Submission on

The General Agreement on Trade in Services and the Legal Profession: The Accountancy Disciplines as a Model for the Legal Profession

CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing over 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the GATS 2000 subcommittee of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the International Practice of Law Committee and approved by the Board of Directors as a public statement by the Canadian Bar Association.

Submission on The General Agreement on Trade in Services and the Legal Profession: The Accountancy Disciplines as a Model for the Legal Profession

I. INTRODUCTION

The Canadian Bar Association (CBA) appreciates the opportunity to provide its views on the World Trade Organization (WTO) Disciplines on Domestic Regulation in the Accountancy Sector (the Accountancy Disciplines)[1] developed under the General Agreement on Trade in Services (GATS).[2] We hope that this will assist the Department of Industry and the Department of Foreign Affairs and International Trade in developing Canada's position on these issues before the WTO's Working Party on Domestic Regulation. In particular, we address whether the Disciplines should apply to the legal services sector and, if so, how.[3]

II. OVERVIEW

The legal profession has unique characteristics arising from its role as intermediary between the citizen and the law and between the citizen and the state. At their core, the activities of the legal profession involve the execution of public duties, not the trade of services.

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1 World Trade Organization, Council for Trade in Services, *Disciplines on Domestic Regulation in the Accountancy Sector*, December 14, 1998, Document No. S/L/64 (98-5140).

2 *General Agreement on Trade in Services*, Schedule 1B to *Agreement Establishing the World Trade Organization*, April 15, 1994.

3 In this submission, references to the "legal services sector", the "legal profession" or "lawyers" includes Québec notaries.

International trade treatment of legal services cannot be blindly subsumed in a common approach toward professional services generally, nor should international trade considerations drive all aspects of these deliberations. Any GATS disciplines for the legal profession must be (i) tailored to the unique characteristics of the profession, and (ii) sufficiently supple to accommodate differences in national regulatory regimes that govern the profession in different jurisdictions. Those characteristics and regimes define in large measure the very society of the nation in which they have developed.

In approaching these issues, the federal government must have a clear idea about why there should be international trade disciplines for legal services. Cross-border trade in legal services is growing in response to client demands. However, it is not clear that domestic and international clients are seeking international disciplines. There is some evidence which suggests that the absence of international disciplines may on occasion distort cross-border trade in legal services,[4] but such incidents do not appear to be widespread. We urge the federal government to consider carefully the need for such disciplines and consult further with the legal profession and the public at large before undertaking any negotiations or commitments.

This should not be taken as opposition to any international disciplines governing the cross-border delivery of legal services. Nations sometimes do establish needless obstacles and difficulties which do not serve to protect an independent legal profession in its role as intermediary between citizens and the state. These impediments ought to be withdrawn.

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4 See *In Re John W. Comrie, Q.C.*, Court File No. M.R.16113, October 1, 1999 (Ill. S.C.), where the Illinois Supreme Court refused to admit a Canadian lawyer to the Illinois state bar. Illinois Supreme Court Rule 705 allows out-of-state attorneys with significant practice experience to be admitted to the Illinois Bar. The application was refused because the applicant was licenced to practice in another country rather than another state and because he did not attend an American Bar Association approved law school.

International trade disciplines will likely increase opportunities for Canadian lawyers to practice international law and Canadian law abroad. Canadian law firms are uniquely placed in the international legal market. Canadian lawyers are directly exposed to the two major legal systems of the Western world (civil law in Quebec and common law in the remaining jurisdictions) and they practise in two globally important languages. Canada's legal culture is influenced by that of the United Kingdom and the United States, which are the principal players in the international legal market. Canadian lawyers are also competitive in the international market in terms of cost, skills and experience.

If, following a careful assessment, the federal government decides to support the establishment of such disciplines, then we urge that there be specific disciplines with respect to the legal profession. The legal profession should not be covered by a common generic set of professional disciplines, as this would threaten a central pillar in the kind of society Canadians have been striving to create and improve.

III. THE SPECIAL ROLE OF THE LEGAL PROFESSIONAL

The legal profession in Canada (and many other jurisdictions) is both regulated and self-governing. On the one hand, the public interest requires lawyers to be subject to standards of competence and professional conduct and demands an objective regulatory structure to ensure lawyers observe these standards. On the other, there is an over-arching public interest in ensuring the profession's independence from the state. This point is succinctly put by G.D. Finlayson, Q.C. (now Mr. Justice Finlayson of the Ontario Court of Appeal) as follows:

> The legal profession has a unique position in the community. Its distinguishing feature is that it alone among the professions is concerned with protecting the person and property of citizens from whatever quarter they may be threatened and pre-eminently against the threat of encroachment by the state. The protection of rights has been a historic function of the law, and it is the responsibility of lawyers to carry out that function. In order that they may continue to do so there can be no compromise in the principle of freedom of the profession from interference, let alone control, by government.[5]

The unique public function of lawyers as intermediaries between the citizen and the state is demonstrated most dramatically, and most disturbingly, by the fact that lawyers around the world continue to be the target of state-sponsored attacks. The International Commission of Jurists has estimated that from March 1997 to February 1999, 53 lawyers and judges were killed, three disappeared, 272 were prosecuted, arrested, detained or tortured, 83 were physically attacked, 111 verbally threatened and 354 professionally obstructed.[6] Thus, in many parts of the world, lawyers face public threats and persecution for performing their professional functions, in a way which is unimaginable for other professionals.

To ensure independence from state interference, the legal profession must be self-regulating. In Canada, self-regulation is accomplished through the provincial and territorial law societies which are governed by elected "benchers", the majority of whom are senior lawyers. Lawyers, through the law societies, must be able to determine the standards of admission into the profession, establish standards and rules which govern members of the profession, and discipline those who fail to meet these standards. Independence requires the profession's freedom from governmental or international pressure in matters of access to the profession or of discipline.

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5 (1985) 4 *Advocates Society Journal* 11, cited in Law Society of Upper Canada, 34th Bar Admission Course, *Professional Responsibility Reference Materials*, (Toronto: Law Society of Upper Canada, 1991) at 1-1.

6 International Commission of Jurists, *Attacks on Justice*, cited in International Bar Association Human Rights Institute, *HRI News*, December 1999 at 2.

Many of the unique characteristics of the profession, and its relation to the public, flow from the lawyer's fundamental role as the intermediary between the citizen and the law. They do not simply derive from a set of rules laid down by a professional body. Rather, they are centuries-old principles which have developed to ensure the proper functioning of the legal system. For example:

- to ensure complete candidness in the lawyer-client relationship, lawyers have an absolute obligation to maintain the confidentiality of communications with their clients, unless otherwise authorized by their clients;[7]
- except in the rarest of circumstances, the legal doctrine of solicitor-client privilege prevents third parties, including government authorities, from forcing the lawyer to reveal these confidential communications;
- to ensure that lawyers are free from influences which may compromise their advocacy of a client's interests, the lawyer/client relationship is governed by the strictest rules regarding conflict of interest, as laid down by the governing bodies of the profession[8] and the Supreme Court of Canada;[9]
- Canadian lawyers owe a duty of undivided loyalty to their clients and do not serve, as do some professions, as instruments of the state's control or supervision of its citizens; and
- lawyers are not merely professional service providers, but also hold a public office as Officers of the Court.

This is not in any way to argue that lawyers are better, more ethical or more professional than members of other professions. It is simply to say that the unique role of lawyers makes the obligations of the legal professional more of a social imperative. Practising lawyers

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7 See, e.g., Canadian Bar Association, *Code of Professional Conduct*, Chapter IV (attached). The *Code* is used in a number of Canadian jurisdictions.

8 *Ibid.*, Chapters V and VI (attached).

9 *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 at 1259-64.

confront ethical issues on a frequent basis and arguably face greater scrutiny for failure to meet their obligations. Throughout, they must cope with demanding obligations towards their clients, towards the courts and towards government generally.

A further characteristic distinguishing the legal profession from other professions is the subject matter of its expertise. Most professions are concerned with activities that are definite – not dependent on human choices but universal in the sense that their principles transcend national boundaries. Establishing best practices in conducting financial audits and preparing financial statements, building a properly functioning mechanical or electrical system, performing heart surgery or designing a high-rise building all involve principles which transcend national borders. It is true that local codes may specify some of the details of how this subject matter is applied, but the core of the subject matter does not depend on the values and choices of people and elites within a particular nation-state.

By contrast, the subject matter of lawyers' work is inherently local and indefinite. Laws change from nation to nation, province to province, state to state, city to city and time to time. Except at a level of abstraction that is not useful here, laws are not founded on universal principles which transcend national boundaries. Instead, they reflect the values and choices of people and elites in geographically defined units and at particular times. The subject matter of law is governed by human choice, which makes it indefinite. Sovereign legislatures adopt particular laws as a specific choice among many possible articulations of the public interest.

Those schooled in the law and able to serve citizens faced with legal problems are nearly always expected to know the law of a particular place. Almost all WTO members have therefore established unique national (or sub-national) qualification and regulatory mechanisms for admission to, and governance of, the legal profession. This is appropriate, as the common elements of different legal systems tend to be at a high level of generality. It is difficult, therefore, to conceive that many WTO members would consider another

member's qualification and regulatory mechanisms as adequate to govern the practice of law within their jurisdiction.

The above discussion highlights the fundamental differences between the legal profession and others and suggests that a wholly common approach is not appropriate. It also suggests that disciplines governing the legal profession need to grant a significant amount of discretion to regulators of the legal profession. This is to maintain independence of the profession, ensure that lawyers establish a connection with the locality in which they will practice, assure the public and the profession that practising lawyers have a minimum accepted knowledge of local laws, and protect the unique characteristics and values of the profession.

IV. REVIEW OF THE ACCOUNTANCY DISCIPLINES

The purpose of the Accountancy Disciplines, as stated in the preamble ("Objectives"), is to facilitate trade. This is accomplished by elaborating further rules that:

- prohibit measures that create "unnecessary barriers to trade" (Art. I);
- impose transparency obligations with respect to regulation of the profession (Art. II);
- impose disciplines on licensing requirements (Art. III) and licensing procedures, which together govern entry into the profession (Art. IV);
- impose disciplines on qualification requirements (Art. V) and qualification procedures (Art. VI); and
- impose disciplines on "technical standards" (Art. VII).[10]

A. Provisions Which Do Not Raise Concerns

On the whole, we believe that many of the principles set out in the Accountancy Disciplines can be easily adapted to the legal profession. Indeed, they are already observed in

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10 *Supra*, note 1.

practice in Canada by the profession and its governing bodies. These would include the following:

- Preamble: Objectives – The purpose of the disciplines is to facilitate trade in the service.
- Art. II: Transparency: paras. 1 - 5 – Member states shall make publicly available information concerning licensing authorities, requirements and procedures and concerning procedures for review of decisions. Upon request, member states shall inform other members states of the rationale for behind domestic regulatory measures. When introducing new measures, member states shall endeavour to provide opportunity for comment.
- Art III: Licensing Requirements: paras. 1 and 6 – Licensing requirements shall be pre-established, publicly available and objective. Fees shall generally reflect the administrative costs involved and shall not represent in themselves an impediment to practising the relevant activity.
- Art. IV: Licensing Procedures: paras. 1 - 5 – Licensing procedures should be pre-established, publicly available and objective and shall not in themselves be a restriction on the supply of a service. Application procedures should not be more burdensome than necessary to ensure applicants fulfil qualification and licensing requirements. On request, unsuccessful applicants shall be informed of the reasons for rejection of the application.
- Art. V: Qualification Requirements: para. 3 – Mutual recognition agreements between member states can play a role in verifying qualifications and educational equivalency.
- Art. VI: Qualification Procedures: paras. 1 - 3 – Verification of an applicant's qualifications shall be done in a reasonable time frame. Unsuccessful applicants will be advised of additional qualifications required, if any. Examinations will be held at reasonable frequent intervals and shall be open to all eligible foreign and foreign-qualified applicants. Fees shall generally reflect the administrative costs involved and shall not represent in themselves an impediment to those practising the relevant activity.

> Residency requirements not subject to scheduling under the GATS shall not be required for sitting examinations.

Subject to being modified for the specific context of the legal profession, the principles underlying the foregoing provisions could be adopted without raising conflicts with the profession's fundamental characteristics, discussed above.

B. Provisions Which Raise Concerns

The remainder of the disciplines may potentially raise problems for the Canadian legal profession and therefore cause the CBA concern. These are summarized below.

Article I: General Provisions: para. 1 – This provides that regulatory measures must not be "prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade". Further, it commits member states to "ensure that such measures are not more trade-restrictive than necessary to fulfil a legitimate objective". Finally, it provides a non-exhaustive list of "legitimate objectives" which includes: quality of service, professional competence and integrity.

WTO dispute resolution panels under the General Agreement on Tariffs and Trade (GATT) have articulated a very high standard for the word "necessary" under Article XX of the GATT. A party must establish there "were no alternative measures consistent with the General Agreement or less inconsistent with it" that could reasonably be expected to have attained the relevant objective.[11] In the dozen or so cases which have been decided under Article XX, a member state's measure has never been upheld on the grounds of "necessity". Further, the burden of establishing necessity falls upon the party imposing the restriction.

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[11] See *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, 37th Supp. B.I.S.D. 200 (1990) at 223.

By contrast, panels interpreting the words "relating to" have allowed member states greater latitude. In these cases, the party seeking to impose the restriction must establish that the "primary aim" of a measure otherwise inconsistent with GATT rules "relates to" a permissible objective.

In light of the severe test imposed by the word "necessary", the requirement in Article 1 that regulatory measures not be more trade-restrictive than necessary to fulfil a legitimate objective raises difficulties. Our view is that the legal profession should not have to prove the "necessity" of rules which it is convinced are required to preserve its integrity and protect the public. The standard should be clarified to ensure that regulators have significant latitude in adopting such rules. This might be accomplished through the use of the "relating to" language, noted above.

Also problematic is the notion of what constitutes a "legitimate objective" under Article I of the Accountancy Disciplines. Although the Article lists examples of legitimate objectives – protection of consumers, quality of the service, professional competence and integrity of the profession – we remain concerned that "legitimate objective" can be interpreted broadly or narrowly by a dispute panel. More clarification is required to ensure the profession's self-regulating bodies retain a sufficient level of discretion.

We recognize that the Preamble to the GATS preserves the right of member states to regulate for national policy objectives, which arguably might include rules governing the legal profession. However, this right has less legal force because it is not contained in the body of the GATS. To be truly comforting to the legal profession, the right to regulate in furtherance of the above goals needs to be much clearer.

These are not new issues for the WTO. The organization has always faced tensions between liberalizing trade in goods and services and preserving member states' ability to

regulate in what they perceive to be the public interest.[12] In light of the WTO's history under the GATT, we believe the organization should take a cautious approach to opening up markets in the legal services sector, ensuring that the ability to regulate in the public interest is clear.

Article III: Licensing Requirements: para. 2 – This deals with residency requirements not subject to a reservation from national treatment under GATS. It requires member states to consider whether less trade restrictive means could be employed to achieve the purposes of residency requirements.

In the context of legal services, residency requirements often serve legitimate purposes. They foster a connection of lawyers to the jurisdiction in which they are qualified. Residency requirements also make disciplinary control over lawyers more practicable and ensure the protection of clients by facilitating their ability to sue for professional negligence. Residency requirements *per se* could be proscribed in relation to lawyers practising exclusively home-country law or international law without reference to local law, as long as law societies retained the ability to deal with specific concerns such as discipline and liability insurance. In view of the different positions adopted by various provincial and territorial law societies with respect to residency requirements, it is important to ensure that Canada will schedule appropriate reservations in this regard.

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12 WTO dispute panels have considered several cases where governments were of the view that they were defending legitimate public interests, yet the measures in question were declared to be contrary to WTO rules. See, for example: *United States - Standards for Reformulated and Conventional Gasoline*, adopted May 20, 1996, WT/DS2/AB/R and *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, adopted November 6, 1998, WT/DS58/AB/R (environmental measures); *Canada - Certain Measures Concerning Periodicals*, adopted July 30, 1997, WT/DS31/AB/R (culture policy); and *European Communities - Measures Affecting Meat and Meat Products (Hormones)*, adopted 13 February, 1998, WT/DS26/AB/R, WT/DS48/AB/R (health and safety).

Article III: Licensing Requirements: para. 3 – This provides that where membership in a professional organization is required to fulfil a legitimate objective, members must ensure that the terms for membership are reasonable and do not include conditions unrelated to the fulfilment of the objective.

In two jurisdictions in Canada (British Columbia and New Brunswick), lawyers are required to be members of the CBA. Other jurisdictions may follow this example in the future. The CBA is the essential ally and voice of the legal profession in Canada. It is the premier provider of services to the profession, such as continuing legal education programs. It actively pursues the interests of the profession, defends the independence of the bench and bar and advocates for improvements in the law and accessible and fair justice systems.

We believe that jurisdictions should be permitted at their choice to impose universal membership in organizations like the CBA which preserve and promote the interests of the legal profession and which promote the public interest in an improved justice system. Such requirements should not be subject to third-party review as to whether they pursue a "legitimate objective".

Article III: Licensing Requirements: para. 4 – This provides that Members must ensure that the use of firm names is not restrictive, save in fulfilment of a "legitimate objective".

Most law societies have rules governing the choice of firm names, frequently limiting firm names to current or former partners. These prudential rules protect the consumer of legal services by ensuring that law firm names do not mislead members of the public. In the absence of the ability to restrict the choice of firm names, there would be little to stop firms from choosing potentially misleading names. These rules therefore fall within the scope of "legitimate objectives". They are a proper subject for regulation and must clearly be left to

the judgment of individual law societies in light of the specific circumstances within their respective jurisdictions.

Article III: Licensing Requirements: para. 5 – This provision deals with the appropriate level of professional indemnity insurance coverage for a foreign applicant. It requires regulators to take into account the applicant's existing insurance coverage, insofar as it covers activities in the host member's territory and is consistent with the legislation of the host member.

Professional indemnity insurance plays an important role in protecting the consumers of legal services from errors and omissions by their lawyers. Therefore, there must be no impediment to a client being able to sue a lawyer in the event of an error or omission. Further, there must be no impediment to a client collecting on his or her judgment or settlement in a lawsuit, once obtained.

Paragraph 5 appears to provide member states with a fair degree of latitude to regulate professional indemnity insurance. However, given the considerations above, the disciplines should spell out, in a non-exhaustive manner, certain prudential measures which are explicitly permissible. These would include the foreign insurer being able to meet solvency requirements and being required to waive the defence of *forum non conveniens* when they are sued in the host country.[13] We recognize that these concerns would arguably apply to professions other than the legal profession and indeed may be worth considering in the context of other professions. That said, other professions (such as accountancy) do not generally require their members to maintain professional liability insurance as a condition of being able to practise. Law societies do impose this requirement, so it makes

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13 The defence of *forum non conveniens* (literally, not a convenient forum) can be raised by a defendant where it can establish that the lawsuit should be pursued in another jurisdiction because, for instance, all of the available witnesses reside there.

sense to allow them to set minimum standards for insurance coverage aimed at protecting the public.

Article V: Qualification Requirements: para. 1 – This provision requires member states to ensure that their governing bodies take into account qualifications acquired in the territory of another member.

With the exception of general principles underlying broad doctrines such as the "common law" or "civil law", legal rules are jurisdiction-specific. This provision therefore is out of place in the context of disciplines for the legal profession. It is unlikely that foreign qualifications will be of great relevance to the practice of law in Canada. This is particularly true for those who intend to practice host-country law or represent clients before courts and tribunals. That said, so long as it clear member states are merely required to "take into account" foreign qualifications, this provision may not be overly problematic.

Article V: Qualification Requirements: para. 2 – This provides that the scope of examinations and other qualification requirements must be limited to subjects relevant to the activities for which authorization is sought.

Law societies in Canada and the governing bodies in many foreign jurisdictions qualify lawyers "at large" to practise in any field. This is, of course, subject to rules of professional conduct which prevent lawyers from taking on mandates beyond their competence. The "activity for which authorization is sought" is therefore to be a full member of the bar, not to be a business lawyer or a criminal lawyer or a labour relations lawyer. Indeed, this makes a good deal of sense, as there is a good deal of cross-pollenation between areas of the law. Competition law, for example, frequently includes a number of criminal prohibitions. The practice of labour law can demand a knowledge of how businesses can be structured to avoid liability in a labour relations context. Construction lawyers require a basic knowledge of real estate law in order to properly file liens.

Legal regulators (in Canada, the law societies) should retain full discretion to determine the appropriate level of general knowledge required of a practising lawyer, regardless of the lawyer's intended area of practice. In the context of the legal profession, this provision is not appropriate.

Article VII: Technical Standards: paras. 1& 2 - These provisions require member states to ensure that measures relating to technical standards only fulfil legitimate objectives. It urges member states to take into account internationally recognized standards of the relevant international organizations.

The legal profession does not have "technical standards" in the sense used in these provisions. The profession has standards relating to competence and professional conduct, however these should remain at the full discretion of law societies. They should not be subject to third-party review to determine whether they fulfil "legitimate objectives" Further, given the jurisdiction-specific nature of laws and legal systems, there are no internationally recognized standards of relevant international organizations with respect to the practise of law.

V. MATTERS NOT ADDRESSED

We stressed above the role of the legal professional and the importance of certain fundamental values of the legal profession. These core values derive from the unique role that lawyers play in the judicial system and the unique relationship they have with their clients. They include:

- self governance of the legal profession;
- independence of the legal profession;
- avoidance of conflicts of interest;
- preservation of client confidentiality;
- preservation of solicitor-client privilege; and

- avoidance of the unauthorized practise of law.

In Canada and other countries, there is increasing concern about non-lawyers engaging in the practice of law. Unauthorized practice hurts the public interest because it places the consumers of legal services in the hands of those who are not properly trained and who cannot ensure respect of the core values mentioned above. Law societies play a crucial role in protecting the public by regulating and preventing the unauthorized practice of law.

One issue which currently is of profound importance for the legal profession and the public is the regulation of "multi-disciplinary practices" (MDPs). MDPs are business arrangements in which lawyers and non-lawyers practice together to provide a broad range of advice, including legal advice, to consumers. MDPs encompass a variety of forms, from highly integrated organizations with lawyers and non-lawyers all working under one ownership structure to loose referral networks. Highly integrated MDPs are currently prohibited or severely restricted in many countries, including Canada, the United States and England. In some Western European nations, such as France, Germany and Spain, international accounting/professional service firms have established associated law firms which are separate in structure but work almost exclusively for the clients of the accounting/professional service firm.

Some in the legal profession believe that highly integrated MDPs represent a threat to the core values. In particular, they believe partnership with other professionals may erode lawyers' independence of judgment, as advice becomes geared to the needs of the firm's business rather than the client. Traditional protections for confidential information may also be jeopardized, they say, as non-lawyers within the firm may have competing obligations to publicly disclose information.

The core values are a foundation of our legal system and of our democracy. Disciplines governing trade in legal services must ensure that law societies can continue to preserve

and protect these values. This can be accomplished, for example, by providing that nothing in the disciplines will affect the right of member states or the regulators of their respective legal professions to regulate in furtherance of those values. Further, with respect to MDPs, the disciplines should provide that nothing will affect the right of independent professional bodies to make rules governing incompatibility of professions or the kinds of vehicles within which lawyers may be allowed to practise.

VI. CONCLUSION

We have argued in this submission that legal regulators (law societies in this country) need to be given a wide berth in regulating the profession. Our overall concern is that law society rules concerning matters which relate to the public interest not be subject to review by a third-party dispute settlement body. This would be inconsistent with the principle of self-regulation demanded by our democratic institutions. Further, these rules involve matters which are fundamental to the public interest such as who can practice law, what standards of behaviour they are required to meet and how they must practice. Such issues of public protection should not be left to a panel of "experts" from other countries with little or no familiarity of Canada's legal history and culture.

We appreciate the opportunity to provide our views and look forward to further dialogue on these issues as negotiations on new disciplines move forward. In particular, we would welcome the opportunity to meet with federal government officials and to comment on draft disciplines for the legal services sector.

VII. APPENDIX