THE CHANGING WORKPLACES REVIEW

- INTERIM REPORT -

Submission of the Society of Energy Professionals
October 14, 2016

INTRODUCTION

In November 2015, The Society of Energy Professionals (the "Society") provided the Special Advisors with its initial submissions concerning the Changing Workplaces Review ("CWR").

In this supplementary submission, following release of the CWR Interim Report, the Society will focus on four issues identified by the Special Advisors in their Interim Report – professional exclusions, managerial exclusions, recourse to interest arbitration after a lengthy strike or lockout, and broader based bargaining. Otherwise, the Society urges the Special Advisors to review its initial submissions.

A. EXCLUSION OF PROFESSIONALS OUTDATED AND UNJUSTIFIED

Section 4.2.1 of the Interim Report addresses occupational exclusions under the OLRA. The Report recognizes that the review of current exclusions must be informed by recent Supreme Court of Canada decisions recognizing the right of employees under section 2(d) of the *Charter* to associate meaningfully in pursuit of workplace goals, and in particular, to engage in collective bargaining through the bargaining agent of their choice. It lists the options under this section as:

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; and

    b) permitting access to collective bargaining by domestic workers employed in a private home.

The Society reiterates our view set out in our submissions of November 6, 2015, that the OLRA should be amended to remove all occupational exclusions from the Act, including lawyers.

Indeed, with respect to the exclusions of professionals including lawyers from collective bargaining, the Society would refer the Special Advisors to expert evidence in the Society's recent *Charter* challenge on behalf of staff lawyers at Legal Aid Ontario (described below). This evidence provides compelling justification for the elimination of the professional exclusions under s. 1(3) of the OLRA.

Our submissions of November 6, 2015, set out the background to the Society's s. 2(d) *Charter* challenge before the Superior Court to Legal Aid Ontario's ("LAO") refusal to recognize or bargain with The Society, the bargaining agent independently chosen by the lawyers employed by LAO. In that proceeding, the LAO took the position that given the OLRA exclusion of lawyers, it was under no obligation to recognize the Society as the lawyers' chosen bargaining agent.

The LAO supported the exclusion of lawyers from collective bargaining on the basis that such exclusion was necessary to avoid conflicts with lawyers' professional duties, including duties to avoid conflicts of interest and to uphold client confidentiality.

Had the case proceeded on the merits, the Court would have been required to pronounce on whether or not the exclusion of lawyers from the definition of "employee" under s. 1(3) of the OLRA, could justify an employer's refusal to bargain, in view of the prevailing, liberal principles of freedom of association recognized in Canadian law.

However, in the summer of 2016, on the eve of cross-examinations, LAO agreed to recognize the Society as bargaining agent for LAO lawyers (so long as a majority of lawyers voted in favour of Society representation) and to negotiate a framework for collective bargaining, with binding arbitration over the terms of that framework.

As a result, this important issue of the constitutionality of the exclusion of lawyers under s. 1(3) will not be settled through the courts in the near future. This makes legislative reform even more pressing.

The Society is confident, however, that had the case proceeded to trial, it would have prevailed. In this respect, the Society tendered significant and persuasive expert evidence demonstrating that not only were any professional conflicts unlikely to occur as a result of lawyers participating in collective bargaining, but that collective bargaining would actually enhance lawyers' ability to meet their professional obligations.

We are attaching affidavits from two expert witnesses:

- Affidavit of Professor Shelagh Campbell, sworn June 23, 2016 (**Tab A**)
- Affidavit of Beth Symes, sworn June 24, 2016 (**Tab B**)

We briefly highlight some of the significant findings of these two experts.

<u>Expert Affidavit of Professor Shelagh Campbell</u>

Professor Shelagh Campbell is an Assistant Professor at the University of Regina in the areas of ethics and human resource management. Her research and writings focus on forms of collective representation among professionals.

In her affidavit, she chronicles changes that have taken place in the legal profession over the past few decades and notes that the types of management/employee relationships currently prevalent in the legal professional context were not contemplated in either the early development of the professions or of the Canadian labour relations legislation of the 1940s and 1950s.

Lawyers are increasingly practicing in a form of dependent employment, in circumstances where they have little control over their working conditions. She states, at para. 17:

> Increasingly, however, lawyers are employed in large bureaucratic organizations, and also increasingly without ownership stake in the firm. In this way the individual lawyers is not on a path to deploy their own labour and to control their individual labour process, but their labour is deployed by an employer who controls the labour process and the terms and conditions of employment.

And at para. 41:

> ...groups of subordinate lawyer-employees find themselves allied in opposition to the closed ranks of the more senior, partnership or management teams. This amounts to separate communities of interest within a single place of employment.

As Campbell explains, the lack of control that lawyers in dependent employment have over their working conditions can negatively impact on their ability to discharge their professional obligations. For example, an inability on the part of employed lawyers to control their workload can impact on their ability to provide quality legal services and to uphold their obligations to protect the public interest. Employees have increasingly sought collective bargaining as a means to protect their professionalism. As she explains (para 35):

> Collective bargaining protects and strengthens professionalism and counterbalances pressures from the employer that lawyers feel impede their professional obligations and limit the exercise of professional discretion.

Given the current workplace dynamic for lawyers she argues, at para. 37, that collective representation:

> is thus of great importance to lawyers in dependent employment in order for them to be able to express their community of interest when they are gathered together in subordinate labour roles; collective bargaining ensures that there is a demonstrated link between the key interests of these lawyers, their working conditions, and their ability to fulfill their obligations to their profession. ... Canadian labour history has shown that in the absence of legislative protection granting access to collective bargaining, employer resistance can overwhelm and prevent effective employee voice in the workplace.

She notes that the three forms of "collective organization" (the professional body for licensing, an advocacy body, and an association for collective bargaining) all have distinct and necessary functions in addressing the needs of professionals working in dependent employment (para 45).

Campbell concludes that there is "no inherent conflict between membership in a profession and participation in collective bargaining over terms and conditions of employment," and that there is "nothing inherent in the legal profession" that warrants treating this profession differently from the many other professionals such as social workers and engineers, who have access to collective bargaining. Rather, she states:

> For employed professionals in general, and employed lawyers in particular, collective bargaining enhances professionalism, does not represent a threat to professional obligations, and is a critical instrument of voice in the face of the employers' otherwise complete control over working conditions.

Expert Affidavit of Beth Symes

In her Affidavit, Beth Symes, a prominent and pioneering lawyer and Emeritus Bencher with extensive experience in labour and employment matters as well as the oversight of lawyers' professional obligations, specifically addresses objections to the unionization of lawyers that LAO raised. Such objections, advanced by the respondents in the LAO litigation, included suggestions that collective bargaining is inconsistent with lawyers' duties of professionalism, including duties of confidentiality and to avoid conflicts of interest, as well as the suggestion that a lawyer's right to strike could result in his or her withdrawal of services and consequent breach of the Rules of Professional Conduct.

Before addressing concerns respecting issues of confidentiality and conflict of interest specifically, Symes points out that all regulated professionals in Ontario and elsewhere in Canada owe obligations to their clients and/or patients and that the collective agreements of many unionized professionals include mechanisms for resolving conflicts that may arise between employer's demands and these professionals' ethical and professional obligations. Professional obligations are not altered by collective bargaining.

In terms of confidentiality, she points to examples of doctors, nurses and pharmacists who have similar professional obligations to those of lawyers but who have negotiated "professional responsibility" clauses into their collective agreements, with binding mechanisms for resolution of disputes in a manner that respects client/patient confidentiality. In her view, there was "no risk that by organizing, the LAO staff lawyers will breach their confidentiality obligations" (para 46).

She also disagreed with the assertion that there would be a "substantial risk" of conflicts of interest should staff lawyers unionize. She noted that collective agreements that cover lawyers can and do include mechanisms to address conflicts of interest that arise between a lawyer and potential client. In terms of the assertion that a client could have

a conflict of interest with the bargaining agent itself, Symes was of the view that this was a very remote possibility, but in any event, could be dealt with by retaining outside counsel (para 52).

In terms of a concern that unionized lawyers could strike and violate their professional obligations to their clients, Symes concluded that it was unlikely that lawyers would cease to act for their clients in such a manner, that the *Act* does not dictate when strikes must begin, and that the parties may agree to resolve any disputes through alternative means such as binding interest arbitration. The legislature may also decide to deem provision of legal services to be an essential service. She also notes that a lawyer is not obliged, during a strike, to "down tools." In her view, "the professional obligations of a lawyer to her clients will always trump the right to withdraw services during a strike."

Overall, Symes concludes that (para 68):

> By providing an effective mechanism to resolve these issues, collective bargaining would actually enhance professional obligations, rather than undermining them.

While Campbell and Symes dealt largely with the justification for the exclusion of lawyers under the OLRA, their comments apply equally to the other excluded professionals: architectural, dental, land surveying, and medical professionals. There is no reason to believe that collective bargaining for any of these professionals is inconsistent with their duties to clients/patients.

Finally, Symes emphasizes the extent to which the exclusion of lawyers from collective bargaining legislation in Ontario is an outlier (see paragraph 8 of her affidavit), and the extent to which the professed concerns about permitting lawyers to collectively bargain are theoretical at best.

Indeed, it should be noted that even in the United States, there is no statutory exclusion of lawyers covered by the NLRB, and various other state-based collective bargaining regimes.

Professor Michael Lynk's Paper

In addition, as part of this Review's research projects, Professor Michael Lynk's was commissioned by the Changing Workplaces Review, and prepared a study entitled, "A Review of the Employee Occupational Exclusions under the Ontario *Labour Relations Act, 1995.*" Professor Lynk's paper also provides compelling justification for the elimination of all employee occupational exclusions under the OLRA.

Before reviewing the justification for specific employee occupational exclusions, Lynk reviews a number of significant factors that make a review of these exclusions "timely."

First, he points to recent Supreme Court of Canada cases that have taken a liberal and expansive interpretation of s. 2(d) in relation to collective bargaining. He states that the impact of the Court's recent rulings suggest that "the social purpose of labour legislation" should be "made available to Ontarians in the labour force in a broad and liberal manner so as to enable the realization of these core *Charter* values within the workplace" (p. 7).

Second, he notes that current concepts in industrial relations, including at the international level, recognize that all employees are intrinsically the vulnerable party in an employment relationship and that there ought to be "universality" in the availability of collective bargaining as a "protective institution" to all employees (p. 8).

Finally, he notes the need to "bring some rationality" to the purpose of employee inclusions and exclusions under the OLRA. The present scope of inclusions and exclusions under the Act are a "patchwork" that "may not always suggest an underlying logic and consistency" (p. 9).

Lynk then proceeds to review, in detail, recent Supreme Court of Canada cases, including *Mounted Police.* He states, at page 15:

> it would appear that, in the aftermath of *Mounted Police,* the *complete* exclusion of an occupational category of employees from any statutory access to collective bargaining would be a presumptive breach of the *Charter,* which could be saved only by a compelling justification from a Canadian government under the s. 1 analytical framework.

In reviewing the Court's reasoning in *Mounted Police,* Lynk states, at p. 19, that the Court's reasoning suggests:

> ...that meaningful access to associational freedom requires a genuine statutory pathway for employees to create or join an autonomous and effective employee organization capable of bargaining, on a broadly equal basis, enforceable collective agreements with the employer.

Lynk also points out that international law supports the inclusion of all employees in collective bargaining. Article 2 of *Convention No. 87* provides all employees have the right, "without distinction whatsoever," to establish and join employee organizations for collective protection. This convention has been interpreted very broadly by the CFA and the CEACR to mean that except for non-civilian members of the armed forces and the police, all occupations of workers should enjoy associational freedoms and meaningful access to collective bargaining.

In terms of the exclusions of workers in regulated professions, he says, at pages 49-50:

> ...the burden of lengthy work hours, the intrusion by work technology into what was once considered private time, the representation and voice of women and

> minorities, the prevalence of stress and mental illness, and concerns over remuneration, benefits and working conditions – have also become pressing challenges in the professional workplace. As well, issues of control by professionals over workplace direction and the exercise of professional judgement, particularly in larger hierarchical workplaces, have acted as an incentive to seek forms of collective organization that will articulate and advance their job concerns.

He also notes, at page 50, the trend of these professions "shedding traditional views towards collective bargaining" and adopting different forms of "collective voice" including union or "union-like" organizations to negotiate their working conditions.

In terms of international law, Lynk, at page 54, notes that in 1997, the Committee on Freedom of Association of the ILO stated, with specific reference to Ontario, that the legal, dental, medical, land surveying and architectural professions should be granted the right to organize and collectively bargain.

Conclusion

Overall, there is no justification for the exclusion of any professions under s. 1(3) of the OLRA. Professional conflicts are unlikely to arise by virtue of unionization and collective bargaining. To the contrary, collective bargaining provides an important mechanism to enhance the ability of professionals to meet their professional obligations to their clients and to the public. Even more fundamentally, there is simply no basis for stripping professional employees of their constitutional right to engage in collective bargaining.

B. EXCLUSION OF MANAGERIAL EMPLOYEES SHOULD BE RESTRICTED

The Society reiterates its view that an amendment to the OLRA is needed to ensure that supervisors and managers who do not make decisions with respect to policy and the overall operation of the organization are not excluded from collective bargaining. Although this does not seem to have been identified as a specific option in the Interim Report, the Society's submission finds considerable report in Professor Michael Lynk's paper on employee occupational exclusions, discussed above, and commissioned for the CWR.

Lynk notes that the question of whether lower and middle-level managerial employees should enjoy access to collective bargaining within their own bargaining units has been interpreted restrictively in Ontario. However, he notes that for close to half a century, influential studies and commentators have questioned the justification for the managerial exclusion. For example, the 1968 "Woods Report" on Canadian industrial relations recommended the inclusion of supervisors and lower-level managers, where these groups would be placed in their own bargaining units.

Lynk also points out that since 1973, the *Canada Labour Code* has expressly allowed for the certification of designated bargaining units for managerial employees, and cites

important commentary from an influential Canada Board case, *Cominco Ltd.* (1980), 3 Can LRBR 105. In that case, the Board stated, at para. 70:

> ... To say because a person is the sole supervisor present at a time or place creates a conflict because he must be the "management presence" is to think of conflicting loyalties in an outdated framework. Many employees in innumerable circumstances act alone and perform responsible tasks. The fact they also engage in collective bargaining has no impact on their loyalty to their employer or dedication to their job. Supervision by its nature has always required persons to act as the final on-the-site authority.
>
> The fact that employees influence corporate policy or commit an enterprise to expenditures is equally not grounds for finding a conflict. These are common characteristics of the functions of professionals. They have been given collective bargaining rights. They are also common characteristics of the functions of specialists generally, whether tradesmen, technicians or other groups of employees.
>
> Similarly, the fact a person is a supervisor and as such directs the work of others, corrects and reprimands where necessary, allocates work among men and equipment, evaluates or assesses new and longstanding employees, authorizes overtime when necessary, calls in manpower when needed, trains others, receives training to supervise, selects persons for advancement, authorizes repairs, can halt production when problems arise, schedules holidays and vacations, verifies time worked, authorizes shift changes for individuals, and requisitions supplies when needed does not create the conflict or potential conflict that disentitles him to the freedom to associate. The loyalty and integrity of such a person is not altered by union membership or representation. ...

He also noted that in terms of international labour law, the Committee on Freedom of Association has consistently taken the position that managerial and supervisory employees should be entitled to collectively bargain, subject to being placed in their own distinct bargaining units. The Committee has stated that to be denied access to collective bargaining, a true "manager" should be confined only to those employees who "genuinely represent the interests of management."

In conclusion, the Society supports the view, put eloquently by the Canada Labour Board in *International Longshoremen's and Warehousemen's Union and Vancouver Wharves,* [1975] 1 C.L.R.B.R. 162 at 167:

> There is no dispute, the Board believes, with the recognition that the Canadian Parliament, together with the Provincial Legislatures is committed to the fundamental policy that collective bargaining must be facilitated and enhanced for as many people as possible. Collective bargaining rights are not a privilege, not a concession, not a favour, they are a basic right which will not be withdrawn from any employee unless there are very serious reasons.

C. RENEWAL AGREEMENT ARBITRATION

In our submissions of November 6, 2016, the Society proposed that the OLRA be amended to allow access to interest arbitration to settle long labour disputes that last over 90 days. As noted in our submissions, this mechanism would be similar to Section 87.1 of Manitoba's Labour Relations Act, which currently provides a mechanism to have the Manitoba Labour Relations Board settle the provisions of a collective agreement where a dispute has been ongoing for at least 60 days and the parties have worked with a conciliation officer or mediator to settle the terms of a collective agreement for at least 30 days.

This proposal was one of the options reflected in section 4.4.3 of the Interim Report deals with renewal agreement arbitration. Options set out in that section included:

1. Maintain the status quo.

2. As in Manitoba, provide for access to arbitration after a specified time following the commencement of a strike or lock-out provided that:
   a. Certain conciliation and/or mediation steps have been followed;
   b. The applicant for interest arbitration has bargained in good faith; and
   c. It appears that the parties are unlikely to reach as settlement;

3. Empower the OLRB to order interest arbitration as a remedy following a finding of bargaining in bad faith after the commencement of a strike or lock-out, provided that:
   a. Certain conciliation and/or mediation steps have been followed;
   b. The applicant for interest arbitration has bargained in good faith; and
   c. It appears that the parties are unlikely to reach a settlement.

4. As in British Columbia, provide for a mediation-intensive dispute resolution process which does not involve interest arbitration or mediation/arbitration, unless agreed to by the parties, but does provide a number of tools to facilitate dispute resolution, including the making of recommendations by a mediator or fact finder.

In our view, Option 2 (the "Manitoba Model") is necessary, and bad faith bargaining should not be a pre-requisite to accessing renewal agreement arbitration.

As we noted in our earlier submissions, even mature bargaining relationships can produce intractable impasses that may have very high financial and human costs when they are associated with lengthy disputes. These negative costs can occur even in the absence of bad faith bargaining.

Timothy J. Bartkiw examines the Manitoba Model in his paper, commissioned for the Changing Workplaces Review, "Collective Bargaining, Strikes and Lockouts under the Labour Relations Act, 1995." In his paper, Bartkiw notes that since the provisions were

adopted in 2000, there has not been any "'floodgate' of arbitration activity". To the contrary, there have been a total of seven (7) applications filed under these provisions and of these, the Board has been required to make only four (4) rulings on applications under these provisions. He notes that there are a number of "checks" built into this Model to limit recourse to the provision, and notes that the arbitrated outcomes last only for short periods of time.[1]

Bartkiw also reviews what limited commentary there has been about this provision and concludes that overall, the main feedback on this "rarely invoked" mechanism has been a recommendation favouring "slightly longer arbitrated settlements to prevent the occurrence of very short agreements in unique cases" (p. 64).

In the Society's submission, the Manitoba Model incorporates appropriate safeguards to ensure that parties have robust recourse to work stoppages as a tool to exert pressure on the opposing party to compromise its position in bargaining, while recognizing that a threat of subsequent arbitration might "maintain or even spur pressure to settle in such cases, given the risk of eventual arbitrated outcomes if the stoppage becomes 'excessively' long" (p. 61).

The Interim Report notes that Employers believe that a third-party arbitrator "cannot be expected to understand the business and operational needs and interests of the enterprise" and are "not in a position to make decisions that could have a significant impact on the on-going competitiveness and viability of the business." However, this position is patently without merit. Interest arbitrators, on a regular basis, are called upon to study and pronounce on matters impacting on the competitiveness and viability of a business both in the context of first agreement arbitration, and in the context of essential services interest arbitration, which includes renewal agreement arbitration.

Overall, The Society believes that the adoption of the Manitoba Model makes good labour relations sense, and is unlikely to open any "floodgates" to arbitration if adopted in Ontario.

D. BROADER BASED BARGAINING

In its initial submissions, the Society did not make specific proposals respecting broader based bargaining structures. In the Society's view, the Special Advisors are to be commended for recognizing the critical importance of reform in this area, particularly given the changing nature of work and workplaces, and the need to extend collective bargaining to vulnerable workers in precarious workplaces.

The Society recognizes that in a number of sectors, particularly those characterized by smaller and fragmented workplaces, the Wagner Act model does not provide a viable

[1] I.e., one year following the expiry of the previous agreement, or if the agreement is settled past the expiry of the previous contract, the new agreement remains in effect for 6 months only. The parties may agree to extend the duration.

structure for workers to organize and better their working conditions through unionization.

The Society supports a number of options proposed in the Interim Report for broader based bargaining, and recognizes that different options, or models, may be warranted in different circumstances. In particular, in terms of the options listed in section 4.6.1 of the Interim Report, the Society generally supports the following options:

- Option 3 – Certification of franchise operations and single-employer, multi-location certification and bargaining

- Option 4 – Certification on a single employer basis, with the ability to combine bargaining units at different locations of the same employer. Moreover, this should be combined not only with the ability to bargain on a consolidated basis with different locations of the same employer, but also, as contemplated by Option 5, to do so on a multi-employer basis.

- Option 7 –Models for industries where *Wagner Act* model ineffective

- Options 8 – 9 – Models particular to freelancers, dependent contractors, artists

At the same time, it is the Society's view that any new form of legislated broader based bargaining should not apply to workers and unions in sectors that already have significant union representation, and that new structures should not displace established central, multi-employer or sectoral bargaining relationships.

TAB A

Court File No.: CV-15-537113

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

THE SOCIETY OF ENERGY PROFESSIONALS, IFPTE LOCAL 160, AND DANA FISHER, DIANE ABBOTT, DAVID BEAL, ALEXANDRA CAMPBELL, KYLE NOONAN, CAROLINE PRICE, MICHAEL STORY and KENDALL YAMAGISHI on their own behalf, and on behalf of all of the members of the Society of Energy Professionals, IFPTE Local 160 who are employed as lawyers at Legal Aid Ontario

Applicants

- and -

LEGAL AID ONTARIO, and THE CROWN IN RIGHT OF ONTARIO as represented by THE MINISTRY OF THE ATTORNEY GENERAL OF ONTARIO

Respondents

AFFIDAVIT OF PROFESSOR SHELAGH CAMPBELL

I, Shelagh Campbell, of the City of Regina in the Province of Saskatchewan, MAKE OATH AND SAY:

1. I am an Assistant Professor at the University of Regina. Prior to joining the faculty at the University of Regina in 2012, I was a postdoctoral scholar at l'Université du Québec à Montréal (TELUQ division). Before becoming an academic, I held a number of management positions in the private and public sectors, culminating in a senior leadership role with the Public Service Commission of the Province of Nova Scotia. In this role I was responsible for civil service-wide human resources initiatives and special projects. In this capacity I dealt directly with labour relations matters of an extraordinary nature, including a variety of compensation initiatives for technical and professional staff. I was chief negotiator (management) on the initial framework agreement between the Nova Scotia Crown Attorneys Association, representing Crown Prosecutors, and the Province. I hold a Bachelor of Commerce degree with Honours from Queen's University, a Master of Industrial Relations from the University of Toronto and a PhD in Management from Saint Mary's University.

2. My principal areas of teaching are ethics and human resource management. My research and writing focus on forms of collective representation among professionals. My work is interdisciplinary and draws from labour relations, sociology, and organization theory.

3. In particular I have explored extensively the experiences of Canadian government lawyers and their pursuit of collective bargaining. This research has resulted in a number of works including:

(a) my PhD dissertation titled Continental drift in the legal profession: The struggle for collective bargaining by Nova Scotia's crown prosecutors;

(b) peer-reviewed journal articles: Erosion and renewal of professional powers in public sector employment: The role of occupational community published in *Relations industrielles/Industrial Relations;* Struggles on the frontier of professional control: leading cases from Canada published in *Economic and Industrial Democracy*, and Extending occupational community analysis: Assessing the impact of workload on the rule of law, forthcoming in *Legal Studies*; and

(c) numerous conference presentations, detailed in my curriculum vitae, which is attached to this affidavit as Exhibit "A".

4. I was asked by the firm of Goldblatt Partners to review the Record filed by the Applicants and the affidavits of Gavin Mackenzie, Richard Chaykowski, and Robert Ward, and provide my expert opinion on the following questions:

(a) An assessment of the importance and relevance of collective bargaining for employed lawyers;

(b) An assessment of the ostensible and/or actual objectives or purposes served by the exclusion of employed lawyers from legislative protection of the ability to democratically select their own independent bargaining agent and to engage in a process of meaningful collective bargaining with their employer; and

(c) As assessment of the impact of that exclusion, particularly where their employer is opposed to engaging in such collective bargaining.

5. These questions are addressed collectively in the paragraphs which follow.

History and Development of Law as a Profession

6. The legal profession is one of the traditional liberal professions, along with medicine and the clergy. Tracing their roots to medieval times, these occupational groups have significantly influenced our perception of specialized work. The notion of profession now extends to a large number of contemporary occupations, such as architecture, nursing, teaching, engineering, and accountancy. The sociology of professions literature can be briefly summarized as follows: each profession engages in a professional project:[1] a series of actions and attendant structures that serve to create a monopoly for the services of the profession. Inherent in creating this monopoly are these characteristics: members of the profession control entry requirements and certification, and by extension the body of knowledge that determines and defines the work of the profession; members of the profession are responsible for apprenticeship structures that form part of the certification process; the State delegates control over certification processes in return for assurances of quality control and defense of the public interest; and a licensing body regulates the practice of the profession broadly speaking, with responsibly for discipline.[2]

7. Professionalization is not a dichotomous construct; an occupation is not discretely professionalized or unprofessionalized. Rather, there is a continuum along which occupational groups progress.[3] Krause identifies four dimensions of relevance in this process: association whereby individuals gather together and cooperate, forming a collective identity; workplace where workers establish shared space, regulate workflow, and establish boundaries and roles relative to other workers and manager/owners; relationship with the state leading progressively to formal, legal delegated autonomy; and market control in the form of a monopoly. In its fullest form market control extends over the boundaries of other occupations and includes the ability to influence the practice and regulation of others.[4] The legal profession is deemed to be fully professionalized, having attained state sanction as a self-governing profession with the capacity to limit the practice to registered professionals, the capacity to organize all professionals into the governing body, and the ability to influence the boundaries of the profession in defining the scope of its specialized work.

[1] Witz, A. (1992). *Professions and Patriarchy*. London: Routledge.

[2] Abbott, A. (1988). *The System of Professions. An Essay on the Division of Expert Labor*. Chicago: The University of Chicago Press.

[3] Campbell, S., & Haiven, L. (2012). Struggles on the frontier of professional control: Leading cases from Canada. *Economic and Industrial Democracy, 33*(4), 669-689.

[4] Krause, E. A. (1996). *Death of the guilds : professions, states, and the advance of capitalism, 1930 to the present*. New Haven: Yale University Press.

8. When a group protects itself and its activities through rules and restrictions that limit access, it practices closure.[5] A profession that restricts the entry of members to a select few practices exclusionary closure.[6] The legal profession's exclusion of other, non-lawyer members is exclusionary closure and is a protection measure directed outwards to the balance of society. An occupational group moves along Krause's four dimensions over time; sometimes gains on each dimension are made concurrently, sometimes sequentially. An occupation is said to be fully professionalized when it attains autonomous control over the regulation of not only its own members, but the practice of the profession in society at large.

9. A second form of closure, usurpationary closure, is manifest when those in subordinate positions within an organization unite to consolidate their interests in opposition to the closed ranks of a dominant group such as managers, for example, and thereby attempt to usurp some measure control over their working conditions. Usurpationary closure is commonly associated with trade unions, in their relations with their employers. The existence of this dimension in the employment relationship is not a function of the type of work or membership in a specific profession, but is a characteristic of subordination in the employment structure.

10. Finally, some groups both restrict entry and challenge the restrictions of others, practicing both exclusionary and usurpationary closure in a form known as dual closure.[7] Dual closure is often found among professionals employed in large organizations in what is known as dependent employment. This is the case for nurses, for example. This distinction between forms of closure will be examined in greater detail, below.

11. In Canada's days as a British colony, colonial governors licensed lawyers. They used a hybrid of French and English legal systems to control litigation and ensure a monopoly over legal services. This approach also presumably protected the interests of the Crown .[8] Law societies gradually took control of the regulation of practitioners and colonial governments enacted various controls over the profession; examination of candidates was first done by judges and existing barristers, in contrast to the university education and bar

[5] Weber, M. (1947). *The Theory of Social and Economic Organization* (A. M. Henderson & T. Parsons, Trans.). New York: The Free Press of Glencoe, A division of the Macmillan Company.
[6] Parkin, F. (1979). *Marxism and Class Theory: A Bourgeois Critique*. New York: Columbia University Press.
[7] Ibid
[8] Stager, D. A. A., & Arthurs, H. W. (1990). *Lawyers in Canada*. Toronto: University of Toronto Press.

exam of contemporary times. The population of the colony in its early days was too small to support a bar modeled on the British, with separate solicitors and barristers and a system of Inns of Court where only members of Inns were heard by the bench. There were simply too few individuals to handle the growing volume of work. Thus, separate roles for advice and pleading in court collapsed into a single occupation. Central regulation of the profession was established in a Barristers' Society, and gradually the profession emerged as we know it today. The pattern varied across Canada in terms of educational requirements[9] and discipline in its initial years but became more homogeneous over time.[10] Issues like specialization and advertising have given rise to some differentiation across Canadian provinces, but recent mobility agreements counter this and lead to greater national consistency in the governance of the legal profession.[11]

12. The terms 'profession' and 'professionalism' can be distinguished as structure on the one hand and capacity to act on the other.[12] When we talk about the profession, we refer to the institutional forms and the practices and rules that govern becoming a professional. To a lesser extent, the term profession describes the standardized work of those who practice the profession. Professionalism is a characteristic of individuals and refers to both outward demeanour and internal identity. When a person embraces the ideology of her profession and strives to appear to put the public interest before personal interests, when she addresses her tasks with care and attention to detail, we often say she has a sense of professionalism. Professionalism is a conscious action that can be controlled by the individual as well as the institutional forms that surround her.[13] Abel distinguishes between these two concepts when he writes that professionalism in English law is in decline but the profession itself may continue.[14] Thus the profession is not solely defined by the institutional forms established to ensure uniformity in service delivery, but also through the practices of its individual

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[9] Bell, D. G. (2009). Slamming the door on brains: Two early twentieth century law schools and the narrowing of educational opportunity. In C. Backhouse & W. W. Pugh (Eds.), *The promise and perils of law: Lawyers in Canadian history* (pp. 31-48). Toronto: Irwin Law Inc.

Girard, P., & Haylock, J. (2009). Stratification, economic adversity, and diversity in an urban bar: Halifax, Nova Scotia, 1900-1950 *The promise and perils of law: Lawyers in Canadian history* (pp. 75-102). Toronto: Irwin Law Inc.

[10] Stager & Arthurs, Above n8

[11] Ceballos, A. (2009, April 24). Canadian Legal reforms on horizon, *The Lawers Weekly*, pp. 20-22.

[12] Kay, F. (2004). Professionalism and exclusionary practices: shifting the terrain of privilege and professional monopoly. *International Journal of the Legal Profession, 11*(1 & 2), 11-20.

Nelson, R. L., & Trubeck, D. M. (1992). Arenas of professionalism: The professional ideologies of lawyers in context. In R. L. Nelson, D. M. Trubeck & R. L. Solomòn (Eds.), *Lawyers' ideals/ lawyers' practices: transformations in the American legal profession*. Ithica: Cornell University Press.

[13] Nelson & Trubeck, Above n12

[14] Abel, R. L. (2003). *English lawyers between market and state: The politics of professionalism*. Oxford: Oxford University Press.

members.

Changes to the Character and Structure of the Profession

13. The traditional model of professions is predicated on an economic monopoly which its members jealously protect through the exclusion of non-qualified practitioners.[15] I shall not delve here into the social and gender exclusions that accompanied the development of the liberal professions (medicine, the clergy, and law); suffice to say the monopolistic model guaranteed lucrative earnings in an economy where self employment was the norm. However, increasingly professionals of all types and disciplines find themselves not in sole proprietorships but employed in large bureaucratic organizations in a situation of dependent employment.[16] This is one indication of fundamental changes underway in the legal profession.

14. Though considered a fully realized profession, and by implication one where exclusionary closure is complete, the legal profession's independence, self-governance, and autonomy do not remain unchallenged. Evidence indicates the profession has retreated along the closure continuum in recent years. The profession's relationship with the state, broadly speaking, has shifted with greater government intervention in the United Kingdom[17] and Australia. The profession has lost control over legal education[18] in Canada, and employment of lawyers in large firms has increased with more lawyers than ever practicing outside the self-employment model. This latter point is evident in the growth of large law firms; a further indication is the increase in the number of lawyers employed in the public sector.[19]

15. The contemporary legal profession in Canada is comprised of three main groups: lawyers in private practice, lawyers in public practice, and in-house or corporate counsel. Private practitioners are further divided into those who practice independently, in the traditional model of self-employment, and those who are either partners with an ownership stake or else employees of large professional service firms. Data reported by the Federation

[15] Abbott, A. (1988). *The System of Professions. An Essay on the Division of Expert Labor*. Chicago: The University of Chicago Press.
[16] Weiler, P. (1980). *Reconcilable Differences New Directions in Labour Law*. Toronto: The Carswell Company.
Goldenberg, S.B. (1968) Professional workers and collective bargaining *Taskforce on labour relations* Ottawa: Privy Council
White, G. F. (1993). *Determinants of professional unionization in Canada* unpublished PhD dissertation, University of Toronto: Toronto
Kowalsky, A.R. (2015) *Unionization at Justice Canada: Case Study.* unpublished PhD dissertation, York University: Toronto
[17] Abel, Above n 14
[18] Bell, Above n 9
[19] Kowalsky, Above n16

of Law Societies of Canada for the year 2014 indicates that 31% of practicing lawyers in Canada are exempt from insurance, indicating they are in dependent employment of some form: either as government lawyers or in-house counsel.[20] The Federation further reports that sole practitioners comprise a minority of the 99,000-plus practicing lawyers across the country, and that a significant proportion of lawyers are employed in firms with 11 or more lawyers.[21] There are in fact 218 business offering legal services in Canada that employ from 50 to over 500 employees.[22] The growth of large legal firms has not only drawn lawyers into dependent employment but has also segmented the profession.[23] These firms control certain segments of the market, leaving smaller firms and individual practitioners with a limited range of, and often less lucrative, practice opportunities.[24] The preceding discussion of change highlights the fact that the traditional ways of viewing and of controlling professionalization in the practice of law are changing.

16. Susskind writes that legal matters are becoming business matters with the routinization of legal work.[25] Advances in technology result in a pressure to commoditize certain legal transactions in estate law, for example. Increased government intervention in lawyers' market monopoly for legal services may result in a period of significant structural change where the profession's relationship with the state is redefined. Government intervention in the governance mechanisms of the profession in the UK has made Canadian lawyers anxious for the future of their profession. The first university degree granted for the study of law, the Llb, is under review; most Canadian universities have changed the degree to a doctor of jurisprudence, a JD, to indicate a higher status for lawyers who obtained a first degree in another discipline.[26] This change is partly motivated by competition with American lawyers who hold the more prestigious degree and is a sign of market competitiveness. Abel indicates that the burgeoning ranks of lawyers and competition for business coupled with commoditization of some legal functions has affected law firms' financial security. Non-lawyers and foreign providers of legal services threaten legal

[20] Conversation with Director of Communications, Federation of Law Societies of Canada, June 8 2016
[21] Federation of Law Societies of Canada (2014) Law Firms (2014 statistical report) Available at http://docs.flsc.ca/2014-statistics.pdf
[22] Statistics Canada, CANSIM, table 552-0003 Available at: http://www.statcan.gc.ca/cansim/a26
[23] Girard & Haylock Above n 8
Heinz, J. P., Nelson, R., Sandefur, R., & Laumann, E. (2005). *Urban lawyers- the new social structure of the bar*. Chicago: University of Chicago Press
[24] Ibid Heinz et al.
[25] Susskind, R. (2008). *The end of lawyers? Rethinking the nature of legal services*. Oxford: Oxford University Press.
Kowalsky, Above n16
[26] Moulton, D. (2009, November 20). Law Societies applaud report on common law degree, *The Lawyers Weekly*, pp. 1-3.

monopolies. These changes are in response to the globalization and specialization pressures of the contemporary marketplace. While most writers argue the profession will continue to exist, the fee for service model, education requirements, and practice norms will be under pressure to change, both in Canada[27] and beyond.[28] How members will define the profession, its relations with consumers of legal services, and sustainability of the legal profession during this period of change are all uncertain. Exclusionary closure mechanisms of the past may also need to change to keep pace. The fundamental promise of the professional project, a market monopoly and the financial rewards that flow from this monopoly, has been challenged with the changes to admissions, education, apprenticeship periods (articles) and employment forms for lawyers. Parkin states "Modes of closure can be thought of as different means of mobilizing power for the purposes of engaging in distributive struggle."[29] Faced with a fixed amount of resources for distribution, occupational groups will embrace both exclusionary and usurpationary closure strategies to address their needs.

17. The traditional notion of a professional did not anticipate additional forms of collective outside the guild – it was constructed on the premise that there is one place from which individual expertise is deployed out to the client; be that a guild, a workshop, or a private law practice. Increasingly, however, lawyers are employed in large bureaucratic organizations, and also increasingly without ownership stake in the firm. In this way the individual lawyer is not on a path to deploy their own labour and to control their individual labour process, but their labour is deployed by an employer who controls the labour process and the terms and conditions of employment. Consequently, lawyers in these situations of dependent employment turn to the instruments available to employees, in addition to those they have accessed as professionals.

Different Instruments of Regulation and Representation

18. For a professional project to be successful, its members must form a collective and share common interests that they agree to pursue as a unified body. This structure does not preclude multiple forms of collective, however. In fact, three distinct functions exist in the

[27] Leclair, R. (2009, April 24). Why it makes sense to use standard closing documents, *The Lawyers Weekly*, p. 9. Moulton, D. (2009, May 8). Is the billable hour really dying?, *The Lawyers Weekly*, pp. 20-23.

[28] Susskind Above n 25

[29] Parkin, F. (1998). Marxism and class theory: A bourgeois critique. In R. F. Levine (Ed.), *Social class and stratification: classic statements and theoretical debates* (pp. 119-140). Oxford: Rowman & Littlefield.

contemporary professions: quality assurance/certification; advocacy; and collective bargaining. Three institutional forms exist to address the related interests: a licensing and disciplinary body, specialty associations, and trade unions.[30] There is a correspondence between functions and their institutional form and I will address each one in turn.

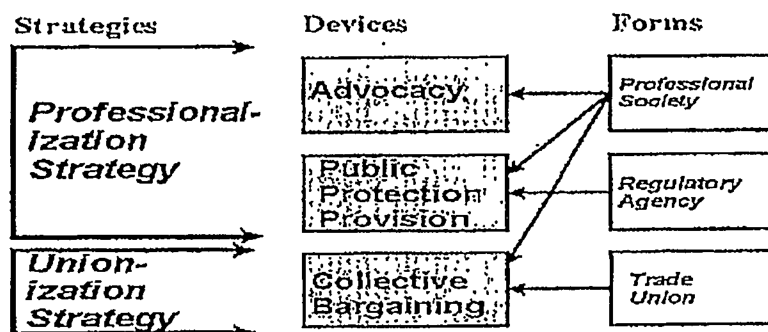
19. The licensing and disciplinary body of a profession purports to protect the public interest. Lawyers belong to a Barristers' Society or a Law Society that fulfills this role. These actions are deemed to protect the public by ensuring quality service and triggering repercussions for those who fail to comply with professional standards. The actions of the governing body also meet the needs of members. Members effectively secure control over access to the profession because they administer the licensing process themselves. The result is a market monopoly for the delivery of legal services. Professional bodies also educate the members in certain core compliance areas. Other professions have a similar structure. Colleges of Nursing, for example, license and discipline registered nurses.

20. A number of interest- or specialty-based associations regroup professionals in particular types of practice, such as the Canadian Association of Nurses in Oncology or the Criminal Lawyers' Association. The goal of these special interest groups is advocacy on behalf of their members. These associations may also support education programs and exchange among members with closely similar practices. The associations often provide a forum for exchange and advice. Larger national associations exist for most Canadian professions as well; for lawyers it is the Canadian Bar Association with corresponding provincial chapters. These national professional associations provide similar advocacy and education services on behalf of lawyers to meet their professional interests.

21. Finally, there are unions which represent the interests of workers in specific bargaining units. Provincial and federal labour boards define bargaining units that are in turn subject to respective jurisdictions' labour legislation. Professionalized occupations, such as public school teachers, university professors, and nurses have existed in structured permanent employment relationships with their employer for decades. These professions have developed collective bargaining over terms and conditions of employment in order to advance and protect their interests in the workplace. Haiven[31] represents the relationship

[30] Haiven, L. (1999). *Professionalization and Unionization among paramedical professions: National regulation and the challenge of globalization.* Working paper, College of Commerce, University of Saskatchewan.
[31] Ibid

between these instruments of closure and institutional forms in the diagram, below.



Organizational Strategies, Devices and Forms for Professionalized Workers

22. This three-instrument structure exists in the legal profession in Canada. The Law Societies control certification and discipline and uphold standards of practice; the Canadian Bar Association and its subsets of specific specialties and regional branches advocate in the public forum and also support education and the specific interests of law practice in their respective knowledge domains; and increasingly public sector lawyers are represented in the workplace by union-equivalent associations that engage in collective bargaining. The existence of these distinct organizational forms to address different interests of a profession does not undermine the legitimacy of the profession; the different forms delineate responsibility for different functions and protect members from potential conflicts. In fact, collective bargaining is not restricted to a limited range of issues. Lawyers who bargain with their employer address a range of issues that impact directly on their professional obligations. Each of the three devices noted by Haiven contribute to closure which protects the integrity of the profession.

23. Neither law society nor bar association represents employee issues to the employer; their role is to unite the broad spectrum of members based on fundamental common interests of practice. By definition, these bodies cannot represent interests from one employment setting to another, where the interests may be varied and not shared across all sites. Representation of interests in the context of employment is beyond the scope of law

societies. However, the working conditions employed lawyers face do have significant impact on their ability to discharge their professional obligations, as I will discuss in the next section.

24. Lawyers in dependent employment are trained and certified in the same manner as all other lawyers in the legal profession. They enjoy the same rights and privileges as members of their profession as licensed members of the various law societies across the country. Lawyers thus employed in the public sector, for example, represented by an union/association for the purposes of collective bargaining, are similarly trained and certified along with their professional peers in the private sector. Their interests as members of the profession continue to be represented by the law societies, and public sector lawyers continue to be bound by the requirements the societies set for licensed professionals. The protection of the public interest role that the law societies ensure is not impeded by collective bargaining among public sector lawyers. The matters in question in collective bargaining include compensation and working conditions (including the exercise of professional discretion) specific to the employment setting, and lie beyond the purview of the law societies to address. However, as reflected in Dana Fisher's affidavit[32] and in my own research, these matters have been shown to be critical for the effective exercise of professional duties. Thus, the act of bargaining does not undermine the integrity and quality of service offered by the profession's members, but supports it.

Management of the Employed Lawyer

25. One reason that the Canadian legal profession can be a collection of several sub-specialties and varied employment forms and yet still retain a sense of unity is due in part to the uniform education and apprenticeship aspects of lawyer training.[33] The profession presents a unified face to the public and to government when lobbying and addressing matters of regulation. But in fact the profession is a disparate set of specialists, and is becoming increasingly so. This raises the possibility that forms of closure may emerge *within* the profession.

26. Hierarchy plays an important role in structuring social relations at work. On the one hand employed lawyers are more independent and express greater control over their

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[32] Affidavit of Dana Fisher sworn January 11, 2016; at para 18-37
[33] Arthurs, H. W., Weisman, R., & Zemans, F. H. (1986). The Canadian Legal Profession. *American Bar Foundation Research Journal, 11*(3), pp 447-532.

labour process than most employees, and on the other hand they are confined in an extensive hierarchy. Although the application of professional mental effort is not curtailed or exploited by technology in the same way as physical effort, management still tries to control professional discretion through control over resources and the imposition of policy.

27. As lawyers take on employment in large organization, lawyers need to manage the labour process of other lawyers. Ackroyd and Muzio[34] examined this phenomenon and highlight instances of occupational closure *within* large legal firms. They illustrate the division and protection exercised by partners against associates in the same profession. Their research focused on private sector law firms, where partners with an equity stake practiced exclusionary closure against non-equity associates. In the public sector, equity is not a factor in employment, however this is replaced by management hierarchies. The following comment from a legal professional is indicative of my findings regarding changes in the profession:

> I think we have probably several professions within the broad legal profession. ... two distinct groups within the profession ...are becoming further and further apart: those who practice in the public side and those who practice in the private side. And there is emerging a fairly significant third group which are those who practice for single employers. [O]ne might call them corporate counsel ... they are employed by their client, they have often both a corporate and a legal role in the client [organization], and I think that that is a real challenge for the principles that govern the profession as a whole because of the nature of loyalty to the corporation employer.[35]

28. The career trajectory of lawyers through a large firm into private, solo practice has fundamentally changed. Increasing access to law school and economic pressure in the practice of law means there are more qualified graduates than positions. With greater competition for legal services, the advent of off-shoring and near-shoring legal services, and a labour supply that exceeds available opportunities for apprenticeships, legal firms have come to resemble large efficiency-seeking bureaucracies.[36] The path to partnership is lengthening, new forms of associate without partnership options are emerging, and nature of legal work has become more and more specialized.[37] These changes contribute to a legal

[34] Aokroyd, S., & Muzio, D. (2007). The reconstructed professional firm: Explaining change in English legal practices. *Organization Studies, 28*(5), 729-747.
[35] Campbell, S. (2010). *Continental drift in the legal profession: The struggle for collective bargaining by Nova Scotia's crown prosecutors.* (PhD dissertation), Saint Mary's University, Halifax
[36] Rogers, J. K. (2000). *Temps: The many faces of the changing workplace.* Ithaca, NY: ILR Press, Cornell University Press.
[37] Kowalsky, above, n 16

workplace where employers, be they in the private or public sector, direct the work of large numbers of lawyers.

29. Greater management span of control results in less time mentoring individual employees and a greater reliance on quantitative measures of performance. Mentorship of employed lawyers is very different from the experience of lawyers in small private practices. In my research, small law office lawyers describe the careful mentoring, case by case, of new lawyers. Large public sector organizations must rely on policy manuals and directives to achieve some semblance of direction and advice. What my interviews with public sector lawyers reveal is a significant subculture within their organizations, whereby individual lawyers support each other in a coffee-circle kind of peer mentorship to compensate for the lack of attention from the senior, management-rank lawyers. This is a further example of how the core principles of the profession are changing, changes that can lead to erosion of an individual lawyer's control over their working conditions, the time they invest in each file, and the client base they pursue.

30. The lack of management support for the professional and ethical obligations of staff lawyers noted in the Fisher affidavit are common themes for public sector lawyers in Canada. My research into the experiences of Crown Attorneys across Canada reveals similar concerns over the impact of working conditions on these lawyers' ability to provide quality legal services to the Crown, and which uphold their obligations to protect the public interest.[38] The Nova Scotia Crown Attorneys in particular noted concerns over a lack of office space, appropriate conditions to meet with clients, adequate resources such as legal databases, qualified support staff and appropriate recording keeping mechanisms, and contract / casual / temporary staff appointments. Additionally, government lawyers have expressed concerns, and sought to bargain over, better opportunities for professional development and timely technical education in the face of the increasing complexity of legal work. All of these working conditions are under the direct control of the employer and have negative impacts on employed lawyers' ability to provide legal services to the standard and of the quality in keeping with their professional obligations.[39] Attached to my affidavit as Exhibit B is the article by Campbell titled Exercising discretion in the context of dependent employment: Assessing the impact of workload on the rule of law.

[38] Campbell, S. forthcoming Exercising discretion in the context of dependent employment: Assessing the impact of workload on the rule of law. *Legal Studies*
[39] Ibid

31. In addition to controlling resources, employers have the discretion to formulate policy, issue instructions and make unilateral changes to work arrangements. These may conflict with the way an individual professional determines his or her duties are to be discharged. One example from Nova Scotia is a directive issued regarding domestic violence whereby prosecutors were instructed to prosecute all cases of alleged domestic violence. Members of the Nova Scotia Crown Attorneys' Association stated this directive inhibits the prosecutor's professional discretion and places obligations on prosecutors to act in specific ways that may in fact conflict with the public interest and standards regarding the likelihood of conviction.[40] This is just one example of an employer's ability to impose conditions that affect the delivery of professional services and, in the extreme, conflicts with staff lawyers' professional obligations. Employers have full discretion to alter work assignments, reorganize work units and change the method of service delivery. Employed lawyers facing these circumstances in their work lives have sought collective barging as a means to protect their professionalism; the absence of a mechanism for representation which achieves effective collective voice is a detriment to legal professionalism in these cases.

32. The legal profession and its controlling institutions protect the scope of practice, not the individual members. In fact, many lawyers I have spoken to over the course of my academic research indicate that the professional structures serve the public interest and not the lawyers in private or public practice. Hodson[41] found that collective actions by employed professionals serve as a defense of professional autonomy in the supervisor/subordinate relationship. Collective representation is an important instrument to protect workers from arbitrary treatment by the employer and its agents: managers. This aspect of workplace relations has been shown to be extremely important for several public sector legal offices and lead them to seek collective bargaining as a way to protect their professional obligations in the workplace.

33. Some, such as Haug & Sussman and Raelin have claimed a deprofessionalization of the legal profession has occurred as a result of the movement of lawyers into dependent employment.[42] My research on public sector lawyers in Canada shows that a distinct form

[40] Campbell Above n 35

[41] Hodson, R. (1995). Worker Resistance: An Underdeveloped Concept in the Sociology of Work. *Economic and Industrial Democracy, 16*(1), 79-110.

[42] Haug, M. R., & Sussman, M. B. (1971). Professionalization and Unionism: A Jurisdictional Dispute? In E. Freidson (Ed.), *The Professions and their prospects* (pp. 89-104). Beverly Hills: Sage.
Raelin, J. A. (1989). Unionization and deprofessionalization: which comes first? *Journal of Organizational Behaviour, 10*, 101-115.

of collective, an occupational community (OC) within the profession, has arisen among lawyers as a response to these substantive changes.[43] The way work is organized in public prosecutions in Canada, for example, has lead to an OC among prosecutors. Some of the features that unite this group in a distinctive subset of the profession include shared work spaces and files, significant resource constraints compared to private sector peers, the complexity of legal work subject to public policy direction, and low remuneration compared to colleagues with the same years of practice at the private bar. This OC reinforces the principles and interests of the members in their professional practice. The OC provides members with a venue for discussion and a voice to advocate and negotiate over those issues which they deem interfere with their abilities to practice law effectively. Thus the profession is not undermined, or 'deprofessionalized' when lawyers move into dependent employment in large numbers; rather lawyers in these work settings mobilize different instruments of closure to protect their professional interests.

34. Dependent employment introduces management/employee relationships that were not contemplated in either the early development of professions or the Canadian labour relations legislation of the 1940s and 1950s. Increasingly, however, we see lawyers in this employment setting. Employer control may be formal, through rules and procedure manuals, or real through intense routinization and eventual breakdown of the labour process. Research confirms[44] that the core principles of the profession, namely the protection of practice scope, remain a key feature of the profession in these increasingly large group employment settings. For almost forty years the industrial relations literature has debated the implications of collective bargaining for salaried professionals with consistent conclusions: traditional notions of the professions and professional work are evolving and the needs of salaried professionals support collective bargaining. [45] In these employment settings we see that lawyers attempt to practice two forms of protection, or closure[46] both of which serve their professional interests. Lawyers adopt a variety of social instruments to accomplish their professional goals, including occupational communities and union-

[43] Campbell Above n 35
[44] Muzio, D., & Ackroyd, S. (2005). On the consequences of defensive professionalism: Recent changes in the legal labour process. *Journal of Law and Society, 32*(4), 615-642.
[45] Adams, G. (1977) Collective bargaining by salaried professionals. Relations Industrielles/Industrial Relations 32(2) p 184-201
Campbell & Haiven, Above n3
See the studies and reports referenced in paragraph 47, below, which draw the same conclusions.
[46] Parkin Above n 28
Campbell Above n 35

equivalent associations. Lawyers in these work settings resemble employees as defined by the Ontario Labour Relations Act, and not a traditional notion of an autonomous professional retained for independent advice. Attached to my affidavit as Exhibit C is the article by Adams titled Collective bargaining by salaried professionals; Exhibit D is the article by Campbell and Haiven titled Struggles on the frontier of professional control: Leading cases from Canada.

The Appropriateness of Bargaining for Employed Lawyers

35. In many respects lawyers in large organizations are like any other employees: they are organized into functional units; a hierarchy of management directs operations; a system of fiscal accountability is put into place; individual performance goals and targets are set and reviewed. While the mission and operational goals of governments and their agencies will vary from those of private sector organizations, for example, they too remain organizations where workers are gathered in subordinate employment. The ability of employees to discharge their duties in keeping with the independence of their profession and to fully exercise professional discretion is not a function of their membership in numerous, distinct collectives. The full exercise of professional discretion is rather a function of the rules that govern the employment relationship.[47] Collective bargaining protects and strengthens professionalism and counterbalances pressures from the employer that lawyers feel impede their professional obligations and limit the exercise of professional discretion.[48] Attached to my affidavit as Exhibit E is the article by Campbell article titled Erosion and renewal of professional powers in public sector employment: The role of occupational community.

36. To a great extent legal work is knowledge work[49] and draws on the skills of well trained, highly educated individuals, many with professional designations, who apply tacit knowledge to a wide array of problems.[50] Implicit in this application of tacit knowledge is the exercise of professional discretion.[51] The explosion of knowledge work in recent years has contributed to the rising numbers of professionals in dependent employment. The ability

[47] Ibid
Campbell, S. (2014). Erosion and renewal of professional powers in public sector employment: The role of occupational community. *Relations Industrielles/Industrial Relations, 69*(1), 159-185.
[48] Campbell Above n 35 page 219, 245
[49] Campbell (2014) Above n 14
[50] Muzio, D., Ackroyd, S., & Chalat, J.-F. (Eds.). (2008). *Redirections in the study of expert labour*. Houndsmills, UK: Palgrave Macmillan.
Special Issue *Relations Industrielles/Industrial Relations, 69*(1), L. Haiven Ed.
[51] Campbell Above n 35

to apply professional discretion in the course of work duties is often associated with the traditional view of autonomous professionals, however in the context of dependent employment this discretion is exercised within a managerial hierarchy, where organization policies also govern employee decisions and working conditions, as noted earlier.[52]

37. Collective representation in the workplace is thus of great importance to lawyers in dependent employment in order for them to be able to express their community of interest when they are gathered together in subordinate labour roles; collective bargaining ensures that their interests are addressed. The ability to bargain is of profound importance in that there is a demonstrated link between the key interests of these lawyers, their working conditions, and their ability to fulfill their obligations to their profession.[53] While collective representation can take many forms, including a trade union or a professional association,[54] Canadian labour history has shown that in the absence of legislative protection granting access to collective bargaining, employer resistance can overwhelm and prevent effective employee voice in the workplace.

38. Collective bargaining is an important mechanism to ensure employee voice in the workplace. Forms of collective voice are critical in a subordinate labour relationship where the economic and punitive power of the employer vastly outweighs the individual power of employees to influence their terms and conditions of employment. Weiler summaries collective bargaining as

> an instrument designed to serve further social values. Among the important objectives are the improvement of the relative economic position of workers, or guarantees of fair treatment and protection for individual employees, or providing the work force with some influence over what happens to the in a working environment where they are destined to spend much of their adult lives.[55]

39. Lawyers often conduct their work in an autonomous manner and the power inherent in their knowledge holds them apart from other types of workers, yet they form a community of peers and as such possess human capital that can be mobilized and which coalesces around specific interests. Collective bargaining is the only means available to lawyers in dependent employment to address the organizational aspects of their working

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[52] Campbell & Halven Above n 3
[53] Ibid
[54] Ibid
[55] Weiler, P. 1988 The professional employee in government, *Report to the Chairman of Management Board of Cabinet*, Toronto, pp 27-28

conditions, such as salary and workload because these lie well beyond the purview of the Law Societies. The scope of bargaining between lawyers and their employers can be quite broad, addressing a wide range of matters of interest and concern to the parties. Without collective representation in the workplace lawyers employed in large organizations, including public sector agencies and departments, are without recourse to the voice mechanisms their non-lawyer coworkers can access under labour legislation.

40. Despite the similarities between employed lawyers and other workers in dependent employment, a significant difference remains. Management and senior executives of large legal organizations also tend to be lawyers. Management staff in legal firms are usually full status members of the legal profession and may also carry a caseload or take on some level of courtroom work. This is true in the public sector as well. Staff lawyers are management's peers in the profession, but subordinated to management and to the employer's economic and/or policy aims. It can be difficult, as research shows, for these managers to conceive of collective action beyond the professional body that does not undermine the tenets of the profession.[56] The language of 'blue collar workers' and 'trade unions' is a barrier for many members of the profession to recognize the legitimacy of forms of collective bargaining that extend beyond, or are contained within the profession. In their discussion of management Crompton and Gubbay[57] highlight an important point. The worker who carries out only part of an ownership or managerial function is no less an agent of the owner or employer because the duty is attenuated or divided. Management's dissatisfaction with bureaucratic limits to their authority does not make management part of the worker collective. Likewise, carrying a partial case load does not exempt management lawyers from exercising control over their subordinates. Management level lawyers perform a distinct role separate from the balance of their colleagues. For these reasons employers and managers in large legal organizations can be particularly resistant to employee collective action.[58]

41. Though lawyers as a professional group may resist notions of unions and blue collar interest representation at an ideological level, research noted above[59] clearly reveals that exclusionary closure is evident <u>within</u> large employment settings in both the public and

[56] Campbell Above n 35
[57] Crompton, R., & Gubbay, J. (1977). *Economy and class structure*. London: MacMillan.
[58] Ibid
[59] Muzio & Ackroyd Above n 40

private sectors, such that groups of subordinate lawyer-employees find themselves allied in opposition to the closed ranks of the more senior, partnership or management teams. This amounts to separate communities of interest within a single place of employment: a setting where all members are practicing law, and all are full members of the governing profession, but form distinct internal communities within the employment setting. Though these lawyers may not be formally unionized in the private sector, the same mechanisms aligning groups with specific interests in a classic management-labour relationship are evident. In any other setting, labour legislation would protect such workers and provide them with the means to form a union if they so wished.

42. What is referred to here as the traditional professional project did not anticipate an emerging managerial relationship within its ranks. The original guild-type apprentice relationship still exists in the private bar to some extent, notably in small to medium-sized firms. However, the working conditions of large legal offices, including those in the public sector, preclude this type of relationship for a number of reasons: workloads are extremely high without a commensurate ability to increase fees that would offset such personalized support; performance management techniques are derived from a bureaucratic model; and the span of control of senior, experienced lawyers to juniors is much greater than that found in many small to medium sized firms. For these reasons we have seen distinct collective identities emerge among employed staff lawyers and a corresponding pursuit of collective bargaining in the public sector in Canada at both the federal and provincial level.[60]

43. The existence of multiple forms of collective in the legal profession is not new. These forms of collective organization achieve a variety of clearly defined, complementary purposes and use of collective bargaining as a tool to achieve a greater measure of control over terms and conditions of employment is not inherently in conflict with the obligations of a profession to support the sound exercise of professional discretion. The existence of all three forms of collective organization: the professional body for licensing, an advocacy body, and an association for collective bargaining more completely addresses the needs of professionals in dependent employment. The fact that all forms of collective were not necessarily anticipated in the genesis of the profession is merely a reflection of the

[60] Lawyers who bargain include those in the Federal Department of Justice; the Provincial governments in Ontario, Manitoba, Saskatchewan, Quebec, British Columbia, New Brunswick and Nova Scotia; and Legal Aid lawyers in British Columbia, Manitoba, and Saskatchewan.

constantly evolving nature of work and professions in contemporary society.[61]

44. Many of the concerns of traditional blue collar workers are reflected in the issues raised by lawyers in dependent employment. Lawyers are concerned about excessive overtime, inadequate tools to complete their work (e.g. computers, databases, office space), and workload. In some instances, safety and security at work has become an important concern, particularly in the practice of criminal law. Leave entitlement, the increasing use of causal or per diem lawyers over full time regular employees, and the increasing complexity of legal work itself are also issues for many employed lawyers, and public sector lawyers note the gap between public and private sector earnings. Private sector lawyers express concern over the increase in time to achieve the rank of partner, the low wages of junior lawyers, and the workload pressures. In keeping with the shift in the labour process to subordinate/superior relationships, lawyers also express concern over their professional autonomy in the workplace. Managerial prerogative is felt to interfere with the exercise of professional discretion and this has given rise to the call for grievance-type processes in the workplace. Having secured the rights and privileges of the profession with respect to society at large, lawyers feel these are eroded in dependent employment. As a result, lawyers are accessing new forms of collective in order to exercise voice in their employment contexts. The traditional forms of collective, the professional/regulatory body, is ill equipped for this role but a union-equivalent body is well suited to it.

45. Canada's earliest labour history saw the establishment of craft unions; unions that limit membership to a single craft or trade. With successive waves of industrialization, industrial unions emerged. Industrial unions by definition represent a variety of workers; this is the distinction that separates them from craft unions. The industrial union is a response to the changing organization of work in the late nineteenth and early twentieth centuries, after significant industrialization of the pre- and post- war economies in North America. This form of union is the dominant form in Canada today. Large industrial (or mixed-member) unions represent a wide range of occupations; a single union might represent members of skilled trades, unskilled workers, administrative support workers, and professionals in a number of fields as distinct as information technology, project management, nursing, teaching, and engineering. These types of unions with broad

[61] Muzio, D., & Hodgson, D. (2008). *Towards organizational professionalism: New patterns of professionalisation in UK expert labour*. Paper presented at the International Labour Process Conference, Dublin, Ireland.

membership are found in the private sector (e.g. Unifor) as well as the public sector (e.g. OPSEU, CUPE). Staff at these unions cannot claim to be experts in all of the fields of endeavour represented by the membership. However, they are trained and offer considerable expertise in member representation and collective bargaining. As such, staff in major industrial unions are able to act on their members' behalf to represent their interests and concerns. The democratic structure of unions facilitates broad consultation across the membership and decision making processes that ensure grassroots needs are identified and addressed. The bargaining agent does not define the issues and goals of the unit, rather the membership drives the agenda and defines the matters for negotiation and the content of proposals. Skilled union staff members provide strategic advice and tactical skills to achieve the unit's desired goals.

46. In excess of ninety percent of Canadian collective agreements are resolved without recourse to work stoppages.[62] The majority of grievances filed in Canadian workplaces are also settled without recourse to formal arbitration hearings.[63] Workplaces in Canada include professionals such as social workers, engineers, nurses, and teachers who are represented by industrial or mixed-member unions. On a daily basis these workers interact with, and settle disputes with their employer thorough the exercise of their rights defined in their collective agreements. There is no evidence in the literature that the bargaining or grievance processes lead to a breach of client, patient, supplier, or student confidentiality in these workplaces. Professional employees in Canada have successfully protected the integrity of professional standards when they take issue and oppose their employers' actions and policies in grievance and bargaining processes. In short, there is nothing inherent in collective representation for the purposes of collective bargaining that impedes or jeopardizes professional obligations.

47. The preceding discussion is underscored by the findings of a series of reports that specifically address lawyers and collective bargaining. In 1968 the Woods Task Force recommended removal of the statutory exclusion for employed lawyers.[64] The Canada Labour Code has provided (since the early 1970) for collective bargaining for all lawyers except for lawyers employed by the federal government; Department of Justice lawyers

[62] Peirce, J and Bentham, K (2007) Canadian Industrial Relations Pearson Prentice Hall. Toronto at p.296
[63] See Gunn, R. (2014) Reasons why scheduled grievance arbitrations do not go ahead to a hearing. Canadian Arbitration and Mediation Journal 23(2) 69-72 for a summary.
[64] Woods, H.D. 1968 *Canadian Industrial Relations: The report of task force on labour relations.* Privy Council Office, Ottawa.

achieved bargaining rights in 2005.[65] Numerous academic articles and reports on the subject reflect the same conclusions: the historical reasons for exclusions no longer apply in the face of changing workplaces and employment structures.[66] Weiler summarizes the situation best when he states:

> In actual fact most of our prototype professionals are employed by someone else, rather than work alone or in partnership with colleagues. Employment is the occupational situation of almost all Canadian engineers, of a large majority of its architects, a bare majority of the lawyers, and a significant minority of doctors and dentists. ... However, in more recent years more and more lawyers, doctors et al find themselves working in large, bureaucratic organizations whose mission and authority is not specifically professional. Epitomizing that kind of employer is the government – whether federal, provincial or municipal – and such Crown corporations as the Ontario Hydro. It is in that latter setting that the initial professional distaste for collective organization has now largely disappeared.[67]

Attached to my affidavit as Exhibit F is the recommendation from the 1968 Woods report with respect to employed lawyers; Exhibit G is a copy of the 1988 Weiler report; Exhibit H is Chapter 12 from the 1980 Report of the Professional Organizations Committee dealing with employee professionals; Exhibit I is Chapter 13 from the 1979 Trebilcock, Touhy & Wolfson study dealing with the employed professionals prepared for the Professional Organizations Committee; Exhibit J is chapters 4 and 5 from the 1979 working paper prepared by Beatty & Gunderson titled The employed professional, also prepared for the Professional Organizations Committee and dealing with employed professionals; Exhibit K is material from Chapters 3 and 4 of the 1979 Swinton working paper on the employed professional, also prepared for the Professional Organizations Committee and dealing with employed professionals, including lawyers.

48. Workers who share an occupation and a workplace often develop a specific form of group identity known as an occupational community. An OC has been found to be an

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[65] See the decision of the Public Service Labour Relations Board in *Federal Law Officers of the Crown v. Treasury Board of Canada; Association of Justice Counsel v. Treasury Board of Canada;Treasury Board of Canada v. Professional Institute of the Public Service of Canada*, 2006 PSLRB 45 (CanLII). on line at <http://canlii.ca/t/1n54l>

[66] Ontario. Professional Organizations Committee (1980) *Employee professionals (Chapter 12)* in The Report of the Professional Organizations Committee Toronto: Ministry of the Attorney General

Trebilcock, M., Tuohy, C. & Wolfson,A. (1979) *Professional Regulation: A Staff Study of Accountancy, Architecture, Engineering and Law in Ontario* prepared for the Professional Organizations Committee Toronto: Ministry of the Attorney General

Beatty, D. & Gunderson, M. (1979) *The Employed Professional.* Working paper 14 prepared for the Professional Organizations Committee Toronto: Ministry of the Attorney General

Swinton, K. (1979) *The employed professional.* Working paper 13 prepared for the Professional Organizations Committee Toronto: Ministry of the Attorney General

Adams Above n 43

[67] Weiler Above n55 p. 32-33

important resource for achieving a number of important professional and workplace goals. My own research into employed professionals reveals that the structure of the labour/management relationship and the influence of the employer over the tools, training, and accountability structures lead these occupational groups in the workplace to seek collective bargaining. More than just a trade union for the purposes of bargaining, occupational communities are rooted in professional identity and express their concerns in terms of occupational integrity and professionalism. These workplace conflicts or struggles are at their foundation struggles to reconcile obligations to the profession along with obligations to the employer. My research also shows that it is because such occupational communities exist that they are successful in meeting both of these obligations; however, success is dependent on a meaningful mechanism for employee voice, including the ability to object to management decisions on professional grounds without suffering arbitrary and undue repercussions. Employed lawyers with access to collective bargaining have been able to address reconciliation of these dual obligations.

49. Occupational communities emerge among employed lawyers due in large part to the specific working conditions they face and the fact that these conditions are different from self-employment and from the very traditional notions of legal practice. Some of the important indicators of occupational community include clearly defined roles within and outside the work context; shared strong social values; work intensity and marginalization.[68] Often an occupational community will seek organized representation in the face of perceived unfair treatment. Members of the legal profession are already part of one collective: the Bar Societies. When working conditions are such that individuals feel their ability to exercise their full professional obligations is jeopardized, it is not unreasonable for them to look for an alternative form of collective action to address their unique circumstances as employed lawyers. In terms of practicing closure, collective bargaining can support improvements in working conditions (including the exercise of professional duties) and relative incomes for employed lawyers, making employment attractive to new entrants and ultimately strengthening the profession rather than undermining it.[69]

Conclusion

[68] Weststar, J. (2015). Understanding video game developers as an occupational community. *Information Communication and Society, 18*(10), 1-15. doi: 10.1080/1369118X.2015.1036094
[69] Goldenberg (1968) Above n 16 at p 27

50. The forgoing discussion can be summarized as follows:

(a) A variety of complementary, legitimate institutional forms exist to fulfill the distinct and separate needs of regulation, representation, and advocacy for professionals. Unions and union-equivalent associations fulfill employed professionals' workplace-specific needs through collective bargaining.

(b) There is no inherent conflict between membership in a profession and participation in collective bargaining over terms and conditions of employment.

(c) There is nothing inherent in the legal profession which creates a distinction that warrants treatment of employed lawyers differently compared with other employed professionals.

(d) The traditions of the legal profession lead manager-members and employers of lawyers to resist collective bargaining; employed lawyers without legislative protection of their right to collective bargaining face substantial barriers to addressing their professional concerns over working conditions.

(e) For employed professionals in general, and employed lawyers in particular, collective bargaining enhances professionalism, does not represent a threat to professional obligations, and is a critical instrument of voice in the face the employers' otherwise complete control over working conditions.

51. I make this affidavit in support of this application, and for no other or improper purpose.

Sworn before me in the City of Regina in the province of Saskatchewan
On 23rd day of June, 2016

Commissioner for taking Affidavits
Barrister & Solicitor

Shelagh Campbell, PhD

TAB B

Court File No.: CV-15-537113

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

THE SOCIETY OF ENERGY PROFESSIONALS, IFPTE LOCAL 160, AND DANA FISHER, DIANE ABBOTT, DAVID BEAL, ALEXANDRA CAMPBELL, KYLE NOONAN, CAROLINE PRICE, MICHAEL STORY and KENDALL YAMAGISHI on their own behalf, and on behalf of all of the members of the Society of Energy Professionals, IFPTE Local 160 who are employed as lawyers at Legal Aid Ontario

Applicants

- and -

LEGAL AID ONTARIO, and THE CROWN IN RIGHT OF ONTARIO as represented by THE MINISTRY OF THE ATTORNEY GENERAL OF ONTARIO

Respondents

APPLICATION UNDER Rules 12.08 and 14.05 of the Ontario *Rules of Civil Procedure*, ss. 2(d), 24(1) of the *Canadian Charter of Rights and Freedoms*, and s. 52 of the *Constitution Act, 1982*

AFFIDAVIT OF BETH SYMES
(sworn June 24, 2016)

I, BETH SYMES, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I was retained by Goldblatt Partners LLP, on behalf of the Applicants, to provide an expert opinion in connection with this Application. I acknowledge and accept my duty

to provide opinion evidence in accordance with the Acknowledgment of Expert's Duty I have executed and which is attached as Schedule "B" to my Expert Report.

2. I am a lawyer duly licensed to practice law in Ontario by the Law Society of Upper Canada and have been since 1978. I am currently a partner at Symes Street & Millard LLP. I have represented both unions and employers, and I have appeared before regulatory colleges as both prosecutor and as defence counsel. I was elected as a Bencher of the Law Society of Upper Canada in 2003, re-elected in 2007 and again in 2011. For ten years I served on the Proceedings Authorization Committee ("PAC"), which reviews all serious complaints of professional misconduct and ethical breaches made against lawyers and paralegals. I am currently an Emeritus Bencher. A copy of my curriculum vitae is attached as a schedule to my Expert Report.

3. I have prepared an Expert Report dated June 24, 2016, in response to the Expert Report of Gavin MacKenzie dated May 19, 2016, summarizing my opinion on the issues in this Application on which I was asked to opine and are within my expertise. My Report is marked as Exhibit "A". I confirm that my Expert Report is true and accurate to the best of my knowledge.

4. Attached to my Affidavit as Exhibits "B"-"M" are relevant excerpts of the following documents listed in Schedule "C" to my Expert Report, which are not found elsewhere in the record:

   Exhibit "B": Collective agreement between Ontario Nurses' Association and Participating Hospitals

Exhibit "C": Agreement between Professional Association of Residents of Ontario and Council of Academic Hospitals of Ontario

Exhibit "D": Collective agreement between The Canadian National Representatives Union and UNIFOR

Exhibit "E": Collective agreement between SEIU Local 2 BGPWU and the Ontario Nurses' Association

Exhibit "F": Collective agreement between the Canadian Staff Union and the Canadian Union of Public Employees

Exhibit "G": Printout of articling students represented on website of CUPE 1281

Exhibit "H": Printout of website of the Professional Institute of the Public Service of Canada re New Brunswick Legal Aid Group

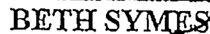
Exhibit "I": Collective Agreement Between Society of Energy Professionals and Hydro One

Exhibit "J": Collective agreement between Ontario Public Service Employees Union and Participating Hospitals

Exhibit "K": Collective agreement between the Canadian Union of Public Employees and Participating Hospitals

Exhibit "L": Providing Physician Services During Job Actions, Policy Statement #1-14 College of Physicians and Surgeons of Ontario

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario, on June 24, 2016.



Commissioner for taking affidavits

BETH SYMES

THE SOCIETY OF ENERGY PROFESSIONALS, IFPTE LOCAL 160 et al.
Applicants

and

LEGAL AID ONTARIO et al.
Respondents

Court File No: CV-15-537113

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

AFFIDAVIT OF BETH SYMES
(SWORN JUNE 24, 2016)

Goldblatt Partners LLP
Barristers & Solicitors
20 Dundas St. West, Suite 1100
Toronto, ON M5G 2G8

Steven Barrett LSUC#: 24871B
Tel: (416) 979-6422
Christine Davies LSUC#: 57390F
Tel: (416) 979-4055
Fax: (416) 591-7333

Lawyers for the Applicants

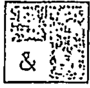
F:\15-1100\00885225.DOCX

TAB

A

This is Exhibit "A" referred to in the
Affidavit of Beth Symes
sworn before me this 24th day of June, 2016

A COMMISSIONER, ETC.

 Symes Street & Millard LLP

Beth Symes
Direct Line 416-920-6179
E-mail symes@ssmlaw.ca

Lori Leblond, Legal Assistant
Phone No.: 416-920-3123
E-mail Leblond@ssmlaw.ca

June 24, 2016

sent by email

Christine Davies
Goldblatt Partners LLP
20 Dundas St. West
Suite 1100
Toronto, ON
M5G 2G8

Re: The Society of Energy Professionals, IFPTE Local 160 et al. v. Legal Aid Ontario et al. Court File No.: CV-15-537113

Dear Ms. Davies:

Retainer

1. I was retained by Goldblatt Partners LLP to provide my opinion on the merits of the professional concerns raised by Gavin MacKenzie concerning the implications of the removal of the exclusion against lawyers being permitted to engage in collective bargaining.

Qualifications

2. I am a partner in the law firm of Symes Street & Millard LLP. I have practiced labour and employment law since my call to the Bar of Ontario in 1978. I have represented both unions and employers in arbitrations, before the Ontario Labour Relations Board, the Canada Industrial Relations Board, and in courts. I have represented a union whose collective agreements included lawyers and an employer whose lawyers were covered by the collective agreement.

3. I have represented professionals such as nurses, doctors, pharmacists, etc. before their regulatory colleges. I have also prosecuted professionals before the discipline committees of their regulatory bodies.

4. I was elected as a Bencher of the Law Society of Upper Canada in 2003, re-elected in 2007 and again in 2011. For ten years I served on the Proceedings

Authorization Committee, the equivalent of the Complaints Committee of other professional bodies, and which reviews all serious complaints of professional misconduct and ethical breaches made against lawyers and paralegals. I served as Vice Chair of PAC. I am currently an Emeritus Bencher.

5. My resume is set out as Schedule "A"

Acknowledgement of Expert's Duty

6. Schedule "B" sets out the Acknowledgement of Expert's Duty (Form 53) which I have signed as required under rule 53.03(2.1)(7) of the *Rules of Civil Procedure*.

Documents Reviewed

7. In preparing my opinion, I have reviewed the documents set out in Schedule "C". The documents I have reviewed are set out as Exhibits to my affidavit except for those that Applicants' Counsel have advised me are included as Exhibits to affidavits otherwise to be filed in these proceedings.

Background to Lawyers Organizing and Collective Bargaining

8. Lawyers in Manitoba[1], Saskatchewan[2], British Columbia[3], New Brunswick[4], Newfoundland[5], Quebec[6], Yukon[7] and those whose employment is governed by federal legislation[8] are permitted to organize and collectively bargain under the respective labour statutes.

9. Until 1993 in Ontario, bargaining agents were not permitted to be certified to represent lawyers and certain other professionals[9]. Bill 40 amended the *Labour Relations Act* and repealed section 6(4) of that *Act* such that lawyers had the right to organize under the *Act* and to have a separate bargaining unit or, if a majority agreed, to be included in a broader bargaining unit. This change brought Ontario labour legislation into agreement with the right to collectively bargain given to lawyers federally and in six other provinces. When Bill 40 came into force in January 1993, some

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[1] *The Labour Relations Act*, C.C.S.M. c.L10, s. 1

[2] *The Saskatchewan Employment Act Part VI Labour Relations*, S.S. 2013 c.S-15.1, ss. 6-1(1)(h)

[3] *Labour Relations Code*, RSBC 1996, C. 244 as amended, ss. 1(1); *Crown Counsel Act*, RSBC 1996, c. 87, as aended

[4] *Industrial Relations Act*, R.S.N.B. 1973 c.T-4 ss. 1(1)

[5] *Labour Relations Act*, RSNL 1990 c.L-1 ss. 2(1)(m)

[6] *Labour Code*, CQLR C-27 ss. 1(l). Criminal prosecutors are excluded from the *Code*, however, there is a separate statute governing their collective bargaining that permits collective bargaining through an association but prohibits strikes and affiliation with a union. *An Act Respecting the Process for Determining the Remuneration of Criminal and Penal Prosecuting Attorneys and Respecting Their Collective Bargaining Plan* S.Q. 2005, c. 73

[7] *Public Service Labour Relations Act*, RSY 2002, c. 185

[8] *Canada Labour Code*, RSC 1985 c.L-2 ss. 3(1)

[9] *Labour Relations Act* R.S.O. 1990 c. L-2 ss. 6(4)

bargaining agents sought to be certified to represent lawyers[10], some employers recognized bargaining units of lawyers and for other employers, lawyers were also included in a broader all employee bargaining unit.

10. When Bill 40 was repealed by the *Labour Relations Act, 1995*[11], which removed the right of lawyers to bargain collectively under the *Act*, some employers continued to recognize the bargaining agent as still representing lawyers.

11. Alberta continues to exclude lawyers from organizing under the *Labour Relations Code*[12], Nova Scotia under the *Trade Union Act*[13], and Prince Edward Island under the *Labour Act*[14]. Nunavut[15] and the North West Territories[16] exclude lawyers under their collective bargaining legislation.

12. In each Canadian jurisdiction, employers may voluntarily recognize a union or an association as representing lawyers in its employ and to negotiate collective agreements with that bargaining agent that govern the terms and conditions of the employment of their lawyers.

13. In Ontario, lawyers who are organized include:

- Crown attorneys are represented by the Ontario Crown Attorneys' Association (OCAA), which has negotiated collective agreements with the Crown in Right of Ontario;
- Lawyers employed by the Ontario government are represented by the Association of Law Officers of the Crown (ALOC), which has jointly negotiated with OCAA collective agreements with the Crown in Right of Ontario;
- Lawyers employed by the government of Canada who work for the Department of Justice, the Public Prosecution Services of Canada, and provide in-house legal services to various federal agencies, tribunals and courts are represented by the Association of Justice Counsel (AJC), which has negotiated collective agreements with the Treasury Board;

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[10] The Association of Law Offices of the Crown (ALOC) was found to be a trade union within the meaning of s. 1(1) of the *Act* and was certified as the bargaining agent for the lawyers employed in their professional capacity by the Workers' Compensation Board. ALOC v. WCB, [1995] O.L.R.D. No. 875

[11] *Labour Relations Act, 1995*, S.O. 1995 c. 1 Schedule A

[12] *Labour Relations Code*, RSA 2000, c.L-1, ss 1(e); *Public Service Employee Relations Act*, RSA 2000. c. P-43, ss. *13(1)*

[13] *Trade Union Act*, R.S.N.S. 1989 c. 475 as amended, s. 2 excluded lawyers as a result of a 2000 amendment; *Civil Service Collective Bargaining Act*, R.S.N.S. 1989 c. 71, as amended, s. 11 also excludes lawyers from organizing.

[14] *Labour Act*, RSPEI 1988, c.L-1 ss. 7(2); *Civil Service Act* RSPEI 1988, c. C-8, ss. 43(2) excludes solicitors.

[15] *Public Service Act*, S. Nu. 2013 c. 26, as amended

[16] *Public Service Act*, RSNWT 1988, c. P-16, as amended

- Lawyers employed by UNIFOR (formerly employed by the Canadian Auto Workers union) are in an all-staff bargaining unit represented by the Canadian National Representatives Union, which has negotiated collective agreements with the employer;
- Lawyers employed by the Ontario Nurses' Association are in an all-staff bargaining unit represented by SEIU Local 2.BGPWU, which has negotiated collective agreements with ONA; and
- Lawyers at the Canadian Union of Public Employees are in a bargaining unit with staff representatives and other professionals represented by the Canadian Staff Union, which has negotiated collective agreements with CUPE.

14. The Ontario Labour Relations Board has determined that because articling students are not members of the Law Society of Upper Canada and are not entitled to practice law, they are not excluded from collective bargaining under the *Labour Relations Act*.[17]

15. Articling students in a number of labour law firms in Ontario[18] are represented by CUPE 1281, a composite local that also represents a broad range of employees from Mayworks Festival, Karma Grocery Co-op, Metro Tenants, and a student radio. The articling and summer students at Goldblatt & Partners LLP are represented by the Canadian Office and Professional Employees Union, Local 343, which has negotiated collective agreements with the law firm.

16. In 2015 the Ontario Labour Relations Board certified OPSEU as the bargaining agent for summer law students employed at Parkdale Community Legal Services[19] and a first collective agreement has been negotiated. The Ontario Labour Relations Board has ordered a vote as to whether the articling students employed at Legal Aid Ontario wish to be represented by the Society of Energy Professionals. The students voted in May 2016 and the ballots were sealed pending legal arguments.[20]

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[17] *Association of Commercial and Technical Employees, Local 1704 v. Parkdale Community Legal Services*, 1977 CanLII 997 (ON LRB)

[18] Cavalluzzo Shilton McIntyre Cornish LLP; Koskie Minsky; Raven, Cameron, Ballantyne & Yazbeck; Ryder Wright Blair & Holmes LLP; and Ursel Phillips Fellows Hopkinson

[19] *OPSEU v. Parkdale Community Legal Services Inc.* [2015] Can LII 49364 (ON LRB)

[20] *Society of Energy Professionals v. Legal Aid Ontario*, [2016] Can LII 30411 (ON LRB)

17. Elsewhere in Canada lawyers have organized and are represented by:

- Professional Employees Association which has negotiated collective agreements with the Legal Services Society (BC Legal Aid) that include all staff lawyers and articling students.
- Legal Aid Lawyers Association which has negotiated collective agreements with Legal Aid Manitoba that covers all lawyers.
- Canadian Union of Public Employee Local 1949 which has negotiated collective agreements with the Saskatchewan Legal Aid Commission that include lawyers as part of an all-staff bargaining unit.
- Fédération des avocates et avocats de l'aide juridique du Québec (FAAJQ) and Fédération des professionnèles which have negotiated collective agreements with Legal Aid Québec that cover staff lawyers.
- Professional Institute of the Public Service of Canada has been certified by the New Brunswick Labour and Employment Board as the bargaining agent for lawyers at the New Brunswick Legal Aid Services Commission.[21] PIPSC announced on May 13, 2016 that they had reached a tentative first agreement, subject to approval of the government of New Brunswick.
- Professional Employees Association which has negotiated collective agreements with the Law Society of British Columbia that include lawyers and non-lawyers.
- Professional Employees Association which has negotiated collective agreements with Themis Program Management & Consulting Limited (Family Maintenance Enforcement Program) that include all lawyers and articling students.
- L'Association des Procureurs aux Poursuites Criminelles et Pénales which has negotiated collective agreements with the Director of Criminal and Penal Prosecutions.
- L'Association des Juristes de l'État which has negotiated collective agreements with the Government of Quebec.
- Nova Scotia Crown Attorneys Association which has negotiated collective agreements with the Nova Scotia Public Service Commission.

[21] *Professional Institute of the Public Service of Canada v. New Brunswick Legal Aid Services Commission*, decision of the New Brunswick Labour and Employment Board dated August 14, 2014

- New Brunswick Crown Counsel Association Inc. and New Brunswick Crown Prosecutors Association Inc. which have negotiated collective agreements with the Board of Management.
- British Columbia Crown Counsel Association which has negotiated collective agreements with the Government of British Columbia.
- Manitoba Association of Crown Attorneys which has negotiated collective agreements with the Province of Management.

18. Some of these bargaining agents represent only lawyers, but others also represent non-lawyers.

Professionalism Concerns

19. In her affidavit sworn January 11, 2016, Dana Fisher states that she and other lawyers at Legal Aid Ontario were concerned that their working conditions affected their professional and ethical obligations as lawyers. Ms. Fisher said that the lawyers were motivated to seek representation through a professional association, in part to help them improve their working conditions so that they could better manage their professional obligations to their clients, and to assist them in navigating the balance between their obligations as lawyers, employees, and public servants. For example, lawyers were concerned about the lack of private space to have confidential conversations with their clients. Another example Ms. Fisher gave was under the Lawyer Workforce Strategy (LWS) family lawyers could be rotated into the criminal law practice, thus replacing experienced criminal lawyers.

20. In his report, Mr. MacKenzie questions whether the Society of Energy Professionals is qualified to assist in providing guidance to the staff lawyers at Legal Aid Ontario about their ethical obligations. He goes on to say that it is difficult to see how these ethical concerns would be alleviated by introducing a union. With respect, I disagree.

21. In Ontario and elsewhere in Canada, all regulated professionals owe obligations or duties to their clients and/or patients that are set out in legislation and through codes of ethics and professional obligations established by their regulator. From time to time the demands of the employer may conflict with those ethical and professional obligations. For professionals who are unionized, the collective agreement can set out mechanisms for resolving those conflicts that protect and promote ethical and

professional obligations. The following examples illustrate the recognition of professional obligations and various mechanisms for resolution:

22. Registered nurses in Ontario are regulated under the *Nursing Act, 1991*[22] and the *Regulated Health Professions Act, 1991*[23]. The College of Nurses' of Ontario is the professional regulatory body and has established Professional Standards and has defined Professional Misconduct. The Ontario Nurses' Association represents the registered nurses employed in almost all public hospitals in Ontario (referred to as the Participating Hospitals). The collective agreement between ONA and the Participating Hospitals identifies nurses' concerns of professional practice, patient acuity, fluctuating workloads and fluctuating staffing such as:

- gaps in continuity of care
- balance of staff mix
- access to contingency staff
- appropriate number of nursing staff[24]

and sets out a process for resolving those concerns that includes an Independent Assessment Committee with the power to make binding decisions.[25]

23. Residents in Ontario are medical doctors who have a limited or restricted licence to practice medicine and whose practice is governed by the *Medicine Act, 1991*[26] and *Regulated Health Professions Act, 1991*[27]. An Agreement between the Professional Association of Residents of Ontario (PARO) and the Council of Academic Hospitals on Ontario sets out the terms and conditions of their employment. The Agreement provides that if residents have concerns that their work assignment is inconsistent with guidelines established, or, if not yet developed, have serious and substantial professional or educational concerns with respect to assignment of work, there is a process set out to resolve those concerns including binding decisions of the Medical Post-Graduate Consultation Committee.[28]

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[22] S.O. 1991, c.32, as amended
[23] S.O. 1991, c. 18, as amended
[24] Article 8 collective agreement between ONA and the Participating Hospitals
[25] collective agreement between ONA and Participating Hospitals:

Appendix 2	p. 84	List of Professional Responsibility Assessment Committee Chairpersons
Appendix 6	p. 85	ONA/OHA Professional Responsibility Workload Report Form
Appendix 8	p. 99	Procedural Guideline for an Assessment Committee Hearing
Appendix 9	p. 106	Workload/Professional Responsibility Tool

[26] S.O. 1991, c. 30, as amended
[27] *supra.*
[28] Article 7 in the Agreement between Professional Association of Residents of Ontario and Council of Academic Hospitals of Ontario.

24. Dieticians, pharmacists, occupational therapists, and physiotherapists, are regulated in Ontario under the *Regulated Health Professions Act, 1991*[29] and the legislation specific to each profession[30] and each professional is governed by their respective college. Psychologists are regulated under the *Psychologists Act, 1991*[31] and are governed by the College of Psychologists of Ontario. Social workers are regulated under the *Social Work and Social Services Work Act, 1998*[32] and are governed by the Ontario College of Social Workers and Social Service Workers. The Ontario Public Service Employees Union represents these professionals in a single bargaining unit and has negotiated collective agreements with the Participating Hospitals that contain provisions about workload and professional responsibilities and a process to resolve these disputes.[33]

25. Registered Practical Nurses in Ontario, like registered nurses are also regulated under the *Nursing Act, 1991* and the *Regulated Health Professions Act, 1991* and are governed by the College of Nurses' of Ontario. In many public hospitals, the Canadian Union of Public Employees represents the RPNs in a mixed bargaining unit and has negotiated collective agreements with the Participating Hospitals that include provisions about workload, professional responsibility, patient care and staffing and a process to resolve these issues.[34]

26. In a similar fashion, bargaining agents representing lawyers have negotiated provisions with their employers which include professional, ethical and workload issues and processes to resolves these disputes. Some of those provisions are set out below.

27. The Ontario Crown Attorneys' Association (OCAA) and the Association of Law Officers of the Crown (ALOC) have negotiated a Framework Agreement with the Queen in Right of Ontario in which the Government agreed that work related activities such as trial preparation and education and professional development were appropriate subjects

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[29] *supra.*
[30] *Dietetics Act, 1991,* S.O. 1991, c. 26; *Pharmacy Act, 1991,* S.O. 1991, c. 36; *Occupational Therapy Act, 1991,* S.O. 1991, c. 33; *Physiotherapy Act, 191,* S.O. 1991, c. 37, all as amended
[31] S.O. 1991, c.38
[32] S.O. 1998, c. 31
[33] collective agreement between OPSEU and Participating Hospitals, Article 6.07 workload issues, Article 6.08, professional responsibility and Appendix A Workload Alert Notification
[34] collective agreement between CUPE and Participating Hospitals, Article 9.15 workload and Article 9.16 professional responsibility, patient care, staffing

for collective bargaining.[35] The parties agreed that disputes about trial preparation would not go to mediation or interest arbitration, but, instead:

> 4.2.2 In light of the importance of trial preparation to the employees, the parties agree to a meaningful process to assist in the resolution of general trial preparation issues.....[36]

28. The Association of Justice Counsel and Treasury Board have agreed that one of the purposes of their agreement is "... to maintain professional standards .....".[37] The agreement also provides that:

> The parties will consult .... on the subject of appropriate office accommodation, having regard (i) to the responsibilities assigned to the members of the bargaining unit, particularly their professional obligation to maintain confidentiality and to protect solicitor-client privilege, ...[38]

29. The collective agreement between the Professional Employees Association and Legal Services Society (BC Legal Aid) addresses professionalism concerns and provides:

> 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 himself/herself with fairness, loyalty and courtesy to his/her Employer, associates and subordinates.[39]
>
> ...
>
> The purpose of the Agreement is: ...
>
> c) to advance professional standards among the employees covered by this Agreement; and
>
> d) to improve, on a continuing basis, the professional services provided by the Employer to the people of British Columbia.[40]
>
> ...
>
> 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 membership and activity shall not interfere with the performance of the employee's responsibilities, duties, or professional obligations. Disputes regarding the extent of such limitation shall be referred to the Joint Standing Committee for resolution. [41]

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[35] Framework Agreement between OCAA and ALOC and the Queen in Right of Ontario, article 2.0 Scope of bargaining (Exhibit 7 to the affidavit of Dana Fisher)

[36] *ibid.,* article 4.2 Issues for Mediation

[37] agreement between AJC and Treasury Board, article 1.02

[38] *ibid.,* Appendix "D"

[39] collective agreement between Professional Employees Association and Legal Services Society, article 1 Preamble

[40] *ibid.,* article 1.01 Purpose of Agreement

[41] *ibid.,* article 1.04 Freedom of Association

Standards of Performance and Professional Requirements

a) ... This clause it not intended to abrogate any right that the Law Society of British Columbia has to make a determination as to counsel's performance or to take action as a result of its determination.

d) Professional Responsibilities

The Employer recognizes that an employee must work in a manner consistent with the Professional Conduct Handbook, the Law Society Rules and the codes of ethics established by the Law Society. The Employer recognizes that an employee must be able to act independently in the representation of clients.

No employee will be disciplined for refusal to comply with an Employer-instructed course of action which, in the employee's opinion, conflicts with the aforesaid standards of the Bar, provided that in such a case the employee shall, upon request, be required to provide the violation of the relevant professional standard or code and the Employer shall have the right to seek alternative advice from the Law Society.[42]

30. The collective agreement between the Professional Employees Association and Law Society of British Columbia has similar provisions with respect to professionalism and provides:

Professional Conduct:

a) Nothing contained in this Agreement alters the effect of the Legal Profession Act, the Rules, and the Code of Professional Conduct for BC.

b) it is understood that the rights and obligations of the employees under this Agreement are subject to their professional obligations under the Legal Profession Act, the Rules and the Code of Professional Conduct for BC.

c) The Parties agree to work together to attempt to ensure that the rights and obligations of employees under this Agreement do not conflict with their professional obligations under the Legal Profession Act, the Rules and the Code of Professional Conduct for BC.[43]

[42] *ibid.*, article 24 Standards of Performance and Professional Requirements
[43] collective agreement between PEA and Law Society of British Columbia, article 1.4 Professional Conduct

31. The collective agreement between the Professional Employees Association and Themis Program Management & Consulting Limited has similar provisions about professionalism and provides:[44]

> Article 25 Standards of Performance and Professional Requirements
>
> 25.1 Performance
>
> ... This clause it not intended to abrogate any right that the Law Society of British Columbia has to make a determination as to counsel's performance or to take action as a result of its determination.
>
> 25.2 Supervision and Duties
>
> .... Normally counsel shall not be required to carry out duties that are inconsistent with their status as legal counsel.
>
> 26.4 Professional Responsibilities
>
> The Employer recognizes that counsel must work in a manner consistent with the Professional Conduct Handbook, the Law Society Rules and the codes of ethics established by the Law Society.
>
> No counsel will be disciplined for refusal to comply with an Employer-instructed course of action which, in the counsel's opinion, conflicts with the aforesaid standards of the Bar, provided that in such a case counsel shall, upon request, be required to provide the violation of the relevant professional standard or code and the Employer shall have the right to seek alternative advice from the Law Society.

32. The collective agreements between CUPE Local 1949 and the Saskatchewan Legal Aid Association cover all employees, including staff lawyers. The job description states that the staff lawyer "is fully responsible for legal services subject to the Code of Professional Conduct of the Law Society of Saskatchewan."[45] The employer recognizes a lawyer's professional responsibility under the Law Society of Saskatchewan's Code of Professional Conduct.[46] There is a binding process for dealing with workload issues.[47]

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[44] collective agreement between the Professional Employees Association and Themis Program Management & Consulting Limited, article 1.1 Purpose of Agreement, article 8.3 Joint Consultation, article 10 Hours of Work, article 13.7 Termination of Right to Practice Law, article 22.2 Freedom of Association, article 25 Standards of Performance and Professional Requirements, article 26 Professional Conduct / Confidentiality

[45] collective agreement between CUPE Local 1949 and Saskatchewan Legal Aid, Appendix "C"

[46] *Ibid., article 32 Workload*

[47] *Ibid., article 19.04 hours of Work, article 32 Workload, Appendix "N" Re Workload Committee*

33. The collective agreements between the Legal Aid Lawyers' Association and Legal Aid Manitoba covers a bargaining unit of lawyers, but does not include articling students. The agreement provides that 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 ......[48] The agreement also references a 'reasonably assigned workload' and a binding process to resolve allegations of unfair working conditions.[49]

34. The Canadian National Representatives Union is the bargaining agent for all employees at UNIFOR, including staff lawyers. The collective agreement provides a binding mechanism to resolve disputes such as excessive workloads. [50]

35. Employees who are professionals, including lawyers, are bound by obligations to their employers and to the regulatory body that governs their practice. When directions from their employer, a lack of resources, or workload issues give rise to professional concerns with their regulator, a mechanism is necessary to deal with such disputes. The bargaining agent identifies these professional concerns as bargaining issues and then negotiates an effective means to resolve these professional concerns such as by a panel of acknowledged experts, the right to grieve and, if not resolved, to binding arbitration.

Professional Concerns Identified by Mr. MacKenzie:

36. Staff lawyers, whether organized or not, are bound by the same professional and ethical obligations as set out in legislation, at common law and by rules or codes of professional conduct. These obligations are not altered by collective bargaining. Indeed, most collective agreements entered into for lawyers acknowledge that the rights set out in the agreement are subject to professional obligations. In fact, an employer's right to direct the workforce is constrained by these professional obligations. Moreover, staff lawyers have an effective mechanism to enforce their professional obligations. Examples of language in collective agreements that capture these obligations include:

- one of the purposes of the agreement is "...to maintain professional standards" [51]

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[48] collective agreements between the Legal Aid Lawyers' Association and Legal Aid Manitoba, article 9.01 Conduct of Employees

[49] *Ibid.,* article 13.01 Hours of Work, article 11,01 Grievance Procedure

[50] collective agreements between The Canadian National Representatives Union and UNIFOR, article 14.02 Staff Assignments

[51] collective agreement between the Association of Justice Counsel and Treasury Board, article 1.02

- 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.[52]
- 'The purpose of the Agreement is ... to advance professional standards among the employees covered by this Agreement;[53]
- The Employer recognizes that an employee must work in a manner consistent with the Professional Conduct Handbook, the Law Society Rules and the codes of ethics established by the Law Society.[54]
- The staff lawyer 'is fully responsible for legal services subject to the Code of Professional Conduct of the Law Society of Saskatchewan".[55]
- The employer recognizes a lawyer's professional responsibility under the Law Society of Saskatchewan's Code of Professional Conduct.[56]
- Nothing contained in this Agreement alters the effect of the Legal Profession Act, the Rules, and the Code of Professional Conduct for BC.[57]
- It is understood that the rights and obligations of the employees under this Agreement are subject to their professional obligations under the Legal Profession Act, the Rules and the Code of Professional Conduct for British Columbia.[58]
- The Parties agree to work together to attempt to ensure that the rights and obligations of employees under this Agreement do not conflict with their professional obligations under the Legal Profession Act, the Rules and the Code of Professional Conduct for British Columbia.[59]

37. The staff lawyers employed by Legal Aid in British Columbia, Saskatchewan, Manitoba, Québec and New Brunswick are all organized. The collective agreements set out the professional obligations and the employers acknowledge that their ability to direct staff lawyers is restricted or limited by these professional obligations.

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[52] collective agreement between the Professional Employees Association and Legal Services Society (BC Legal Aid), article 1 Preamble
[53] *ibid,* article 1.01
[54] *ibid.,* article 24
[55] collective agreement between CUPE Local 1949 and Saskatchewan Legal Aid Association, Appendix "C", job description of a staff lawyer
[56] *ibid., articles 19.04 and 32*
[57] collective agreement between the Professional Employees Association and Law Society of British Columbia, article 1.4
[58] *ibid.*
[59] *ibid.*

I. Confidentiality

38. Gavin MacKenzie states that if lawyers were permitted to bargain collectively and if the Society were to become the bargaining agent for the LAO staff lawyers, he is of the opinion that there would be a risk that the lawyers would be put in a position in which they might breach their duty to safeguard confidential client information. Mr. MacKenzie is of the opinion that the Society, which does not represent any lawyers in Ontario, may not be qualified to provide guidance about the ethical obligations of lawyers practicing in Ontario. He is concerned that confidential client information may be disclosed in the following ways:

1. The staff lawyers would have to disclose confidential client information to the bargaining agent, the Society, so that the Society could properly assess and represent these lawyers on issues relating to ethical issues and competency. Disclosure of confidential client information for the purposes of collective bargaining is not permitted by the Rules; and
2. The Rules do not permit the disclosure of confidential client information to non-lawyers.

Response to potential disclosure of confidential client information

39. In my experience, LAO staff lawyers would not ask a non-lawyer at the Society for advice on professional issues or ethical obligations. Instead, they would continue to seek such advice from a colleague, the Practice Management Hotline of the Law Society of Upper Canada, or from another lawyer retained to give such advice. The Law Society encourages lawyers to seek professional advice and when they do so, the Rules protect client confidentiality.

40. If the Society does not have the legal expertise to provide such advice, it can retain a qualified lawyer for that purpose. Should the professional issue not be resolved, the Society may retain qualified counsel to access the dispute mechanism in the collective agreement. Professional issues can and do arise in non-unionized settings. A lawyer who is dismissed because of competency concerns, may sue for wrongful dismissal, may file a human rights application or may be reported to the Law Society. In a unionized setting, such issues would be dealt with at arbitration, rather than in the courts. The issues of client confidentiality are the same.

41. Rule 3.3-1 provides:

> A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless ...
>
> (b) required by law or by order of a tribunal of competent jurisdiction to do so;

Rule 3.3-1.1 goes on to say:

> When required by law or by order of a tribunal of competent jurisdiction, a lawyer shall disclose confidential information, but the lawyer shall not disclose more information than is required.

42. Confidential client information that is relevant to the issue in dispute may be ordered by a judge or by an arbitrator. Arbitrators receive a variety of confidential information, such as personal health information, and have developed effective means to restrain the further disclosure of such confidential information and to write decisions respecting confidentiality. The right to organize and bargain collectively will not negatively impact on the disclosure of confidential client information.

43. Bargaining agents and employers across Canada have negotiated provisions in collective agreements for dealing with conflict between the professional and ethical obligations of staff lawyers on one hand and of demands of the employer. An example of such provisions is:

> 26.1 Professional Behaviour
>
> All counsel are required to behave and present themselves in a professional manner and to abide by the Rules of the Law Society, the Code of Professional Conduct published by the Canadian Bar Association and the Policies and Procedures of the Employer.[60]

44. Other professionals such as doctors, nurses, pharmacists, etc. have professional and ethical obligations imposed by statute and by their regulatory bodies. Their bargaining agents have negotiated professional responsibility clauses into their collective agreements and binding mechanisms to resolve such disputes. The processes developed respect client / patient confidentiality.

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[60] collective agreement between the Professional Employees Association and Themis Program Management & Consulting Limited, article 26 Professional Conduct / Confidentiality

45. The existence of a bargaining agent for staff lawyers will not cause a breach of confidential client information. Professional issues can arise in any practice setting. The professionalism issues are complicated in an employment setting when the employer places demands upon its lawyers either in terms of time, space, money or directions that result in the layer perceiving a conflict with the Rules of Professional Conduct. Many lawyers in Ontario, including crown attorneys and lawyers employed by the Crown are organized and have bargaining agents. Their bargaining agents negotiate a mechanism to deal with professionalism and ethical disputes. In my ten years on the Proceedings Authorization Committee, there never was an issue of lawyers breaching client confidentiality by disclosing to their bargaining agent.

46. Confidentiality of client information is dealt with in section 3.3 of the Rules of Professional Conduct. Given the paramountcy of such professional obligations, it is my opinion that there is no risk that by organizing, the LAO staff lawyers will breach their confidentiality obligations.

II. Duty to Avoid Conflicts of Interest

47. It is Mr. MacKenzie's opinion that should the Society become the bargaining agent, there would be a substantial risk that a staff lawyer could be placed in a conflict of interest where the lawyer's duty to the client and the lawyer's duty to her union conflict. He hypothesizes that conflicts could arise in two ways:

1. If a potential client of LAO has a conflict of interest with the Society, then that person could not be represented by any LAO staff lawyer; and
2. If a person becomes a client of a staff lawyer at LAO and subsequently learns that he has a conflict with the Society, then the LAO lawyer would have to withdraw and no other LAO staff lawyer could represent that person.

Response to Avoiding Conflicts of Interest

48. I disagree with Mr. Mackenzie's opinion that there would be a substantial risk of conflicts of interest should staff lawyers unionize.

49. Like all lawyers, Legal Aid Ontario staff lawyers must face potential conflicts of interest on a regular basis. For example, a conflict might arise if a staff lawyer provided advice to more than one co-accused in a criminal matter. A staff lawyer might realize that she has a personal connection to a matter, such as her spouse is a potential

witness. In such cases, the staff lawyer cannot provide advice and presumably refers that person to another LAO staff lawyer or to outside counsel and the client is not without legal services.

50. Collective agreements that cover lawyers can provide for such conflicts. An example of such a provision is:

> 26.3 a) Counsel shall advise their Regional Manager and the Director of Legal Services if their job responsibilities involve them with a case where counsel may have a conflict of interest with one of the parties. In such a case, counsel will abide by the rules of the Law Society of BC in relation to conflicts of interest.[61]

51. It is difficult to imagine any situation in which a person eligible for legal aid, would have a conflict of interest with the Society. Legal aid is provided to persons of very limited means for:

- serious criminal matters
- some family and child protection
- some immigration and refugee claims

52. An action by a legally aided client against the Society does not fit any of these areas. For example, legal aid is not available to a person alleging that the Society has failed to represent him, or that he has been terminated by the Society or that the Society has breached his human rights. Therefore, the probability of a conflict of interest arising is remote. In the unlikely event that a conflict does arise, LAO can retain outside counsel to represent this person. In my opinion, the risk of such a conflict of interest is *de minimus*.

53. Moreover, if Mr. MacKenzie were correct that there is a substantial risk of conflicts of interest, then that same risk exists for every lawyer in Ontario who is a crown attorney, a law officer of the Crown and a lawyer employed the government of Canada as each of these lawyers is represented by a bargaining agent, such as the Society.

54. Legal aid staff lawyers across Canada who are unionized manage this issue by negotiating appropriate language in their collective agreements.

55. Finally, Unions have a duty of fair representation to employees in a bargaining unit that includes not acting in a manner that is arbitrary, discriminatory or in bad faith in

[61] collective agreement Professional Employees Association and Themis Program Management & Consulting Limited, article 26.2 Conflict of Interest

the representation of them.[62] But there is no duty owed by members of a bargaining unit to their bargaining agent.[63] Therefore, representation by a union will not increase the risk of a conflict of interest. The union is not another party to whom the LAO staff lawyers owe a duty.

III. Withdrawal from Representation / Work Stoppages

56. Mr. MacKenzie opines that if LAO staff lawyers were permitted to strike, that is to withdraw their services and cease acting for a client, they would breach the Rules of Professional Conduct. In my opinion, even if the bargaining agent were to call a strike, it is highly unlikely that staff lawyers would cease to act for their clients in a manner that breaches their professional obligations.

57. The *Labour Relations Act, 1995*[64] does not set the date on which a strike or lockout must begin. Instead, the *Act* sets out the process for collective bargaining commencing with a notice to bargain[65] , the obligation to bargain in good faith[66], the process of conciliation and mediation[67], a strike vote[68] and then a withdrawal of services. The *Act* provides that no union[69] and no employer[70] shall call or threaten to call an unlawful strike or lockout. That is, the *Act* governs the earliest date on which a strike may occur, but does not dictate the actual date of a strike or lockout.

58. Second, the *Act* also provides alternative means to strikes and lockouts to settle a collective agreement. For example, if the parties have not been able to reach a first collective agreement, either party may apply for binding interest arbitration.[71] In any set of negotiations, the parties may agree to refer all outstanding matters to binding interest arbitration.[72]

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[62] *Labour Relations Act*, S.O. 1995, c. 1, Sched. A, s. 74
[63] *Berry v. Pulley*, [202] 2 SCR 493
[64] S.O. 1995, c.1 Sched. A
[65] *ibid.*, s.16
[66] *ibid.*, s. 17
[67] *ibid.*, s. 18 - 36
[68] *ibid.*, s.79(2) .
[69] *ibid.*, s.81
[70] *ibid.*, s.82
[71] *ibid.*, s. 43(1)
[72] *ibid.*, s. 40(1)

59. Third, some collective agreements with staff lawyers provide that if the parties fail to negotiate a collective agreement, they may mutually agree to refer all outstanding issues to a third-party interest arbitration.[73] Other collective agreements provide that staff lawyers have the right to refuse to cross a lawful picket line.[74] Still other collective agreements provide:

> Failure to cross a picket line encountered in carrying out the Employer's business shall not be considered a violation of this Agreement nor shall it be grounds for disciplinary action, provided counsel meet their professional obligations.[75]

60. In contrast, the collective agreement between the Society of Energy Professionals and Hydro One provides:

> 77.1 Employees will be required to cross picket lines of other unions in order to perform work at their regular/temporary work headquarters.

61. Fourth, if lawyers are permitted to organize and bargain collectively under the *Labour Relations Act, 1995*, in amending the current legislation the legislature may decide that providing legal services is an essential service in Ontario. Employees who have been deemed to provide essential service such as firefighters[76], paramedics[77], the Ontario Provincial Police[78], police[79], hospital workers[80], and Toronto Transit workers[81] are not permitted to strike, but instead their collective agreements are determined by binding interest arbitration. In 2016 the Ontario government voluntarily agreed with OPSEU that disputes with respect to the terms and conditions of employment of

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[73] collective agreement between Professional Employees Association and Legal Services Society (BC Legal Aid), article 7; Framework Agreement between Her Majesty The Queen in Right of Ontario and OCAA and ALOC, article 28.5 that provides:

> 6.3 Interest Arbitration
> 6.3.5 If negotiations and/or mediation do not result in a ratified agreement for those years, the parties will utilize an interest arbitration panel appointed pursuant to paragraph 6.2 above, which for purposes of this framework agreement will be called an interest arbitration panel.
> 6.3.6 .. the decision of the interest arbitration panel will be final and binding on the parties and on all lawyers in the bargaining units.

[74] *ibid.*, article 2.06; Professional Employees Association and Law Society of BC, article 2.06

[75] collective agreement between Professional Employees Association and Themis Program Management & Consulting Limited, article 3.7(b)

[76] *Fire Protection and Prevention Act, 1997*, SO 1997, c 4, s. 42 and 50

[77] *Ambulance Services Collective Bargaining Act, 2001*, SO 2001, c 10, s. 15-19

[78] *Ontario Provincial Police Collective Bargaining Act, 2006*, SO 2006, c 35, Sch B, s. 6

[79] *Police Services Act*, RSO 1990, c P.15, s. 122

[80] *Hospital Labour Disputes Arbitration Act*, RSO 1990, c. H.14, s. 4 and 11

[81] *Toronto Transit Commission Labour Disputes Resolution Act, 2011*, S.O. 2011, c. 2, s. 4 and 15

correctional officers would be determined by binding interest arbitration. On May 26, 2016 an arbitrator issued the award that determined all outstanding bargaining issues.[82]

62. Finally, although a bargaining agent owes a statutory duty to fairly represent the employees in the bargaining unit, a member of the bargaining unit does not owe a duty to her union. It a strike is called, a lawyer is not obliged to withdraw her services. There is no duty or obligation to down tools.

63. In my opinion, the professional obligations of a lawyer to her clients will always trump the right to withdraw services during a strike.

64. Despite some lawyers having the right to strike, no complaint of withdrawal of legal services during a strike came to the Proceedings Authorization Committee while I was a member. The Law Society of Upper Canada has not issued guidelines on the withdrawal of legal services during a labour dispute.

65. In contrast, in September 1999 the College of Physicians and Surgeons of Ontario issued a Policy Statement about doctors providing physician services during job actions. The Policy Statement was updated in September 2010 and then again in March 2014. The Policy states:

> Physicians must fulfil their professional responsibilities and uphold the reputation of the profession by providing services to those in need during job actions, as set out in this policy....
>
> ... Physicians must consider the following before making the decision to withdraw their services:
>
> - What is in the best interests of patients;
> - whether patients will be abandoned;
> - Whether the public will be deprived of access to medical care; and
> - Whether patients and/or the public will be placed at risk of harm.
>
> If after carefully considering the above factors, physicians decide that proceeding with a withdrawal of services is not contrary to their professional responsibilities, they must mitigate the adverse impact on patients and/or the public.[83]

[82] *Government of Ontario v. OPSEU, Correctional Services Bargaining Unit* decision of Kevin Burkett (arbitrator) May 26, 2016

[83] College of Physicians and Surgeons of Ontario, Providing Physician Services During Job Actions, Policy Statement #1-14

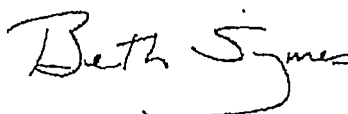
66. In the unlikely event that withdrawal of legal services during a strike harmed a client, the Law Society of Upper Canada could issue a Practice Direction or amend the Rules of Professional Conduct to ensure that withdrawal of legal services must be consistent with a lawyer's professional obligations.

Summary

67. For many years, thousands of lawyers across Canada have organized and bargained collectively with their employer. If the professionalism concerns Mr. MacKenzie is concerned about had occurred in Canada, we might have expected that the Federation of Law Societies Model Code of Professional Conduct, which was adopted by Convocation on October 24, 2013 would have addressed those concerns. Instead, the Rules of Professional Conduct are silent about work stoppages.

68. Should lawyers in Ontario be permitted to organize and bargain collectively under the *Labour Relations Act, 1995*, it is my opinion that LAO staff lawyers would not encounter the professional responsibility issues set out by Mr. MacKenzie as a result of unionizing. By providing an effective mechanism to resolve these issues, collective bargaining would actually enhance professional obligations, rather than undermining them.

Yours truly,



Beth Symes

SCHEDULE "A"

BETH SYMES
SYMES STREET & MILLARD LLP

366 Adelaide Street West, Suite 102
Toronto, Ontario M5V 1R9
Telephone:(416) 920-6179 email:symes@ssmlaw.ca

Professional History

Partner, Symes Street & Millard LLP (formerly Eberts Symes Street & Corbett)	1995 to present
Partner, Scott & Aylen	1993 to 1995
Chair, Pay Equity Hearings Tribunal	1988 to 1993
Partner, Symes Kiteley & McIntyre	1980 to 1988
Sole practice	1978 to 1980
Lecturer in Mathematics, Waterloo Lutheran University (now Wilfred Laurier University),	1969 to 1973
Lecturer in Mathematics, University of Winnipeg	1968 to 1969
Dean of Women, University of Winnipeg	1968 to 1969

Education and Professional Qualifications

Called to the Bar of Ontario	1978
Queen's University, LLB	1976
University of Manitoba, Masters of Science (Mathematics)	1969
University of Manitoba, Bachelor of Science (Honours)	1967

OTHER PROFESSIONAL RESPONSIBILITIES, INVOLVEMENT IN PROFESSIONAL ASSOCIATIONS, TEACHING, PUBLICATIONS:

Bencher, Law Society of Upper Canada 2003 - 2015
Vice Chair Proceedings Authorization Committee
Chair Audit
Vice Chair Finance
Vice Chair Access to Justice
Vice Chair Equity and Aboriginal Issues
Chair Return to Practice Working Group
Member Retention of Women in the Legal Professions

Canadian Institute for the Administration of Justice
President 2011 - 2013

Action Committee on Access to Justice in Civil and Family Matters (Cromwell Committee) 2011 - 2014
Member

Society of Ontario Adjudicators and Regulators 1990 - 1993
Founder

Council of Canadian Administrative Tribunals (CCAT) 1989 - 1993
National Board of Directors

Judging the Wilson Moot

Canadian Bar Association

Women's Law Association of Ontario

Canadian Association of Labour Lawyers

Queen's Centre for Law in the Contemporary Workplace
Advisory Committee

Women's Legal Education and Action Fund (LEAF) 1984 - 1988
Founder and Legal Committee

Teaching

Trial Advocacy at Osgoode Hall Law School, both during the academic term and as a Team Leader in the Intensive Trial Advocacy Program

Economic Regulation at Osgoode Hall Law School in the LLM program

Constitutional Litigation at the University of Western Ontario Faculty of Law.

Strategic Grievance Handling, Queen's Industrial Relations Centre

Women Lawyers in Nepal

Conference Planning

Opening Minds to Mental Health	Toronto	2015
Aboriginal Peoples and Law: We Are All Here To Stay	Saskatoon	2015
Contemporary Equality Challenges	St. John's	2015
Roundtable Complex Criminal Trials	Vancouver Toronto	2015 2014
Privacy in the Age of Information	St. John's	2014
Working with Self-Represented Litigants: Practical Skills and Ethical Issues	Toronto	2014
How Do We Know What We Think We Know: Facts in the Legal System	Toronto	2013
Living at the Margins: Judging Fairly, Judging Responsively	Montreal	2013
The Changing Tides of Administrative Justice	Halifax	2013
Ambiguous Crossroads: Persons with Mental Health Problems and the Criminal Justice System	Halifax	2013
The Courts and Beyond: The Architecture of Justice in Transition	Calgary	2012

Shades of Grey: Challenges of the Aging Employee in the Contemporary Workforce	Toronto	2012
Terrorism, Law and Democracy: 10 Years After 9/11	Montreal	2011

Lectures, Papers and Books

"Women and Work", National Judicial Institute, St. John's 2015

"Access to Justice: Current Initiatives", SOAR Annual Conference, Toronto 2014

"Workplace Investigations", Law Society of Upper Canada, Toronto 2013

"Access to Justice, Equality and the Business of Law", University of Saskatchewan School of Law, Saskatoon 2013

"Be It Resolved That It Is Too Hard to Terminate an Employee for Cause in Canada", Law Society of Upper Canada, Toronto 2011

"Human Rights Issues in Health and Safety", Lancaster, Toronto 2010

"Terminations and Discrimination", Law Society of Upper Canada, Toronto 2009

"Leadership in Social Justice", Faculty of Law, Queen's University, Kingston 2007

"Twenty Years After the Charter: Celebration or Wake?", Canadian Bar Association, St. John's 2006

"From Litigator to Litigant and Back Again: Equality in Practice", *Calling For Change: Women, Law and the Legal Profession* (Ottawa: University of Ottawa Press, 2006) 267

"Challenges of Running a Feminist Law Practice", CBAO Winter Institute, Toronto 2006

"Practice Before Administrative Tribunals", OBA Municipal Law Section, Toronto 2006

"Paths Less Travelled", Queen's Faculty of Law, Kingston 2007

"The Complex Human Rights Case", LSUC Human Rights Update, Toronto 2005

"Mergers and Sales of Businesses", Lancaster House, Toronto 2003

"Juggling: Women, Family and Work", South Western Ontario Women's Association, Port Stanley 2003

"*Symes v. The Queen*", Faculty of Law University of Ottawa, Ottawa 2003

"Labour and Employment Update", CBAO, Toronto 2000

"Taking the Tribunal to Court", CBAO, Toronto 2000

"Litigating Equality Rights", Legal Education and Action Fund Vancouver Conference, Vancouver 1999

"Reproductive Rights & Freedoms", Legal Education and Action Fund Vancouver Conference, Vancouver 1999

"What is Fairness? What is Natural Justice?", Toronto Conference of The United Church of Canada, Toronto 1998

"Ten Years Later: Is the Charter an Appropriate Tool for Social Change?", Tenth Symposium on the Charter, Toronto 1995

"Rule Making: Role of Tribunal", LSUC Special Lectures in Administrative Law, Toronto 1993

"Putting Child Care on the Mainstream Agenda", Manitoba Child Care Association Conference, Winnipeg 1992

"New Directions for Adjudicators", Conference of Ontario Boards and Agencies, Toronto 1991

"Anti-Racist Training for Adjudicators" Canadian Institute for the Administration of Justice, New Brunswick 1991

"Equity in Representation", commissioned paper; Royal Commission on Electoral Reform, Ottawa 1991

"Women and Work in Alberta" Labour Arbitration Conference, University of Calgary, Calgary 1990

"Pay Equity: An Overview", John Deustch Institute, Queen's University, Kingston 1990

"Conduct of a Hearing: The Adjudicator's Perspective", Canadian Institute for the Administration of Justice, Toronto 1990

"Role of the Tribunal Solicitor", Canadian Counsel of Administrative Tribunals, Ottawa 1990

"Legal Challenges of Implementing Pay Equity", National Conference on Pay Equity at York, University, Toronto 1990

"Pay Equity in Canada", Harvard University, Cambridge 1990

"Is a Women's Work Ever Done?, Faculty of Law McGill University, Montreal 1990

"The Changing Face of Feminism", National Association of Women and the Law, Toronto 1990

"Litigating Cases Before the Pay Equity Hearings Tribunal", CBAO, Toronto 1990

"Remedies under the Pay Equity Act", CBAO Midwinter Meeting, Toronto 1989

"Establishing a New Tribunal: Into Unchartered Waters", CBAO Midwinter Meeting, Toronto 1989

"Pay Equity: A Canadian Response to International Conventions", National Association of Women and the Law, Montreal 1989

"Human Rights and the Workplace", Canadian Human Rights Foundation, Saskatoon, 1988

"Legal Issues in Nursing", nursing conferences in Ontario, New Brunswick and British Columbia 1987 & 1988

"Meech Lake Accord: Spending Powers and the Effect on Women", Ontario Council on the Status of Women, Toronto 1987

"Litigating Equality Cases Under the Charter", Faculty of Law, University of Western Ontario, London 1987

"Interface Between Arbitration and Human Rights", Canada Labour Views, Toronto 1987

"Pregnancy and Sex Discrimination", National Association of Women and the Law Conference, February 1987

"The Application of Equality Theories to Maternity Benefits", Conference on the Socialization of Judges to Equality Issues, Banff, 1986; paper published by Carswell, Fall 1987

"Using Litigation as a Tool for Change for Women in Canada", Vancouver Status of Women, Vancouver 1986

"Women and Legal Action" (co-authored M.E. Atcheson, M. Eberts and J. Stoddard), book, Canadian Advisory Council on the Status of Women, October 1984

"Juggling: Women, Work and Parenting", Canadian Advisory Council on the Status of Women, book, April 1984

"Canadian Charter of Rights and Freedoms: Scope and Remedies", Canadian Research and Educational Fund, Toronto 1983

"Litigating Equality Rights Under the Charter", Conference on Women, Law and the Economy, Banff 1983

"Affirmative Action and the Charter of Rights", National Association of Women and the Law Conference, Victoria 1983

"Women's Work: Women's Pay" Clara Brett Martin Lecture, University of Toronto, Faculty of Law, Toronto 1983

"Organizing Women Workers", International Labour Organization Symposium, Queen's University, Kingston 1981

"Enforcing Equal Pay Legislation: A Duty of Unions and Employers", CBAO, Toronto 1980

"Affirmative Action: Quotas, Goals and Contract Compliance", CBAO, Toronto 1980

"Sexual Discrimination In Pensions, Pay and Maternity Leave", Insight Education, Toronto 1979

Recognition and Awards

Member of the Order of Canada	2010
Law Society Medal	1996
Canadian Lawyer: 25 Most Influential Lawyer: Human Rights Law	2011
Woman of Influence	2011

Court File No.: CV-15-537113

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

THE SOCIETY OF ENERGY PROFESSIONALS, IFPTE LOCAL 160, AND DANA FISHER, DIANE ABBOTT, DAVID BEAL, ALEXANDRA CAMPBELL, KYLE NOONAN, CAROLINE PRICE, MICHAEL STORY and KENDALL YAMAGISHI on their own behalf, and on behalf of all of the members of the Society of Energy Professionals, IFPTE Local 160 who are employed as lawyers at Legal Aid Ontario

Applicants

- and -

LEGAL AID ONTARIO, and THE CROWN IN RIGHT OF ONTARIO as represented by THE MINISTRY OF THE ATTORNEY GENERAL OF ONTARIO

Respondents

ACKNOWLEDGMENT OF EXPERT'S DUTY

1. My name is Beth Symes. I live in the City of Toronto, of the Province of Ontario.

2. I have been engaged by or on behalf of the Applicants to provide evidence in relation to the above-noted court proceeding.

3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:

   (a) to provide opinion evidence that is fair, objective and non-partisan;

   (b) to provide opinion evidence that is related only to matters that are within my area of expertise; and

   (c) to provide such additional assistance as the court may reasonably require, to determine a matter in issue.

4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.

June 24, 2016

Beth Symes

SCHEDULE "C"

DOCUMENTS REVIEWED IN PREPARING OPINION

1. Application Record (Volumes 1 & 2) of the Applicants, Responding Record of Legal Aid Ontario (Volumes 1 & 2), and Record of the Respondent, Attorney General Ontario, all filed in the matter of *Society of Energy Professionals, IFPTE Local 160 v Legal Aid Ontario*
2. Collective agreement between Ontario Nurses' Association and Participating Hospitals
3. Agreement between Professional Association of Residents of Ontario and Council of Academic Hospitals of Ontario
4. Framework Agreement between OCAA and ALOC and the Queen in Right of Ontario
5. Collective agreement between Ontario Crown Attorneys' Association, Association of Law Officers of the Crown and the Crown in Right of Ontario
6. Agreement between Association of Justice Counsel and Treasury Board
7. Collective agreement between Professional Employees Association and Legal Services Society (BC Legal Aid)
8. Collective agreement between Professional Employees Association and Law Society of British Columbia
9. Collective agreement between the Professional Employees Association and Themis Program Management & Consulting Limited
10. Collective agreement between CUPE Local 1949 and Saskatchewan Legal Aid
11. Collective agreement between the Legal Aid Lawyers' Association and Legal Aid Manitoba
12. Collective agreement between The Canadian National Representatives Union and UNIFOR
13. Collective agreement between SEIU Local 2 BGPWU and the Ontario Nurses' Association

14. Collective agreement between the Canadian Staff Union and the Canadian Union of Public Employees

15. Collective agreement between the Professional Employees Association and Themis Program Management & Consulting Limited

16. website of CUPE 1281

17. certification of the Professional Institute of the Public Service of Canada for the lawyers at the New Brunswick Legal Aid Services

18. website of the Professional Institute of the Public Service of Canada re New Brunswick Legal Aid Group

19. Collective agreement between Ontario Public Service Employees Union and Participating Hospitals

20. Collective agreement between the Canadian Union of Public Employees and Participating Hospitals

21. Providing Physician Services During Job Actions, Policy Statement #1-14 College of Physicians and Surgeons of Ontario

22. Collective agreement between Society of Energy Professionals and Hydro One