SUBMISSION TO THE CHANGING WORKPLACES REVIEW

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Executive Summary

Legal Aid Ontario (LAO), an independent statutory agency situated within the broader public sector, plays a vital role in Ontario's justice system and in the effective administration of justice in Ontario. LAO's more than 350 staff lawyers help to fulfill LAO's access to justice mandate in a number of important ways, including by providing duty counsel representation to vulnerable low income clients in criminal and family courts across the province. The contribution of legal aid to maintaining public confidence in the administration of justice has been described on more than one occasion as essential, and relies in no small part on the professionalism and dedication of the lawyers who provide legal aid services.

Lawyers are among the professional groups specifically excluded from collective bargaining under Ontario's *Labour Relations Act* (LRA). There is, at present, no Ontario legislation addressing the issues that could arise for public and broader public sector lawyers who bargain collectively. These issues are significant, relating to the lawyer's duty to maintain confidentiality, to avoid conflicts of interest, and not to withdraw from representation of a client except for good cause and on reasonable notice. They are capable of affecting the ability of individual lawyers to adhere to the Rules of Professional Conduct of the Law Society of Upper Canada, which set out the responsibilities and ethical obligations of lawyers to their clients and to their profession. Due to the central position that the legal profession occupies within the justice system, they are also capable of affecting both the function and the reputation of the administration of justice itself.

Recent jurisprudence from the Supreme Court of Canada has made it clear that s.2(d) of the *Canadian Charter of Rights and Freedoms* protects freedom of association in order to engage in meaningful collective bargaining with an employer. Statutory exclusion of any group of employees from collective bargaining is demonstrably inconsistent with the current state of the law. However, merely removing the existing statutory exclusion would create a vacuum within which the above-noted issues could arise, since the LRA does not address the professional responsibilities of lawyers or the reliance that the justice system places on lawyers who work in public service.

The Canadian experience with lawyers and collective bargaining has been varied, since provinces and territories differ in their approach to labour relations and some do not prohibit collective bargaining by the legal profession. Bargaining through a professional association is the model of choice in most jurisdictions where lawyers bargain collectively, although some groups of lawyers have moved to mixed-member unions.

While some collective agreements for lawyers in public service include provisions recognizing the importance of their professional responsibilities, there is no uniform approach. Meantime, across Canada, there is a growing interest in collective bargaining by lawyers in public service. The law has also been evolving rapidly. These developments point to a need for legislation to address the issues identified in this submission.

LAO recommends that:

1. In addressing the statutory exclusion of lawyers from collective bargaining, the option of implementing a legislative framework that is specific to the context of lawyers working in public service should be considered as an alternative to leaving the exclusion in place or creating a vacuum with respect to lawyers by removing it.

2. Such a framework should recognize the contribution of the legal profession, and of lawyers working in public service, to maintaining public confidence in the administration of justice and ensuring that Ontario has a properly functioning justice system.

3. The framework should also explicitly recognize the paramountcy of the professional responsibilities of members of the legal profession. In light of those responsibilities, the framework should require bargaining units for lawyers to be comprised only of lawyers.

4. Given the fundamental role played by lawyers in public service, and in recognition of the fact that public and broader public service employers have limited access to resources, a statutory framework for lawyers working in public service should include a bargaining and dispute resolution process that emphasizes reduction and mitigation of negative impacts on the courts and the public. There are currently several statutory public and broader public sector bargaining models in Ontario that provide a continuum of potential options.

Introduction

Legal Aid Ontario (LAO) is an independent statutory agency with a mandate to promote access to justice for low-income Ontarians. While LAO is independent of the Ontario

government it also forms part of the broader public service, and is by statute accountable to the government for the expenditure of public funds.

LAO plays a vital role in Ontario's justice system and in the effective administration of justice in this province. In addition to private bar lawyers who are admitted to legal aid panels and who provide certificate and per diem duty counsel services to legal aid clients, LAO employs more than 350 staff lawyers who help to fulfill LAO's access to justice mandate in a number of important ways. Many staff lawyers work as full-time duty counsel in the province's criminal and family courts. Staff lawyers also play important roles as LAO senior litigators, advice lawyers, research lawyers, staff lawyers in legal aid offices, including the Refugee Law Office and LAO's Family Law Service Centres, that provide a wide range of legal services to clients, and as lawyers providing corporate support to LAO in areas such as program and policy development. Every day, their professionalism and dedication to providing high quality services to legal aid clients makes a difference in the lives of many vulnerable and disadvantaged persons who would not otherwise have anyone to assist them in addressing their legal issues.

There is no existing statutory framework for collective bargaining by members of the legal profession in Ontario. Lawyers are among the professional groups specifically excluded from Ontario's labour relations legislation, the *Labour Relations Act*, 1995 (LRA).[1] Lawyers have also been specifically excluded from Ontario's legislative framework for public sector collective bargaining, the *Crown Employees Collective Bargaining Act*, 1993.[2] No legislation has been enacted in Ontario to provide a parallel framework that could address the specific issues that are likely to arise in the context of collective bargaining by lawyers employed in a professional capacity, and particularly by those working in the public and broader public sectors.

In 2015, Ontario's Ministry of Labour established the Changing Workplaces Review. The interim report of the Review was released in July 2016.[3] While it focuses primarily on vulnerable workers in precarious employment, the interim report also touches on other issues, including that of the exclusion of regulated professionals such as lawyers

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[1] The definition of "employee" in s.1(3) of the *Labour Relations Act*, 1995, S.O. 1995, c.1 Schedule A, excludes any person "who is a member of the architectural, dental, land surveying, legal or medical profession entitled to practise in Ontario and employed in a professional capacity". Section 3(b) goes on to exclude any person who "exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations".

[2] *Crown Employees Collective Bargaining Act*, 1993, S.O. 1993, c. 38, [*Crown Employees Collective Bargaining Act*], s.1.1(3).

[3] C. Michael Mitchell and John C. Murray, *Changing Workplaces Review Special Advisors' Interim Report* (Ontario Ministry of Labour, July 2016) online: <https://www.labour.gov.on.ca/english/about/pdf/cwr_interim.pdf> [Changing Workplaces Interim Report]

from collective bargaining within the framework of the LRA. The interim report identifies two potential options for approaching the exclusion of professionals such as lawyers:

1. Maintain the status quo.

2. Eliminate some or most of the current exclusions in order to provide the broadest possible spectrum of employees access to collective bargaining by, for example:

    a. permitting access to collective bargaining by employees who are members of the architectural, dental, land surveying, legal or medical profession entitled to practice in Ontario and employed in a professional capacity; .... [4]

In addressing the application of these options to lawyers, LAO's submission explores the following questions:

- First, why are lawyers in public service, including and perhaps especially those who provide legal aid services, essential to maintaining public confidence in the administration of justice in this province?

- Second, what are the issues that may arise for lawyers who engage in collective bargaining, in light of their unique professional obligations and the role that they play in the administration of justice?

- Third, what are some potential avenues for addressing the issues that may arise for lawyers in a collective bargaining environment?

- Fourth, what has been the Canadian experience to date with lawyers and collective bargaining?

- Fifth, what is the impact of recent legal developments in this area?

[4] Changing Workplaces Interim Report, Chapter 4.2.1, at page 54.

In addition to the two options that have been identified in the interim report, LAO's submission recommends consideration of a third option for addressing the exclusion of lawyers from the LRA framework. LAO believes that this option, which relies on the development of a sector-specific legislative framework, is the only option that is capable of recognizing collective bargaining rights for lawyers in a manner that is consistent with recent Supreme Court of Canada jurisprudence, while at the same time establishing appropriate protections relating to public service and broader public service lawyers, both in recognition of the services that these lawyers provide in the public interest and in acknowledgement of the unique professional and ethical responsibilities of all lawyers.

The fundamental role of lawyers in public service

The importance of an independent bar to the public interest in maintaining a fair and functioning justice system has been underscored numerous times. In *Law Society of British Columbia v. Mangat,* Gonthier J., for the Court, stated that "[l]awyers are an integral part of the administration of justice"[5], and quoted McIntyre J. in *Andrews v. Law Society of British Columbia*, where a qualified and independent legal profession was described, as follows, as being of fundamental importance to the administration of justice:

> It is incontestable that the legal profession plays a very significant -- in fact, a fundamentally important -- role in the administration of justice, both in the criminal and the civil law. I would not attempt to answer the question arising from the judgments below as to whether the function of the profession may be termed judicial or quasi-judicial, but I would observe that in the absence of an independent legal profession, skilled and qualified to play its part in the administration of justice and the judicial process, the whole legal system would be in a parlous state. In the performance of what may be called his private function, that is, in advising on legal matters and in representing clients before the courts and other tribunals, the lawyer is accorded great powers not permitted to other professionals... . By any standard, these powers and duties are vital to the maintenance of order in our society and the due administration of the law in the interest of the whole community.

[5] *Law Society of British Columbia v. Mangat* [2001] S.C.J. No. 66, at para. 46.

> The lawyer has, as well, what may be termed a public function. Governments at all levels, federal, provincial and municipal, rely extensively upon lawyers, both in technical and policy matters. In the drafting of legislation, regulations, treaties, agreements and other governmental documents and papers lawyers play a major role. In various aspects of this work they are called upon to advise upon legal and constitutional questions which frequently go to the very heart of the governmental role. [6]

Ontario has the distinction of being home to more lawyers than any other Canadian jurisdiction. The Law Society of Upper Canada, which is the professional licensing body for both lawyers and paralegals in Ontario, is the largest law society in Canada, reporting a membership of 49,048 lawyer licensees as of November, 2015. [7] While roughly half of Ontario's lawyers still work in traditional private practice, a large number work outside of the sole practitioner or law firm environment. Many of them have built careers in public service, working for the Ministry of the Attorney General and in legal services branches across various provincial ministries, as well as in various roles at a variety of agencies, boards and commissions.

As noted above, these lawyers in public service play a vital role. As well, in the courts and tribunals of the province, lawyers who serve the public are a necessity to the ongoing conduct of legal proceedings that include criminal and quasi-criminal prosecutions, child welfare matters and human rights claims. Without the services provided by lawyers in public service, the courts and tribunals of the province could not function properly. Criminal cases, to provide only one example, would not be heard, and prosecutions would be at risk of being stayed as a result of unreasonable delay in contravention of the *Canadian Charter of Rights and Freedoms*. The concept of the public interest lies at the heart of all of this work:

> The concept of the "public interest" is the foundational principle that guides and structures the special role of government lawyers. This public interest role is derived from a number of constitutional and statutory sources but, in Ontario, it finds its foundation in s.5(b) of the *Ministry of the Attorney General Act*, which provides that the Attorney "shall see that the administration of public affairs is in accordance with the law". This responsibility to uphold and advance the rule of

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[6] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at pp. 187-188.

[7] Website of The Law Society of Upper Canada: http://www.lsuc.on.ca/faq.aspx?id=1275#q1266. Based on lawyers' annual reports to the Law Society, approximately half of Ontario's licensed lawyers (24,417 as of November 2015) are working in private practice, but over one quarter of them (13,931) are "otherwise employed", meaning for the most part that they work in government or education. The remainder (10,700 lawyers) are not employed in Ontario, either because they have retired from practice or work outside of the province.

> law falls not just to the Attorney but to all government lawyers who act on his or her behalf.[8]

The lawyers who, through LAO, provide legal aid services to vulnerable low-income clients play what is arguably the most vital and specialized public interest role within the public and broader public service. Indeed, it has been stated by the Chief Justice of Canada, the Rt. Hon. Beverley McLachlin, that legal aid is an essential public service:

> ... Providing legal aid to low-income Canadians is an essential public service. We need to think of it in the same way we think of health care or education. The well-being of our justice system – and the public's confidence in it – depends on it.[9]

This call was taken up in the 2011 report of The Public Commission on Legal Aid in British Columbia, which recommended that legal aid be "fully recognized as an essential public service on par with healthcare, public education and social assistance. It is an integral aspect of the justice system and is as necessary as courtrooms, judges, prosecutors, police and so on. The legal aid system can help the courts run smoothly, or it can bring the court system to a virtual standstill."[10] This report argues that the case for recognizing legal aid as an essential public service "is a very strong one, founded on the tripartite basis of sound social and economic policy, a moral commitment to fairness and justice for all of our citizens, and legal and constitutional rights".[11]

In Ontario, LAO is the independent, not-for-profit agency responsible for delivering legal aid services to eligible clients. LAO's statutory mandate calls upon the corporation to provide "consistently high quality legal aid services in a cost-effective and efficient manner to low-income individuals throughout Ontario"[12], and to do so "independently from the Government of Ontario but within a framework of accountability to the Government of Ontario for the expenditure of public funds".[13] The current memorandum of understanding (MOU) between LAO and Ontario's Ministry of the Attorney General affirms, in section 5, that legal aid "is a service of fundamental public interest", and that

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[8] Patrick J. Monahan, "In the Public Interest": Understanding the Special Role of the Government Lawyer", (2013), 63 S.C.L.R.(2d).

[9] The Rt. Hon. Beverley McLachlin, C.J.C., "Preserving Public Confidence in the Courts and the Legal Profession", (2003), 29 Man.L.J. 277-287, at 281.

[10] Leonard T. Doust, QC, Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia (March 2011), online: Public Commission on Legal Aid <http://www.publiccommission.org/media/PDF/pcla_report_03_08_11.pdf> [Foundation for Change], at page 44.

[11] Foundatin for Change, at page 45.

[12] *Legal Aid Services Act*, 1998, S.O. 1998, Chapter 26 [LASA], s.1(a).

[13] LASA, s.1(d).

LAO plays a "unique role within the justice system", including the facilitation of the protection of constitutional rights.[14]

Legal aid clients tend to be particularly vulnerable and they face significant barriers to access to justice. All of them are very poor.[15] They lack the resources and the ability to use those resources to their advantage that most other Ontarians take for granted. In comparison with the general population, persons who qualify for legal aid assistance are disproportionately likely to be Aboriginal, Black or new Canadians, to be single parents, to have a disability, to be experiencing mental illness or addiction, and to face language and literacy barriers. Their vulnerability and disadvantage often brings them into conflict with the bureaucracy and the justice system, and their legal issues tend to be both complex and overlapping. They are people who desperately need help, and they look for that help to the lawyers of LAO.

LAO's over 350 staff lawyers, including the duty counsel who work daily in criminal and family courts across the province, provide legal services that are essential to their low-income clients in the areas of criminal, family, and immigration and refugee law. LAO's lawyers:

- Help persons who are accused of crimes to defend themselves, to seek diversion of their charges or otherwise resolve their matter;
- Assist individuals who are in the throes of family breakdown to establish custody and access to children;
- Provide vital assistance and representation to victims of domestic violence; and
- Help vulnerable refugee claimants who are fleeing from danger, including torture and persecution, to establish new lives in a place of safety.

The contribution of these lawyers to the protection of vulnerable Ontarians is invaluable. As former Ontario Chief Justice Roy McMurtry has stated:

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[14] Memorandum of Understanding between Legal Aid Ontario and the Ministry of the Attorney General, dated November 2014 [LAO-MAG MOU], online: < http://www.legalaid.on.ca/en/publications/downloads/MOU/LAO-MAG%20Memorandum%20of%20Understanding%202014.pdf >, s.5 ("Guiding Principles").

[15] LAO's Financial Eligibility Guidelines, current to April 1, 2016, provide that a single (family size 1) applicant must have an income that is below $14,888 in order to qualify for legal representation, and must have an income lower than $21,438 in order to qualify for duty counsel or summary legal advice assistance: LAO website, "Am I eligible for legal aid?", online: <http://www.legalaid.on.ca/en/getting/eligibility.asp.>

> The basic purpose of legal aid is to serve the public by enabling each of its members to have access to the kind of legal assistance that is essential for the understanding and assertion of our individual rights, obligation and freedoms under the law. ... Legal aid is perhaps the single most important mechanism we have to turn the dream of equal rights into a reality. Indeed, our laws and freedoms will only be as strong as the protection that they afford to the most vulnerable members of our community. In affording this protection, legal aid does make a deep and essential contribution to our social fabric and indeed to our very way of life.[16]

The professional responsibilities of lawyers

The legal profession is a self-regulating profession. In *Canada (Attorney General) v. Law Society of British Columbia*, the Supreme Court of Canada acknowledged the importance of the legal profession's self-regulated status in this way:

> ... The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally. The uniqueness of position of the barrister and solicitor in the community may well have led the province to select self-administration as the mode for administrative control over the supply of legal services throughout the community. ... [17]

Law societies, as the governing bodies of the legal profession, have the authority to establish the rules by which lawyers are to conduct themselves and they have the disciplinary power to enforce those rules. Any consideration of potential options for dealing with the exclusion of lawyers from collective bargaining legislation in Ontario must take into account the professional and ethical obligations of members of the self-regulated legal profession, and how these might be affected in a collective bargaining environment.

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[16] Chief Justice R. Roy McMurtry, Report of the Chief Justice of Ontario Upon the Opening of the Courts of Ontario for 2007, website of the Court of Appeal for Ontario, online: < http://www.ontariocourts.ca/coa/en/archives/ocs/2007.htm >

[17] *Canada (Attorney General) v. Law Society of British Columbia* [1982] 2 S.C.R. 307, at 327.

All licensed lawyers in the province of Ontario are subject to the Rules of Professional Conduct of the Law Society of Upper Canada.[18] The Rules set out the responsibilities and ethical obligations of lawyers to their clients and to their profession. Consistent with their integral role in the justice system, all lawyers are charged under the Rules with the duty of upholding the rule of law and the administration of justice. Rule 5.6-1 states as follows:

> 5.6-1 A lawyer shall encourage public respect for and try to improve the administration of justice.

The Commentary that accompanies this Rule contains the following statements, which are germane to an appreciation of the position that lawyers occupy, not only within the justice system but also within society at large:

> [1] The obligation set out in the rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community. A lawyer's responsibilities are greater than those of a private citizen. A lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations. The lawyer in public life should be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to public statements. Yet for the same reason, a lawyer should not hesitate to speak out against an injustice.
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> [2] The admission to and continuance in the practice of law implies on the part of a lawyer a basic commitment to the concept of equal justice for all within an open, ordered, and impartial system. However, judicial institutions will not function effectively unless they command the respect of the public, and because of changes in human affairs and imperfections in human institutions, constant efforts must be made to improve the administration of justice and thereby maintain public respect for it.[19]

The Rules thus impose a substantial burden on lawyers to conduct themselves generally in such a way as to encourage public respect in the administration of justice. The Rules also contain very detailed provisions that guide the conduct of lawyers in all aspects of their practice and their relationships with clients, other lawyers and the Law

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[18] The Law Society of Upper Canada, Rules of Professional Conduct, online: < http://www.lsuc.on.ca/lawyer-conduct-rules/ >.

[19] Rules of Professional Conduct, Rule 5.6-1, The Lawyer and the Administration of Justice; Commentary to Rule 5.6-1.

Society itself. Rule 3 is a fundamental rule that sets out the duties of lawyers in relation to their clients. These duties fall into several areas, dealing with matters such as competence, quality of service, confidentiality, and conflicts of interest. It is here, in consideration of the requirements of Rule 3, that specific concerns may arise in respect of unionized lawyers. Under the LRA's model of collective bargaining, there could be a risk of unionized lawyers being placed in breach of certain of the duties owed by Ontario lawyers under Rule 3.

For example, Rule 3.3 requires lawyers to hold client information in strict confidence.[20] The Commentary to Rule 3.3 notes that the ethical rule is wider than the law of lawyer and client privilege, and "applies without regard to the nature or source of the information or the fact that others may share the knowledge".[21] The Commentary also clarifies that a lawyer "owes the duty of confidentiality to every client without exception and whether or not the client is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them."[22] In an environment of compulsory collective bargaining pursuant to the LRA, unionized lawyers could find themselves organized in larger bargaining units with non-lawyers. A union dealing with a range of issues presumably related to its members' file loads, working conditions and duties to their employer would need to be able to understand those issues properly. There is, accordingly, a risk that lawyers could be placed at risk of breaching their professional obligations by disclosing confidential client information to non-lawyers, in contravention of the Rules.

Rule 3.4 provides that a lawyer may not act or continue to act for a client where there is a conflict of interest, except as permitted under the rules.[23] The Commentary to the Rule explains that a conflict of interest exists "when there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person."[24] The Commentary also stresses that, because a client may be unable to judge whether the performance of a lawyer's duties has actually been compromised, "the rule addresses the risk of impairment rather than actual impairment".[25] Employees who become members of a union take on certain obligations as members of that union, and lawyers would be no different. There is a resulting risk that these obligations to the union could give rise to a conflict of interest situation between a lawyer and his or her

[20] Rules of Professional Conduct, Rule 3.3, Confidentiality.
[21] Rules of Professional Conduct, Commentary to Rule 3.3, Confidentiality.
[22] Rules of Professional Conduct, Commentary to Rule 3.3, Confidentiality.
[23] Rules of Professional Conduct, Commentary to Rule 3.3, Confidentiality.
[24] Rules of Professional Conduct, Commentary to Rule 3.4, Conflicts.
[25] Rules of Professional Conduct, Commentary to Rule 3.4, Conflicts.

client, should the duties owed by the lawyer to the client and the lawyer's interests and role as a union member ever conflict.

Rule 3.7 requires lawyers not to withdraw from representation of a client, "except for good cause and on reasonable notice to the client".[26] The Commentary to this Rule stresses that, "[a]lthough the client has the right to terminate the lawyer-client relationship at will, the lawyer does not enjoy the same freedom of action. Having undertaken the representation of a client, the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship."[27] Unionization of lawyers under the LRA framework, which provides a right to strike when certain conditions are met, would give rise to the potential for legal work stoppages by lawyers. Regardless of their individual dedication to their duties and to their clients, lawyers in a unionized environment could face a pressurized situation in which they might feel that they had no choice but to withdraw their services, in breach of their professional obligation not to withdraw from representation of their clients.

In *Canada (Attorney General) v. Federation of Law Societies of Canada*[28], the Supreme Court of Canada held that the lawyer's duty of commitment to the client's cause is "a principle of fundamental justice".[29] In this case, Cromwell J. described the duties of lawyers to their clients, and the protections accorded to these duties, as follows:

> The duty of lawyers to avoid conflicting interests is at the heart of both the general legal framework defining the fiduciary duties of lawyers to their clients and of the ethical principles governing lawyers' professional conduct. This duty aims to avoid two types of risks of harm to clients: the risk of misuse of confidential information and the risk of impairment of the lawyer's representation of the client (see, e.g., *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, [2013] 2 S.C.R. 649, at para. 23).
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> The Court has recognized that aspects of these fiduciary and ethical duties have a constitutional dimension. I have already discussed at length one important example. The centrality to the administration of justice of preventing misuse of the client's confidential information, reflected in solicitor-client privilege, led the Court to conclude that the privilege required constitutional protection in the context of law office searches and seizures: see *Lavallee*. Solicitor-client

[26] Rules of Professional Conduct, Rule 3.7, Withdrawal from Representation.
[27] Rules of Professional Conduct, Commentary to Rule 3.7, Withdrawal from Representation.
[28] *Canada (Attorney General) v. Federation of Law Societies of Canada,* 2015 SCC 7, [2015] 1 S.C.R. 401.
[29] *Canada (Attorney General) v. Federation of Law Societies of Canada,* at para. 8.

> privilege is "essential to the effective operation of the legal system": *R. v. Gruenke*, [1991] 3 S.C.R. 263, at p. 289. As Major J. put it in *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445, at para. 31: "The important relationship between a client and his or her lawyer stretches beyond the parties and is integral to the workings of the legal system itself" (emphasis added).
>
> The question now is whether another central dimension of the solicitor-client relationship — the lawyer's duty of commitment to the client's cause — also requires some measure of constitutional protection against government intrusion. In my view it does, for many of the same reasons that support constitutional protection for solicitor-client privilege. "The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system": *McClure*, at para. 2. These words, written in the context of solicitor-client privilege, are equally apt to describe the centrality to the administration of justice of the lawyer's duty of commitment to the client's cause. A client must be able to place "unrestricted and unbounded confidence" in his or her lawyer; that confidence which is at the core of the solicitor-client relationship is a part of the legal system itself, not merely ancillary to it: *Smith v. Jones*, [1999] 1 S.C.R. 455, at para. 45, citing with approval, *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644 (C.A.); *McClure*. The lawyer's duty of commitment to the client's cause, along with the protection of the client's confidences, is central to the lawyer's role in the administration of justice.[30]

The Court's conclusion in this case was that the duty of commitment to the client's cause is "not only concerned with justice for individual clients but is also deemed essential to maintaining public confidence in the administration of justice". [31]

The foregoing points to the reason why it would be difficult to overstate the importance of the duties to clients that are owed by all lawyers under Rule 3. Ontario public service lawyers, regardless of the ministry or government department in which they work, have but a single client to whom they owe these duties. In contrast, lawyers providing legal aid services have multiple clients who are typically compromised by the barriers and challenges that stem from economic and social disadvantage. The importance of safeguarding their interests ranks alongside safeguarding the ability of the lawyers who serve them to maintain their professional standards and obligations in doing so.

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[30] *Canada (Attorney General) v. Federation of Law Societies of Canada,* at paras. 81-83.

[31] *Canada (Attorney General) v. Federation of Law Societies of Canada,* at para. 97.

In 1999 the Ethics Committee of the Law Society of British Columbia was asked by the Criminal Justice Branch of the Ministry of the Attorney General in that province to provide an opinion on the issue of the professional responsibilities of lawyers employed as crown counsel when engaged in a collective action to withdraw services. The British Columbia Crown Counsel Association had provided the Ministry with four weeks' notice of the specific dates when services would be withdrawn and three additional weeks' notice that a withdrawal of services would take place. Without commenting on the merits of the proposed withdrawal of services, and making reference to the committee's stance on the withdrawal of legal aid services, the Ethics Committee reached the following conclusion:

> In the context of a withdrawal of legal aid services, it was the Committee's opinion that it is not permissible for a lawyer to withdraw from a matter in support of a collective withdrawal of services without the consent of the client, either as an express term of the retainer agreement or by informed consent freely given at the time of the withdrawal.
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> That was because, when the client is an individual legal aid client, that breach of contract would be unfair to the client, which is prohibited under Rule 3(a). When the client has the resources available to the Province of British Columbia, the result may be different. However, even in that case, there may be instances when no amount of notice would be sufficient to allow withdrawal.
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> It is the Committee's view that the work that Crown Counsel perform is critical and that, in the context of a collective withdrawal of services, the question of when a lawyer may withdraw from a Crown Counsel commitment cannot be made without due regard for the interests of Crown, the courts, potential accused persons and others involved in the justice system. The Committee concluded that a decision in this context that permitted lawyers to withdraw from a commitment to perform Crown Counsel services, by simply giving notice, did not give sufficient recognition to the essential role that Crown Counsel play in the justice system. It depends on the facts of individual cases whether it is unfair to the Crown and the other parties to the criminal justice system for Crown Counsel to withdraw on the notice given in the present circumstances.[32]

[32] The Law Society of British Columbia, Notice to the Profession, "Ethical duties of Crown Counsel withdrawing services", March 4, 1999, online: <https://www.lawsociety.bc.ca/page.cfm?cid=1162&t=Ethical-duties-of-Crown-Counsel>.

Potential avenues for addressing professionalism issues

The tension between the professional duties owed by lawyers to their clients and the obligations that they would take on as members of a collective bargaining unit is capable of reconciliation, outside of the framework of the LRA as currently drafted. Legislative safeguards can be put in place to diminish the risk that confidential information will be disclosed to non-lawyers in contravention of the Rules, or that a conflict of interest will occur that prevents a lawyer from acting for his or her client. Legislative solutions also exist to minimize or eliminate the risk of lawyers breaching their duty not to withdraw from representation. While some protections can be established, through negotiation, in individual collective agreements – as will be seen in the next section of this submission – these tend to be expressed as general principles, are not comprehensive, and vary widely from agreement to agreement.

Some statutes contain a definition of a "professional employee" and require a certified bargaining unit for professional employees to be comprised only of professional members.[33] A solution of this kind, in this case requiring all members of a bargaining unit for lawyers to be members of the legal profession, speaks to some of the issues that could arise for lawyers in a mixed-member unit and could go some distance towards addressing confidentiality concerns, although it might not be sufficient to preclude disclosure that might take place within the context of a dispute resulting in a labour board decision, for example.

Due to the context in which they perform their duties and the importance of the public services that they provide, certain groups of employees in the public and broader public sector have been brought under the umbrella of dedicated statutory frameworks for collective bargaining. In Ontario, these groups include government employees who are covered by the *Crown Employees Collective Bargaining Act,* police who are covered by

[33] See *The Canada Labour Code*, R.S.C., 1985, c.L-2, which applies to federally regulated employees – such as those working in rail transport and telecommunications – and which defines a "professional employee" as a member of a professional organization that is authorized by statute to establish the qualifications for membership in the organization. Section 27(3) provides that, "[w]here ... a trade union applies under section 24 for certification as the bargaining agent for a unit comprised of or including professional employees, the Board, subject to subsections (2) and (4), shall determine that the unit appropriate for collective bargaining is a unit comprised of only professional employees, unless such a unit would not otherwise be appropriate for collective bargaining." See also s.39(3) of Manitoba's *Labour Relations Act*, C.C.S.M. c.L10, which states that "[t]he board shall not include professional employees practising a profession in a unit with employees who are not professional employees practising that profession unless it is satisfied that a majority of the professional employees practising that profession wish to be included in the unit; and the board may take such steps as it deems appropriate to determine whether the professional employees wish to be included in the unit."

the *Police Services Act*[34] and the *Ontario Provincial Police Collective Bargaining Act*,[35] , and teachers who are covered by the *School Boards Collective Bargaining Act*, 2014.[36]

One common feature of these types of dedicated statutory frameworks is the designation of a bargaining agent for the employees in question, and this is also a feature that would offer protection to lawyers who need to uphold their professional obligations and guard against the disclosure of confidential information. These types of statutory frameworks may also identify matters that fall within the scope of collective bargaining under the framework, as some matters relating to public sector workers may not be negotiable. Finally, these dedicated frameworks for important groups of publicly funded employees frequently establish statutory mechanisms for bargaining and the resolution of disputes. This is particularly a concern in the public and broader public sector due to the desire to maintain access to key public services within a limited funding envelope.

These statutes address dispute resolution for important public services in different ways. At one end of the continuum, work stoppages are not prohibited, as is the case with public school teachers. At the other end are statutes that prohibit strikes, as is the case for Ontario's hospital workers, municipal police and firefighters. In such cases, however, the removal of the strike option is generally replaced with provision for dispute resolution by way of binding arbitration. While this option avoids strikes, it is risky for the public service employer since it could result in unsustainable compensation awards. For a broader public service agency like LAO, which operates within a fixed budget, this would lead to a reduction in services or other budget cuts. While it is possible to draft legislation that requires an arbitrator or board of arbitration to make decisions or awards based on criteria that include the employer's ability to pay in light of its fiscal situation, [37] there is another reason why putting the final decision in the hands of a third party would be ill-considered in a statute dealing with lawyers in public service. There is a potential risk that the arbitrator could be a non-lawyer who would not appreciate the professional responsibilities of lawyers and whose decision could undermine adherence to the Rules by lawyers in the bargaining unit.

In the middle of the framework continuum are statutes that allow for work stoppages subject to essential service limits, which typically apply to some positions as designated in an essential services agreement. See, for example, Ontario's *Crown Employees Collective Bargaining Act*, which includes provisions dealing with the designation of

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[34] *Police Services Act*, R.S.O. 1990, Chapter P.15.

[35] *Ontario Provincial Police Collective Bargaining Act*, 2006, S.O. 2006, c. 35, Sched. B.

[36] *School Boards Collective Bargaining Act*, 2014, S.O. 2014, c. 5

[37] See, for example, the *Hospital Labour Disputes Arbitration Act*, R.S.O. 199, Chapter H.14, s.9(1.1).

essential services.[38] Depending on how many positions are designated, and whether or not designation is considered to have the effect of rendering a union's job action ineffective, the use of essential services designations may or may not lead to a requirement of binding arbitration to resolve disputes.

Although there is no Ontario counterpart, an example of a dedicated statutory framework from outside of Ontario, specifically involving lawyers, is British Columbia's *Crown Counsel Act.*[39] British Columbia does not have legislation that excludes lawyers from collective bargaining. The *Crown Counsel Act* designates the British Columbia Crown Counsel Association as the exclusive bargaining agent for all Crown counsel in the province. Under this legislation the Association is authorized to enter into agreements with the employer regarding salary, hours of work and other working conditions. In a manner that is typical of similar statutory frameworks, some matters are excluded from collective bargaining under this Act, such as matters that are covered by the provincial *Public Sector Pension Plans Act* or the *Public Service Act.*

In British Columbia, the agreement between the government and the British Columbia Crown Counsel Association provides that the Association has the right to withdraw services following the expiry of the agreement and the government has the right to obtain essential services designations under the provincial *Labour Relations Code.* Under the agreement, the Association is not to undertake a withdrawal of services without notice and unless essential services levels have been agreed to by the parties or have been designated by the Labour Relations Board of that province.[40]

Lawyers and collective bargaining: the Canadian experience

Provinces and territories differ in their approach to labour relations. There is no single Canadian model. Lawyers are not excluded by statute from collective bargaining in several jurisdictions, although, in addition to Ontario, the prohibition currently exists in Alberta, Nova Scotia, Prince Edward Island, the Northwest Territories, and Nunavut.

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[38] *Crown Employees Collective Bargaining Act*, Part IV ("Essential Services"), s.30.

[39] RSBC 1996, chapter 87.

[40] Agreement between Government of The Province of British Columbia and British Columbia Crown Counsel Associatin with respect to Crown Counsel, Article 6, online: <http://www.bccrowncounselassociation.bc.ca/upload/docs/2011contract.pdf>.

There are several examples of Canadian lawyers in public service organizing to negotiate collective agreements with their employers. Indeed, the interest of lawyers in public service in this form of association appears to be growing. Even in jurisdictions where the statutory exclusion exists, there are groups of lawyers who have succeeded in entering into collective bargaining with their employer through voluntary recognition. This has occurred in both Nova Scotia and Ontario, where crown counsel and other government lawyers have organized, obtained voluntary recognition, and subsequently negotiated collective agreements.[41] In jurisdictions where no statutory prohibition exists, government and legal aid lawyers have organized for the purpose of collective bargaining in British Columbia, Saskatchewan, Manitoba, Quebec, and New Brunswick. Federally-employed lawyers, at one time excluded from collective bargaining, no longer face this restriction and have done the same.

There are a number of broad observations that can be made about the Canadian experience to date. These observations may help to suggest possible approaches to the situation in Ontario.

First, the model of association of choice for most lawyers has to date been the in-house association. Although they are not unions these associations perform a union-like function, independently representing the membership in negotiating matters such as salaries, working conditions and mechanisms for resolving grievances. Their structure, membership and scope are by definition restricted to lawyers and matters affecting lawyers. The association model has been adopted by crown counsel in British Columbia, Ontario and Nova Scotia, as well as by federal government lawyers, and by crown attorneys and legal aid staff lawyers in Manitoba and Quebec. [42] In some cases, however, groups of lawyers have chosen to be represented by mixed-member unions:

- In British Columbia, lawyers at the B.C. Legal Services Society are represented by the Professional Employees Association (PEA), which also represents lawyers employed by the Law Society of British Columbia and British Columbia's Family Maintenance Enforcement Program.

[41] Two groups of lawyers in Ontario's public service, the Ontario Crown Attorneys' Association and the Association of Law Officers of the Crown, have formed associations that have been voluntarily recognized by their employer. Also, in Nova Scotia, crown attorneys have formed an association, the Nova Scotia Crown Attorneys Association, that their employer has voluntarily recognized.

[42] In Manitoba, crowns are represented by the Manitoba Association of Crown Attorneys and legal aid staff lawyers by the Legal Aid Lawyers Association. Crown attorneys and legal aid staff lawyers in Quebec have formed associations as well. Federal crown counsel are represented by the Association of Justice Counsel.

- Lawyers and support staff employed by the Saskatchewan Legal Aid Commission belong to an all-staff bargaining unit of the Canadian Union of Public Employees (CUPE).

- In New Brunswick lawyers at the Legal Aid Services Commission are represented by the Professional Institute of the Public Service of Canada (PIPSC) and since 2014-2015 have been in the process of negotiating their first collective agreement. New Brunswick crown attorneys, formerly represented in collective bargaining by two in-house associations, the New Brunswick Crown Counsel Association and the New Brunswick Crown Prosecutors Association, are now also represented by PIPSC, and have to date also been unsuccessful in arriving at a collective agreement with the provincial government.

A second observation is that, while some collective agreements for lawyers contain provisions recognizing the importance of lawyers' professional responsibilities, there is no uniform approach and some agreements contain no such recognition. Collective agreements between groups of organized lawyers and their employers commonly include professional development provisions that relate to the employer's accommodation of the employed lawyers' participation in continuing legal education activities. These agreements may also refer to the employer's recognition of lawyers' professional responsibilities. In some cases they also contain provisions that relate to lawyers' professional responsibilities more generally and from the perspective of both parties to the agreement.

For example, in Manitoba, where both legal aid staff lawyers and crown attorneys have formed associations and entered into collective agreements with their employers, the agreement between the province and the Legal Aid Lawyers' Association includes the following provision:

> Each employee shall observe standards of behaviour consistent with his functions and role as a public servant and as a member of the Law Society of Manitoba and in compliance with the terms of this Agreement and the employee shall observe his oath of office and oath of allegiance where he has taken an oath of allegiance.[43]

[43] Agreement between the Province of Manitoba and the Legal Aid Manitoba and the Legal Aid Lawyers Association, 2006-2010, online: < https://www.gov.mb.ca/finance/labour/pubs/pdf/agreements/legal_aid.pdf >

The strongest examples of protective provisions in collective agreements, however, come from British Columbia, where lawyers employed by the B.C. Legal Services Society, the Law Society, and the Attorney General's Family Maintenance Enforcement Program are all represented by a single union, the Professional Employees Association (PEA). Again, there are notable differences between the agreements. In the current agreement between the Legal Services Society and the PEA, the Preamble contains the following statement:

> The parties to this Agreement recognize that all employees covered by this Agreement are bound by the professional standards and codes of conduct of their licensing body. These codes of conduct require the employee to conduct herself/himself with fairness, loyalty and courtesy to her/his Employer, associates and subordinates.[44]

The same agreement goes on to address the potential for conflict between freedom of association and professional responsibility:

> Every employee is free to belong to, and to participate in, the activities of any association, society, organization, club or group without censure, or disciplinary action by the Employer, subject only to the limitation that such membership and activity shall not interfere with the performance of the employee's responsibilities, duties, or professional obligations. ....[45]

Although provisions of this kind do serve to acknowledge and address the issues that may arise for lawyers who bargain collectively there is, however, no consistency in the manner in which these issues are raised or dealt with, even within individual jurisdictions.

A third observation is that the situation with respect to collective bargaining by lawyers is in flux. The removal of statutory exclusions for collective bargaining by lawyers in jurisdictions where these exclusions currently exist would be likely to result in more groups of lawyers organizing under the labour relations schemes in their respective

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[44] Fifteenth Collective Agreement between The Legal Services Society and The Professional Employees Association, October 1, 2014 to September 30, 2019, online: <http://www.pea.org/system/files/Legal_Services_Society_Collective_Agreement_Oct_1_2014_to_Sept_30_2019.pdf >, Article 1 (Preamble).

[45] Fifteenth Collective Agreement between The Legal Services Society and The Professional Employees Association, Article 1.04 (Freedom of Association).

jurisdictions, in the absence of any other applicable statutory framework. Given the current economic climate and the financial constraints faced by governments as they attempt to balance competing priorities and balance their budgets, labour disputes involving lawyers – and, potentially, other groups of currently excluded professionals, should the exclusions be removed – are not unforeseeable.

In New Brunswick, where the collective agreement between the provincial government and the association of crown prosecutors expired in 2013, bargaining between the government and the crown attorneys' bargaining agent, The Professional Institute of the Public Service of Canada, has failed to result in a new agreement after the lawyers rejected the government's offer in August 2016. The matter is before the Labour and Employment Board in New Brunswick, but recent reports in the media indicate that a strike by crown attorneys in that province could potentially occur before the end of the year.[46] In 2012, the province and the two associations for government lawyers in New Brunswick also failed to reach agreement on classification of some services performed by employees in the two bargaining units as essential services.[47]

Doctors, like lawyers, are currently excluded from collective bargaining under the LRA in Ontario. The Ontario Medical Association (OMA), representing Ontario doctors, enters into Physicians Services Agreements with the province that establish fees for doctors. In August, 2016, the doctors rejected a tentative agreement on a new Physicians Services Agreement, in part because it did not include provision for binding arbitration to resolve bargaining impasses. The OMA has initiated litigation that seeks a finding that doctors have a constitutional right to binding arbitration in the absence of a right to strike.[48]

Recent legal developments

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[46] CBC News, "Crown prosecutors seek to skip conciliation step, move to strike option: Court backlog looms after 97% of Crown prosecutors reject latest contract offer from New Brunswick government", September 1, 2016, online: <http://www.cbc.ca/news/canada/new-brunswick/crown-prosecutors-contract-strike-union-1.3742665 >.

[47] New Brunswick Crown Prosecutors Association (Re) [2012] N.B.L.E.B.D. No. 16, 210 C.L.R.B.R.(2d) 1 (New Brunswick Labour and Employment Board).

[48] Ontario Medical Association press release, "Ontario's doctors vote to reject tentative Physician Services Agreement", August 15, 2016, online: < https://www.oma.org/Mediaroom/PressReleases/Pages/OntariosdoctorsvotetorejecttentativePhysicianServicesAgreement.aspx >.

The question of legislative exclusions from collective bargaining is an area of the law that has been evolving rapidly, and any future course of action that relates to these issues should be undertaken with recent developments in mind.

The question of excluding certain groups of employees from collective bargaining under labour relations legislation has recently been addressed by the Supreme Court of Canada, in what is now the leading case on the issue. In *Mounted Police Association of Ontario v. Canada*[49], the Court found that s.2(d) of the Canadian Charter of Rights and Freedoms protects employees who desire association in order to engage in meaningful collective bargaining with an employer, and that, viewed purposively,[50] "the s.2(d) guarantee of freedom of association protects a meaningful process of collective bargaining that provides employees with a degree of choice and independence sufficient to enable them to determine and pursue their collective interests".[51] However, the Court in this case emphasized that there is more than one labour relations model that is capable of accommodating choice and independence in a way that ensures meaningful collective bargaining, and that other kinds of models, including those that designate a bargaining agent, may be found constitutional where sufficient choice and independence are maintained, depending on a contextual analysis of the industry culture and workplace.

At issue in this case was the exclusion of members of the Royal Canadian Mounted Police (RCMP) from unionization and collective bargaining by the federal *Public Service Labour Relations Act* (PSLRA),[52] and the imposition, via the *Royal Canadian Mounted Police Regulations*[53], of a non-unionized Staff Relations Representative Program (SRRP) as the primary mechanism through which members of the RCMP could raise labour relations issues. The Court determined that, far from being independent, the SRRP was "squarely" under the control of management, was "part of the labour-management structure of the RCMP",[54] and further that it "deliberately" restricted the freedom of members to advocate for the ability to be represented by an independent association.[55] The Court concluded that the SRRP scheme substantially interfered with the degree of independence and choice that would be sufficient to enable RCMP members to meaningfully pursue their collective workplace interests.

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[49] *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC1, [2015] 1 S.C.R. 3 (Supreme Court of Canada).[*Mounted Police Association*]

[50] In the sense of preventing individuals "who alone may be powerless, from being overwhelmed by more powerful entities": *Mounted Police Association,* at para.70.

[51] *Mounted Police Association,* at para. 5.

[52] *Public Service Labour Relations Act*, S.C. 2003. C.22, s.2.

[53] *Royal Canadian Mounted Police Regulations*, 2014, SOR/2014-281, s.56, replacing *Royal Canadian Mounted Police Regulations*, 1988, (repealed), s.96.

[54] *Mounted Police Association,* at para. 113.

[55] *Mounted Police Association,* at para. 117.

While clearly indicating that the government "cannot enact laws or impose a labour relations process that substantially interferes with" the Charter-protected right to a meaningful process of collective bargaining,[56] the Court just as clearly stated that the Charter-protected right "is one that guarantees a process rather than an outcome or access to a particular model of labour relations".[57] The Court emphasized that there is more than one labour relations model that is capable of providing "sufficient employee choice and independence from management to permit meaningful collective bargaining"[58], and that the "Wagner Act" model, which forms the basis for the PSLRA as well as for Ontario's LRA, is only one such model:

> This Court has consistently held that freedom of association does not guarantee a particular model of labour relations .... What is required is not a particular model, but a regime that does not substantially interfere with meaningful collective bargaining and thus complies with s.2(d) ... What is required in turn to permit meaningful collective bargaining varies with the industry culture and workplace in question. As with all s.2(d) inquiries, the required analysis is contextual.
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> ....
>
> The Wagner Act model ... is not the only model capable of accommodating choice and independence in a way that ensures meaningful collective bargaining. The designated bargaining model (see, e.g., *School Boards Collective Bargaining Act, 2014*, S.O. 2014, c.5) offers another example of a model that may be acceptable. Although the employees' bargaining agent under such a model is designated rather than chosen by the employees, the employees appear to retain sufficient choice over workplace goals and sufficient independence from management to ensure meaningful collective bargaining. This is but one example; other collective bargaining regimes may be similarly capable of preserving an acceptable measure of employee choice and independence to ensure meaningful collective bargaining.
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> ...
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> The search is not for an "ideal" model of collective bargaining, but rather for a model which provides sufficient employee choice and independence to permit the formulation and pursuit of employee interests in the particular workplace context at issue. Choice and independence do not require adversarial labour relations; nothing in the *Charter* prevents an employee association from engaging willingly

[56] *Mounted Police Association,* at para. 81.
[57] *Mounted Police Association,* at para. 67.
[58] *Mounted Police Association,* at para. 92.

> with an employer in different, less adversarial and more cooperative ways. This said, genuine collective bargaining cannot be based on the suppression of employees' interests, where these diverge from those of their employer, in the name of a "non-adversarial" process. Whatever the model, the *Charter* does not permit choice and independence to be eroded such that there is substantial interference with a meaningful process of collective bargaining. Designation of collective bargaining agents and determination of collective bargaining frameworks would therefore not breach s.2(d) where the structures that are put in place are free from employer interference, remain under the control of employees and provide employees with sufficient choice over the workplace goals they wish to advance.[59]

In its s.1 Charter analysis, the Court noted that the Attorney General of Canada had argued that the exclusion of RCMP members from collective bargaining was based on the need to maintain and enhance public confidence in the neutrality, stability and reliability of the RCMP. Acknowledging the need for an independent and objective police force as a pressing and substantial objective, the Court nonetheless found no rational connection between the denial of the s.2(d) right and the maintenance of a neutral, stable and reliable police force.[60] Further, the infringement was not found to be minimally impairing, as the Court noted that provincial police forces throughout Canada "have the benefit of collective bargaining regimes that provide basic bargaining protections."[61] It was noted that in some jurisdictions this had been accomplished through general provincial labour relations statutes containing provisions specific to the police (such as, in Saskatchewan, restrictions on strikes and lock-outs, and the requirement of conciliation and arbitration as a means of resolving labour disputes), while in other jurisdictions, such as Ontario, Quebec, and Newfoundland and Labrador, there are specific statutes that provide for, among other things, the establishment of employee associations, the negotiation of collective agreements, grievance procedures, conciliation and arbitration.[62] Noting that the RCMP's mandate differs from that of other police forces, the Court nonetheless found no evidence that providing the RCMP with a labour relations scheme similar to that of other forces would keep it from fulfilling its mandate. [63]

In conclusion, the Court was careful to point out that its ruling would not prevent the federal government from pursuing an avenue "other than the PSLRA" to govern labour relations within the RCMP: "[s]hould it see fit to do so, Parliament remains free to enact

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[59] *Mounted Police Association,* at paras. 93-97.
[60] *Mounted Police Association,* at para. 147.
[61] *Mounted Police Association,* at para. 151.
[62] *Mounted Police Association,* at para. 151.
[63] *Mounted Police Association,* at para. 153.

any labour relations model it considers appropriate to the RCMP workforce, within the constitutional limits imposed by the guarantee enshrined in s.2(d) and s.1 of the *Charter*."[64]

In the wake of the Supreme Court of Canada's decision in *Mounted Police Association of Ontario v. Canada*, the federal government has recently introduced new legislation to address collective bargaining by RCMP members.[65] Members were consulted and surveyed broadly prior to drafting of the legislation. A clear majority of members indicated that they preferred an "in-house" form of representation.

Conclusion

In this submission, LAO has illustrated the central role played by lawyers in public service to the proper functioning of the justice system and to public confidence in the administration of justice. The submission also explains the critical importance of safeguarding lawyers' ability to remain in compliance with professional standards and meet the duties that they owe to their clients.

In recent years there has been increasing interest by Canadian lawyers in public service in associating for the purpose of collective bargaining. At the same time, the changing legal landscape clearly points toward the removal of statutory exclusions from collective bargaining, although at this time there are a number of jurisdictions in addition to Ontario which retain the exclusion. LAO's submission notes that bargaining through a professional association is still the model of choice in most jurisdictions where lawyers bargain collectively, although some groups of lawyers have moved to mixed-member unions.

The individual collective agreements for these groups of lawyers that have been accessed and reviewed by LAO fail, for the most part, to thoroughly address the critical issues that may arise from the collective bargaining process for lawyers and the administration of justice. The strongest examples of protective provisions are from British Columbia, but there is no consistency across agreements in this regard, even

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[64] *Mounted Police Association,* at para. 156.

[65] Bill C-7, An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures, passed Third Reading in the Senate on June 21, 2016: LEGISinfo online: <http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=8126682>

within that province, because each agreement is an individual contract. In terms of a legislative response, to date British Columbia has used legislation to designate a bargaining agent for its crown attorneys and New Brunswick has attempted to have certain functions performed by government lawyers including crown prosecutors designated as essential services.

Lawyers who work in public service are publicly funded and they do not work in a "for profit" environment. When these lawyers excel in their work, the result is better public service, and not more profits earned. Their employers must work within fixed budgets, and are accountable to the public for the expenditure of funds. The most recent reports out of New Brunswick indicate that, with collective bargaining at an impasse, a strike by crown attorneys may occur. As governments struggle to balance budgets, impasses of this kind are not unforeseeable.

The approach that is ultimately taken to the issue of the exclusion of lawyers from the LRA has the potential to affect all Ontario public sector and broader public sector lawyers, as well as those who rely on their services. It also has the potential to affect the ability of Ontario's justice system to function properly. One potential response to the exclusion of lawyers is a "status quo" response, in which no legislative changes would be made. This approach, however, is demonstrably inconsistent with the Supreme Court of Canada's ruling in *Mounted Police Association of Ontario v. Canada.*

A second potential response would be simply to amend the LRA to remove the exclusion for lawyers. This would have the effect of making the LRA's framework for certification of bargaining agents and negotiation of collective agreements available to all Ontario lawyers who are employed in a professional capacity. At first glance, this would appear to be a simple and relatively easy approach. However, the LRA was not drafted with the work of the legal profession in mind and it has nothing to say about lawyers who work as public servants in Ontario, or the reliance that Ontario's justice system places on lawyers who do not work in the for-profit sector. Merely removing the statutory exclusion would create a vacuum in which a situation of the kind that has been developing in New Brunswick could arise in Ontario.

A third potential response, the development of a legislative framework specific to lawyers, would be able to reduce the risk of lawyers encountering the specific kinds of ethical concerns and issues that could arise uniquely for lawyers employed in a professional capacity who engage in collective bargaining. Additionally, such a framework would be capable of addressing the added considerations that apply to Ontario lawyers who work as public servants. It might also be used to establish

mechanisms for dealing with unresolved conflicts, as a means of reducing the likelihood of work stoppages and the impact that they would have on the administration of Ontario's courts and tribunals and on vulnerable clients who rely on legal aid services.

While it is true that at least some of these issues could be dealt with in individual collective agreements between groups of lawyers and their employers, as has been done to some degree in British Columbia and Manitoba, collective agreements are contracts between parties and so, necessarily, deal with one group of employees at a time. They are also finite in duration, and thus are not capable of establishing permanent, foundational principles or frameworks. Ontario's public and broader public sector includes more than one group of employed lawyers. Negotiated individually and in silos, their individual agreements might look very different from each other (as they do in British Columbia and Manitoba), containing different rules and mechanisms and potentially, in some cases, missing some important considerations. By developing a comprehensive legislative framework, the government would be able to avoid these problems.

LAO believes that establishing a comprehensive legislative framework for collective bargaining by Ontario lawyers in the public and broader public sector is the best way to address the considerations that apply specifically to these lawyers, while at the same time safeguarding choice and independence in the collective bargaining process.

Recommendations

LAO recommends that:

1. In addressing the statutory exclusion of lawyers from collective bargaining, the option of implementing a legislative framework that is specific to the context of lawyers working in public service should be considered as an alternative to leaving the exclusion in place or creating a vacuum with respect to lawyers by removing it.

2. Such a framework should recognize the contribution of the legal profession, and of lawyers working in public service, to maintaining public confidence in the administration of justice and ensuring that Ontario has a properly functioning justice system.

3. The framework should also explicitly recognize the paramountcy of the professional responsibilities of members of the legal profession. In light of those responsibilities, the framework should require bargaining units for lawyers to be comprised only of lawyers.

4. Given the fundamental role played by lawyers in public service, and in recognition of the fact that public and broader public service employers have limited access to resources, a statutory framework for lawyers working in public service should include a bargaining and dispute resolution process that emphasizes reduction and mitigation of negative impacts on the courts and the public. There are currently several statutory public and broader public sector bargaining models in Ontario that provide a continuum of potential options.