forward in the Consultation Paper. The comments are preliminary because the IBA has not been engaged in these consultations to date and lacks the resources to provide more detailed commentary and analysis. We conclude with a recommendation that the LSUC undertake a comparative assessment of its consultations with Aboriginal licensees and the consultations underway regarding racialized licensees. If it is determined that there are gaps in the consultations regarding Indigenous licensees, the IBA recommends that efforts be made to address those gaps.

BACKGROUND TO THE INDIGENOUS BAR ASSOCIATION (IBA)

- [8] The IBA is a national association comprised of Indigenous lawyers (both practicing and non-practicing), legal academics and scholars, articling clerks and law students, including graduate and post-graduate law students. Significantly, the IBA includes First Nations, Inuit and Metis peoples and our mandate must take account of the perspectives of all three peoples.
- [9] The IBA was incorporated as a not-for-profit federal corporation and is governed by a Board of Directors. In the Board, the IBA aims to reflect regional interests as well as gender balance and representation of First Nations, Metis and Inuit peoples. The Board also has two seats specifically for Student Members. There is also an Executive within the IBA, which is elected from amongst the Board. The current President is Koren Lightning-Earle. The Head Office of the IBA is at the Six Nations of the Grand River Nation, Ohsweken, in the Province of Ontario. There is also an office located at 70 Pineglan Crescent, in the City of Ottawa, Province of Ontario.

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[10] The objects of the IBA, as stated in its Letters Patent, are as follows:

- i. To recognize and respect the spiritual basis of our Indigenous laws, customs and traditions.
- ii. To promote the advancement of legal and social justice for Indigenous peoples in Canada.
- iii. To promote the reform of policies and laws affecting Indigenous peoples in Canada.
- iv. To foster public awareness within the legal community, the Indigenous community and the general public in respect of legal and social issues of concern to Indigenous peoples in Canada.
- v. In pursuance of the foregoing objects, to provide a forum and network amongst Indigenous lawyers: to provide for their continuing education in respect of developments in Indigenous law; to exchange information and experiences with respect to the application of Indigenous law; and to discuss Indigenous legal issues.
- vi. To do all such other things as are incidental or conducive to the attainment of the above objects.

[11] The IBA was founded in 1989, when there were only a handful of Indigenous lawyers in Canada. In the twenty-six years in which the IBA has been in existence the number of Indigenous people in the legal profession has grown to over a thousand. All our work is done on a volunteer basis. Aside from some project and conference funding, our only source of funding is from our membership dues. Nevertheless, our numbers and our activities continue to expand.

[12] Though IBA is a national association, it has a significant presence in Ontario. IBA members in Ontario are very active in the affairs of the Law Society of Upper Canada (LSUC) and this submission is being put forward by the IBA on behalf of its members in Ontario.

THE ENGAGEMENT PROCESS RESULTS

[13] Before addressing the consultation questions, IBA would like to comment briefly on the engagement results. The overall conclusion from the engagement was stated as follows: “Information obtained to date suggests that racialization is a constant and persistent factor affecting licensees during entry into practice and opportunities for career advancement.”

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[14] More particularly, according to the Consultation Paper, the following challenges emerged:

- a. Discrimination and stereotypes;
- b. Cultural differences and fit;
- c. Lack of mentoring, sponsors, role models and networking opportunities;
- d. Intersecting factors and increased vulnerability;
- e. Race as a factor in entering sole practice;
- f. Barriers to entry into the profession;
- g. Barriers faced in advancing in the profession;
- h. Risk factors in entering the regulatory process;
- i. Additional barriers faced by internationally trained lawyers; and
- j. Additional barriers faced by paralegals.

[15] The IBA's view is that racialization is a "constant and persistent fact" affecting the lives of Indigenous peoples. Indigenous licensees are not likely an exception. In fact, the Aboriginal Consultation Report confirms this. The specific challenges listed in paragraphs a, b, c, d, e, f, and g are certainly equally relevant to Indigenous licensees. Judicial notice can be taken of some of these challenges; they are also confirmed directly or indirectly in the LSUC's Aboriginal Consultation Report. It is unclear because of lack of data whether paragraph h applies. Paragraph i is not applicable. Paragraph j is likely relevant to Indigenous licensees.

QUESTIONS FOR THE PROFESSION

A. ENHANCING THE INTERNAL CAPACITY OF ORGANIZATIONS

[16] As aforesaid, the challenges facing Indigenous licensees are similar to those of racialized licensees in terms of the barriers to recruitment and advancement. This would appear to find confirmation in the Aboriginal Consultation Report; i.e., 54% reported they faced barriers; many Indigenous licensees identified as sole practitioners (22%); many went to work for government (19%); and that in the first three years many found jobs that did not require them to be licenced (68%).

[17] Accordingly, the IBA agrees with the need for enhanced internal capacity of organizations, including law firms, to address the barriers to recruitment and advancement facing Indigenous licensees.

[18] The IBA also feels that it is the role of the Law Society to act as catalyst in promoting diversity. Unfortunately, at this point in time, because the IBA has not

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been engaged in the consultation, it is not possible to say what model of diversity program is preferable to the IBA.

- [19] IBA also agrees with the need for demographic data and the reason is self-evident: you cannot identify and manage (and work to eliminate) discrimination, particularly systemic discrimination, unless you know the numbers. The IBA commends the LSUC for taking steps to identify Aboriginal law as an area of practice – it gives important information to work with.
- [20] The IBA cannot take a position at this point in time on the preferred model for the collection of this data. Nor can the IBA state a position on compliance. IBA recommends further consultation on these issues.

B. MENTORING, ADVISORY SERVICES AND NETWORKING

- [21] Obviously mentoring, advisory services and networking are highly significant for Indigenous licensees and this subject is covered quite well in the LSUC's Aboriginal Consultation Report.
- [22] This Report confirms that this issue is a top priority:

Overall, most of the respondents supported mentoring and networking as a top priority for the Law Society to continue and to develop for Aboriginal law students, Licensing candidates and lawyers. They cited that their own experiences in completing law school, the Bar Admission Course/Licensing program and making the transition into working as a lawyer was more difficult because of their feelings of lack of connection to other Aboriginal students, Licensing candidates and lawyers. They identified that what helped them most was contact with their Aboriginal law student peers and, more importantly, contact with experienced Aboriginal lawyers who could explain to them how to find work, how to run a practice as a business, how to deal with difficult situations in practice and other related issues.

- [23] One point that the IBA wished to highlight is the importance for Indigenous licensees of connecting and associating with other Indigenous law students and licensees. This point is made in the Aboriginal Consultation Report, at paragraphs 41 and 43. This is an area in which the IBA can be helpful, by providing opportunities for Indigenous licensees to network with Indigenous law students, licensees, academics and judges. IBA has offered its input in the past and continues to be prepared to assist to the extent that its resources permit.

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- [24] The LSUC has undertaken some efforts towards mentoring and networking. It would be useful to assess the success of these efforts to date and identify what needs to be done to improve upon them, including more outreach to the IBA.

C. ENHANCING CULTURAL COMPETENCE IN THE PROFESSION

- [25] The Consultation Paper defines cultural competence as follows:

‘an ability to interact effectively with people of different cultures. Cultural competence comprises four essential capacities:

- a. We must understand our own cultural positions and how they differ from and are similar to others (critical cultural self-analysis).
- b. We must understand the social and cultural reality in which we live and work and in which our clients live and work.
- c. We must cultivate appropriate attitudes towards cultural difference.
- d. We must be able to generate and interpret a wide variety of verbal and non-verbal responses (client centred interviewing).’

- [26] IBA agrees with the need to enhance cultural competence in the legal profession, including licensees and judges. This is especially so with regard to Indigenous peoples and their legal traditions because the jurisprudence from the Supreme Court of Canada mandates that equal weight be given to the Aboriginal perspective. An understanding of the Aboriginal perspective requires cultural competence.
- [27] The IBA supports the idea of giving accreditation through the LSUC CPD Program for cultural competence in Indigenous cultures and laws. The IBA is prepared to assist in this regard.

D. DISCRIMINATION AND THE ROLE OF THE COMPLAINTS PROCESS

- [28] The question is: “How should the Law Society best ensure that complaints of discrimination are brought to its attention and effectively addressed?” and the following proposals are put forward for consideration:

- By updating the Rules of Professional Conduct and the Paralegal Rules of Conduct to specifically define and address systemic discrimination and by developing a communication plan for the profession.
- By working with associations of racialized licensees to enhance their ability to bring forward complaints.
- By assigning an expert group of Professional Regulation staff members to handle complaints of racial discrimination.

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- By working with associations of racialized licensees to enhance their capacity to offer duty counsel type support to their members who have been the subject of complaints.

- [29] The IBA agrees that the LSUC needs to have a role in making sure that complaints of discrimination are effectively addressed within the legal profession. Addressing systemic discrimination against Indigenous licensees will require a positive and proactive approach. In the view of the IBA, this will probably require changes to the *Rules of Professional Conduct*.
- [30] The IBA supports a role of associations of racialized licensees, including Indigenous licensees, in ensuring that discrimination complaints are effectively pursued and addressed, particularly complaints of systemic discrimination.

E. THE OPERATIONS OF THE LSUC

- [31] The Consultation Paper discusses the following programs be implemented internally to address the results of this consultation:

Initiative 1: Enhance the Equity Compliance Program

The Law Society would enhance its Equity Compliance Program to include a request for demographic data when retaining vendors, firms or legal counsel to provide services.

Initiative 2: Conduct an Internal Equity Audit

The Law Society would strengthen its policies and programs by conducting an operational equity audit of its services offered to the profession.

Initiative 3: Internal Collection of Data

The Law Society would consider the internal collection of further data on issues relating to racialization in the regulatory process

Initiative 4: Develop a More Diverse Public Face/Image for The Law Society of Upper Canada

The Law Society would consider strategies to develop a more diverse and inclusive public image/face of the Law Society.

- [32] The IBA supports the need for internal adjustments within the LSUC to ensure the results of this consultation are meaningfully implemented. The IBA also recommends assessing work currently underway to implement the proposals from the Aboriginal Consultation Report, and making sure that the efforts are harmonized

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in a manner that respects the commonalities and differences applicable to Indigenous licensees.

CONCLUSION

[33] Given that Indigenous licensees appear to have been excluded from the consultation regarding racialized licensees, the IBA recommends that the LSUC undertake a comparative assessment of its consultations with Aboriginal licensees and the consultations underway regarding racialized licensees. If it is determined that there are gaps in the consultations regarding Indigenous licensees, the IBA recommends that efforts be made to address those gaps.

Thank you for your consideration.

Sincerely,



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