



Windsor Law

University of Windsor

Josée Bouchard, Director, Equity
The Law Society of Upper Canada
Osgoode Hall, 130 Queen Street West
Toronto, ON M5H 2N6

Sunday, March 15, 2015

Re. Submissions on Consultation paper on Racialized Licensees from the Equity and Diversity Committee, Faculty of Law University of Windsor

Dear Ms. Bouchard,

The University of Windsor Faculty of Law (Windsor Law) is committed to delivering legal education that is informed by and takes account of the theory and the practice of access to justice. Our institutional understanding of access to justice has evolved over the years to reflect changes in academic and policy related literature, changes in the law, the diverse population of Ontario and the evolving nature of legal practice.

The Equity and Diversity Committee of the Faculty of Law derives its mandate from the Faculty Council of Windsor Law. The Committee was set up in 2010 to address equity and diversity related issues at Windsor Law. The Committee is delighted to read the LSUC's *Consultation paper on Developing Strategies for Change: Addressing Challenges Faced by Racialized Licensees* (Consultation paper) and especially the strategies proposed in that report to change inequities entrenched in our legal profession.

The mandate stated in the consultation paper is that the LSUC working group would identify "challenges faced by racialized licensees in different practice environments, including **entry into the profession** [*emphasis added*] and advancement."¹ In this submission, we will add several key concerns that have been omitted in the consultation paper as it relates to entry into the profession. These are: Law school admissions and the intersectional nature of social markers; the National Accreditation Committee and Foreign Trained Lawyers; and the use of "cultural competence" as an approach to inequality. We also include opinions on the use of mentoring and on some related LSUC governance issues.

¹ Law Society of Upper Canada, Working Group, "Developing Strategies for Change: Addressing Challenges Faced by Racialized Licensees" (Consultation Paper at 6) [unpublished].

1. ENHANCING DIVERSITY IN THE LEGAL PROFESSION, THE LICENSING PROCESS AND LAW SCHOOL ADMISSIONS

Racialized Ontarians are an under-represented minority population in the legal profession. According to the current census data, close to 25% of Ontarians are racialized.² While significant gains have been made in this area, current numbers are not reflected in admissions to law schools in Ontario.³ At Windsor Law for example, our official admissions policy specifically seeks to address access to legal education as an access to justice issue. When reviewing admissions files, our Admission Committee is attentive to both academics (LSAT scores and GPA) and community engagement. By taking this holistic approach to admissions, and by applying it to every application received, we attract a large pool of candidates from diverse communities across the equity and diversity spectrum. As a result, Windsor Law has a large number of racialized students and this trend in admissions is steadily increasing.⁴

Law schools in Ontario can of course try harder to attract candidates from various equity seeking communities. But law schools cannot do it alone. The LSUC should directly engage with equity seeking groups through various initiatives that attract members of those groups to the legal profession. For example, the LSUC can sponsor events for high school students, Indigenous groups and university students across Ontario (and beyond) that provide information about the nature of careers in the legal profession and that encourage them to apply to law schools.

At present, there is vast under representation of Indigenous, Afro-Canadians and LBGTI (especially racialized) applicants to law schools. From our understanding, the LSUC has undertaken such initiatives in the past, but it does not seem to be a current Law Society priority. The under representation of these three particular groups is indicative of broader socio-economic, political and cultural conditions that entrench the continued marginalization of these particular groups in our diverse Canadian landscape. Legal education and access to a career in the legal profession can serve as one pathway to potentially empower these communities.

In particular, there is an underrepresentation of trans people (especially racialized trans people) in law schools.⁵ Legal Aid Ontario is in the process of

² Law Society of Upper Canada, Working Group, “Developing Strategies for Change: Addressing Challenges Faced by Racialized Licensees” (Consultation Paper at 8) [unpublished].

³ Law Students Society of Ontario, “Just or Bust? Results of the 2014 Survey of Ontario Law Students’ Tuition, Debt, & Student Financial Aid Experiences” online: (2014) < <http://lssso.ca/wp-content/uploads/2014/09/LSSO-Report-2014.pdf> >

⁴ See longitudinal data gathered and analyzed internally, reported in Dolores J. Blonde et al, “The Impact of Law School Admission Criteria: Evaluating the Broad-Based Admission Policy at the University of Windsor Faculty of Law”61 (1998) Sask L Rev 529.

⁵ Nicole Nussbaum, “World Pride: Throwing a Legal Lifeline to the Trans Community”, *The Star* (28 June 2014), online:

gauging access to justice barriers for the trans community in Ontario; the LSUC and Ontario law schools must also play a role in this legal empowerment.

Ultimately these examples serve to demonstrate the overlapping nature of various social markers.⁶ The Consultation paper rightly finds that “racialization is a constant and persistent factor affecting licensees during entry into practice and opportunities for career advancement.”⁷ but fails to analyze intersections of various social markers⁸ for racialized licensees. In particular, there ought be a focus on the intersections of language, ability, culture, religion, national identity and socioeconomic status. The Consultation paper does note the overlapping nature of gender and race, and to a limited extent age, but it could further investigate these additional intersecting markers listed above.

The linkages between law school admissions policies and racialized licensees in Ontario are hard to ignore. This linkage requires further exploration if the LSUC’s equity and diversity commitments are to be achieved. In this regard, we propose the following in **enhancing the diversification of the legal profession:**

- **Recruitment Initiative:** Engage the legal profession in proactive outreach and recruitment initiatives to encourage and influence individuals of minority status to take an active interest in the legal profession and apply to law school. The LSUC should also supplement current recruitment strategies with financial and network supports including bursaries and structured mentorship programs that track outcomes.
- **Accessible Admissions Process Initiative:** Encourage law schools to adopt a much more holistic approach to their admissions policies that go beyond GPA and LSAT scores.
- **Removing the New Lawyer Licensing Fee:** Part of a deep diversity analysis must acknowledge the disproportionate numbers of equity seeking group members who graduate with higher-than-average debt load, and with fewer networks and supports to finance law school, licensing fees, and early career debts.

2. INCLUSION OF NCA CANDIDATES

<http://www.thestar.com/news/pridetoronto/2014/06/28/world_pride_throwing_a_legal_lifeline_to_the_trans_community.html>

⁶ Constance Backhouse, “What is Access to Justice?” in Julia Bass, W.A. Bogart and Frederick H. Zemans eds. *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 113-46; Janet Mosher, “Lessons in Access to Justice: Racialized Youths in Ontario’s Safe Schools” (2008) 48(4) *Osgoode Hall Law Journal* 807;

⁷ *Supra* note 2 at 6..

⁸ Kimberle Williams Crenshaw, “Twenty Years of Critical Race Theory: Looking Back to Move Forward” (2011) 43:5 *Connecticut Law Rev* 1253.

National Committee on Accreditation (NCA) candidates are predominantly foreign-trained lawyers or recent law school graduates from various jurisdictions. Above and beyond specific barrister and solicitors exams required to practice law in Ontario, NCA candidates are required to successfully overcome the following barriers to legal practice.

- 1) Pass examinations in prescribed core competency areas of law (for each challenge exam, a fee of \$400-500 is collected by the Federation);
- 2) Take additional courses offered through Canadian law schools; and
- 3) Complete an additional Canadian law degree.⁹

Given the consultation paper's focus on promoting access to justice for racialized licensees, it is necessary to examine the NCA process.

Although available statistics on racialized NCA candidates are few, statistics do exist regarding the success rate of NCA candidates. The stunning failure rate can assist in this conversation if only to enable a greater understanding of the inherent structural difficulties associated with the NCA process.

The challenge exams are self-study and there has been a distressingly high failure rate. According to FLSC statistics, 4,515 foreign-trained lawyers applied to be assessed from 1999 to 2009, but less than half of applicants, 1,708, ended up with certificates of qualification.¹⁰

It must be recognized that lawyers trained abroad face unique challenges for entry into the Canadian legal profession. These challenges may include cost barriers, lack of networking opportunities, unfamiliar work experience, and, more specifically for this paper, discrimination on the basis of race and/or ethnic origin.

[W]hile the Task Force raises the problem of discrimination faced by racialized and National Committee on Accreditation (NCA) candidates, its response is not to address this problem directly but rather to suggest changes. As a consequence, it fails to address the differential challenge that racialized candidates faced "challenges that their colleagues did not"; and

⁹ Federation of Law Societies of Canada, "Completing NCA Exams" (2015) online: < <http://www.flsc.ca/en/nca/completing-assigned-subjects/completing-assigned-subject-with-nca-exams/>>

¹⁰ Michael Rappaport, "Foreign-trained lawyers face hurdles", *Lawyers Weekly* (11 December 2009). Online: <http://www.lawyersweekly.ca/index.php?section=article&volume=29&number=30&article=4>

NCA candidates also faced challenges in finding articling positions.¹¹

The Consultation Paper and the consultation process will be incomplete without the inclusion of the NCA licensees. The proposed ‘solutions’ will be inadequate to address the concerns for racialized licensees. In seeking to engage the profession and with the hopes of establishing a detailed implementation plan, the working group must examine all routes to licensing for racialized persons.

We ask that the working group address the following questions, with the hope of gaining a more comprehensive understanding of how the NCA process may raise greater barriers for racialized licenses, and with the hope of mitigating such barriers through effective resolution:

- a) *What percentage of the approximate 38%¹² of successful NCA candidates are racialized?***
- b) *Of these racialized candidates, what types of processes under the NCA are they subject to prior to accreditation?***
- c) *Of these racialized candidates, what percentage successfully obtain an articling position that leads to future employment?***
- d) *Of these racialized candidates, what percentage end up in sole-practice? What reasons have they identified as leading to this?***

3. CULTURAL COMPETENCE

The Equity and Diversity Committee is also concerned that a thin vision of equity has been employed in the Consultation Paper – one that fails to recognize the history of the structural exclusions and systemic inequalities that may exist in law firm cultures and in the profession more generally. The interview data from StratCom spoke to this reality. The Consultation paper appears to approach this issue through the lens of cultural competence. As the LSUC is aware, there is a burgeoning body of literature on cultural competence and lawyering in Canada and the United States.¹³ A narrowly-defined “cultural competence” tends to focus

¹¹ Federation of Asian Canadian Lawyers. 2008. Submission to LSUC Licensing and Accreditation Task Force Federation of Asian Canadian Lawyers. Online: <http://facl.ca/wp-content/uploads/2012/08/FACL-submissions-to-LSUC-articling-task-force.pdf>

¹² Samar Dehghan, “The NCA Student Experience”, *Canadian Lawyer Mag* (13 August 2012). Online: <http://www.canadianlawyermag.com/4266/the-nca-student-experience.html?print=1&tmpl=component>

¹³ See, for example, Susan Bryant, “The Five Habits: Building Cross-Cultural Competence in Lawyers” (2001-2002) 8 *Clin L Rev* 33; Carolyn Copps, Hartley and Carrie Petrucci, “Practicing Culturally Competent Therapeutic Jurisprudence...” (2004) 14 *Wash U JL & Pol* 133; Rose Voyvodic, “Lawyers Meet the Social Context: Understanding Cultural Competence” (2005) 84 *Can Bar Rev* 563; Fiona Kay, “Integrity in a Changing Profession: Issues of Diversity and

on the behavioral and knowledge-based approaches to culture. It is epitomized in advice such as: “certain cultures don’t use eye contact”. Such an ethos can result in a superficial approach to diversity and inclusion.

We encourage the LSUC to use a wider lens that includes reflective practice and critical awareness of self and other. This practice is rooted in experiential awareness. This approach focuses on behavioral, knowledge, and attitudinal areas when approaching ideas of difference and inequality. This approach also encourages lawyers to use critical self-awareness as an ongoing practice to embed anti-oppressive practices in daily habits. We think that this approach captures concerns from the interview subjects about “micro aggressions” that occur in the workplace, and the often unconscious biases that allow racism, sexism, ableism, and anti-poverty beliefs to creep into both individual and systemic practices.¹⁴

4. MENTORSHIP

As the Consultation paper and survey data indicate, there is a strong correlation between high quality mentorship/sponsorship programs and professional success. Such programs already exist in most if not all law schools, and have active participation from members of the legal profession. What we are advocating here is an LSUC initiative for equity-seeking groups. This program would support students in the transition between law school and job seeking. This is a task well suited for practicing members of the bar and would most likely be well received by law schools as a voluntary program offered to equity-seeking candidates.

The Consultation paper sets out a number of mentoring options including team and peer mentoring services. The Equity and Diversity Committee is of the view that a one-on-one mentoring relationship offered on a voluntary basis might be effective in some cases. However, we would like to highlight another option suggested in the “Remunerated” section under “Professional one-on-one mentoring” in the Consultation paper and survey data. We think that a career coaching model, rather than a traditional mentorship model based on expertise as a legal professional, is better suited for racialized licensees. This model is best suited for those entering the legal profession transitioning to a new practice career. Moreover a career coaching model would help set long-term goals aimed at overcoming both the internal and external barriers for new lawyers. In either case, care must be taken to provide an appropriate approach to counseling that would not further entrench the existing barriers.

Inclusion” (Paper presented to the Fifth Colloquium of the Chief Justice of Ontario’s Task Force on Professionalism, October 2005); Annette Demers, “Cultural Competence and the Legal Profession: An Annotated Bibliography of Materials Published Between 2000 and 2011” (2011) 39 Int’l J Legal Info 22.

¹⁴ Tara Yosso et al., “Critical Race Theory, Racial Microaggressions, and Campus Racial Climate for Latina/o Undergraduates” (2009) 79: 4 Harvard Educational Review 659.

5. BRIEF COMMENTS ON GOVERNANCE

The Equity Advisory Group Working Group noted the importance of a reflective governance body. We agree that, at minimum, there should be seats reserved for members of equity-seeking groups on Convocation.

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