



Memorandum

To: Allan Bogutz, Craig Goebel & Laura Watts

From: Heather Campbell

Articled Student

Date: July 11, 2010

Re: Emeritus Lawyer – Canada, Australia & New Zealand

INTRODUCTION

This memorandum reviews the existence (or non-existence) of an emeritus lawyer membership category among law societies in Canada, Australia and New Zealand. It also considers whether retired lawyers in these jurisdictions can provide *pro bono* legal services, and if so, whether they receive insurance coverage. A chart summarizing the discussion is included on page 10. The memorandum concludes by identifying four areas for future research.

CONCLUSIONS

In Canada, while only the Law Society of Upper Canada (Ontario) has created an emeritus lawyer category, retired lawyers in Alberta, British Columbia and Saskatchewan can provide *pro bono* services and are extended insurance coverage for claims arising from these services.

In Australian jurisdictions, there is no emeritus category; however, Victoria and Queensland allow lawyers to apply for a free practising certificate solely so they can provide *pro bono* services. Lawyers without professional indemnity insurance can apply to the National Pro Bono Resource Centre to undertake *pro bono* services under the National Pro Bono Professional Indemnity Insurance Scheme.

There is no emeritus lawyer category in New Zealand. Retired lawyers wishing to provide *pro bono* legal services need to hold a current practising certificate.

CANADA

The Pro Bono Committee of the Canadian Bar Association has passed a resolution urging all law societies in Canada to:

- (i) to arrange with their insurers the extension of insurance coverage for pro bono legal work by uninsured lawyers, if they do not currently have such arrangements;
 - (ii) to establish Pro Bono Committees to facilitate the development of the proposal, monitor progress in implementing it, and assist the law societies with related issues on an ongoing basis, such as drafting and revising the list of approved pro bono programs and services that qualify lawyers for coverage; and
 - (iii) to recognize and encourage the unique contribution that retired lawyers, public sector lawyers and in house corporate counsel may bring to pro bono initiatives; and
- (b) offer the law societies the volunteer resources of its branches and the CBA Pro Bono Committee to assist with the development and implementation of these proposals.¹

Ontario

In 2006, the Law Society of Upper Canada's ("LSUC") Convocation² approved the emeritus lawyer category as a means to increase access to justice.³ The category permits retired lawyers to provide legal services *pro bono* through Pro Bono Law Ontario ("PBLO") without paying the LSUC annual fee.⁴ Convocation also approved regulatory requirements for emeritus lawyers and agreed to review the category three years after implementation.⁵

In Ontario, approved *pro bono* legal services operate under the auspices of Pro Bono Law Ontario.⁶ Discussions about creating an "emeritus status" began in the late spring of 2005 between Lynn Burns, Director of PBLO and the LSUC.⁷ The proposal was based on the similar initiatives in American jurisdictions.⁸ It was discussed in the fall of 2005 by the Access to Justice Committee, which approved the concept in principal, but identified several im-

¹ Pro Bono Committee, Canadian Bar Association, Resolution 07-04-A "Insurance Coverage for Pro Bono Legal Services, online: <<http://www.cba.org/CBA/groups/pdf/07-04-A.pdf>>.

² The LSUC's Board of Directors.

³ The Law Society of Upper Canada, New Release, "New 'Emeritus' membership status permits retired lawyers to provide pro bono legal services without paying the annual fee" (June 2006), online:

<<http://www.lsuc.on.ca/news/b/conv/?i=9867>> [LSUC, "Emeritus"].

⁴ *Ibid.*

⁵ *Ibid.* I am waiting for a response from the LSUC regarding whether this review has been undertaken.

⁶ The Law Society of Upper Canada, Professional Regulation Committee, *Report to Convocation* (June 2006), online:

<http://www.lsuc.on.ca/benchmark/media/conjune06_prec.pdf> at 4 [LSUC, *Report*].

⁷ *Ibid.* at 5.

⁸ *Ibid.* at 4.

plementation issues.⁹ Regulatory enhancements added to the proposal satisfied the concerns of the Access to Justice Committee and Professional Regulation Committee.¹⁰

Eligibility requirements

An emeritus lawyer:

1. Must intend to provide at least 50 hours per year of *pro bono* legal services;

2. Be a member in good standing with the LSUC and must not have been disciplined for any reason by the law society of any jurisdiction within the past 15 years (complaints against the member may also be considered);

3. Must sign a statement that he or she has read and will comply with the Rules of Professional Conduct and will submit to the continuing jurisdiction of the LSUC for regulatory purposes;

4. Must agree to neither ask for nor receive any compensation of any kind, except out-of-pocket expenses incurred in connection with the *pro bono* service rendered;

5. Must perform all services under the supervision of a lawyer;

6. Must have been practising for a minimum of 10 of the last 15 years, and if the lawyer has not been in private practice for 5 years or more, he or she must undergo a refresher program;¹¹

7. Must complete a minimum number of professional development hours;

8. Must complete and file the Member's Annual Report (for tracking purposes); and

9. Must not handle trust funds or have access to a trust account.

Insurance coverage

Certain categories of lawyers in Ontario can apply to exempt themselves from paying an annual insurance premium.¹² Generally, lawyers eligible for an exemption include those "who are fully retired from the practice of law, estate trustees, emeritus lawyers, judges, and others no longer practising law."¹³

⁹ *Ibid.*, at 5

¹⁰ *Ibid.*

¹¹ *Ibid.*, at 6-7.

¹² LAWPRO, "Insurance for retired lawyers, estate trustees, emeritus lawyers, judges and others no longer practising law", online: <http://www.lawpro.ca/insurance/practice-type/retired_lawyers.asp> [LAWPRO, "Insurance"].

¹³ *Ibid.* For detailed information on exemption criteria, see LAWPRO, "Rules for Exemption Eligibility", online: <http://www.lawpro.ca/file_online/exemption_eligibility.asp>.

Emeritus lawyers are insured for *pro bono* professional services provided through a LAWPRO-approved *pro bono* program associated with PBL0 as follows:

- They will be provided the standard Run-Off Coverage of \$250,000 per claim/in the aggregate for their approved *pro bono* services, even though the services are provided while exempt under the program; and
- They will not be required to pay any deductible amount for any claims relating to such professional services.

...

[Lawyers providing] *pro bono* work for not-for-profit- organizations (not associated with Pro Bono Law Ontario) ... may continue to qualify for exemption.¹⁴

Pro bono work available to emeritus lawyers

PBL0 identifies several service areas available to emeritus lawyers:

- direct representation and summary advice;
- procedural advice;
- mentoring younger lawyers;
- speakers for volunteer lawyer training;
- speakers for public legal education seminars; and
- drafting online or print guidebooks and tip sheets.¹⁵

Alberta

In Alberta, inactive (retired) members¹⁶ are exempt from the requirement to pay an insurance assessment and they are not covered under the indemnity program.¹⁷ However, retired lawyers can be active for *pro bono* and be covered by the indemnity program if they are offering services rendered through a designated clinic.¹⁸

British Columbia

Since 2002 in British Columbia, the Lawyers Insurance Fund has provided insurance at no cost to retired lawyers performing *pro bono* services ("sanctioned services").¹⁹ Services are "sanctioned services" if:

¹⁴ LAWPRO, "Insurance", *ibid*.

¹⁵ Pro Bono Law Ontario, "Retired Lawyers", online: <<http://www.pblo.org/lawyers/volunteer/item.1127-RetiredLawyers>>.

¹⁶ *The Rules of the Law Society of Alberta*, online: <<http://www.lawsocietyalberta.com/files/rulesesa.pdf>>, Rule 1(1)(f).

¹⁷ *Ibid*, Rule 148(1)(e).

¹⁸ *Ibid*, Rule 148(2.1).

¹⁹ The Law Society of British Columbia, "Coverage under the Police for pro bono legal services", online: <http://www.lawsociety.bc.ca/regulation_insurance/coverage_probono.html>; The Law Society of British Columbia, "Lawyers Insurance Fund extends coverage for pro bono work in approved programs," *Benchers' Bulletin* (2001: No. 6), online: <http://www.lawsociety.bc.ca/publications_forms/bulletin/2000-01/01-12-09_probono.html#probono> [LSBC, "Lawyers Insurance"].

1. they are provided by a lawyer to an individual solely through a *pro bono* legal services program;

2. they are not for the benefit of a person previously known to the lawyer, including a family member, friend or acquaintance; and

3. both the services and the program are approved by the Law Society.²⁰

The *Pro Bono* Committee recommended the coverage "as an important way to expand the pool of lawyers willing to offer *pro bono* services."²¹ The policy provides the same coverage as the mandatory liability insurance policy (\$1 million per claim, \$2 million annual aggregate), without payment of an insurance fee or deductible by the retired lawyer.²²

Retired lawyers are not required to pay the deductible for any claim arising from a "sanc-tioned service."²³

Saskatchewan

While retired members of the Law Society of Saskatchewan are exempt from paying an annual assessment for mandatory liability, they are still entitled to provide *pro bono* services and they are extended insurance coverage pursuant to Endorsement No. 2 of the Lawyers' Professional Liability Insurance Group Policy:

It is understood and agreed that coverage under this policy is extended to members of the Law Society who are exempt from insurance coverage pursuant to Rule 605(4) of the Rules of the Law Society for an Occurrence arising out of Professional Services performed on a pro bono basis through programs approved by the Law Society of Saskatchewan.²⁴

Retired lawyers providing *pro bono* services are not required to pay "the deductible for any claim occurring against [the] lawyer arising out of *pro bono* services provided through a Pro Bono Law Saskatchewan program. Lawyers must register and be a volunteer with Pro Bono Law Saskatchewan programs to receive this benefit."²⁵

Nova Scotia

²⁰ The Law Society of British Columbia, "Pro Bono Services Information Sheet", online: <http://www.lawsociety.bc.ca/regulation_insurance/docs/LIF-probono.pdf> [LSBC, "Information Sheet"]; ²¹ LSBC, "Lawyers Insurance," *supra* note 19.
²² *Ibid.*
²³ LSBC, "Information Sheet", *supra* note 20.
²⁴ Pro Bono Law Saskatchewan, "Insurance Information Sheet", online: <<http://www.pbisask.ca/pdf/insurancecirculard.pdf>>.
²⁵ *Ibid.*

In Nova Scotia, retired lawyers are not insured and they are not allowed to practice, including in *pro bono* situations.²⁶ However, the idea of insuring retired lawyers providing *pro bono* services has been discussed. In a 2009 paper funded by the Law Foundation of Nova Scotia, the Nova Scotia Pro Bono Study group assessed the state of *pro bono* practice in the province and the feasibility of establishing a provincial *pro bono* organization.²⁷ The group identified the lack of insurance as a significant impediment to *pro bono* practice:

Of non-practicing or retired lawyers who do not currently provide *pro bono*, 79% indicated a lack of insurance as their most significant barrier to participation. In order to increase the involvement of the non-practicing or retired bar, an alternative insurance arrangement is a vital element of *pro bono* programming.²⁸

Other provinces and territories

New Brunswick, Prince Edward Island,²⁹ the Yukon, the Northwest Territories³⁰ and Nunavut³¹ do not have an emeritus lawyer category. It appears retired lawyers in these jurisdictions are not insured for (or entitled to provide) *pro bono* services. It seems the same situation exists in Manitoba and Newfoundland; however, this has yet to be confirmed.

The Barreau du Québec grants Advocatus Emeritus (Ad. E) distinction to lawyers who distinguish themselves according to 3 criteria: professional excellence, a sustained and remarkable contribution to the profession and a profound influence.³² This honorary title is limited to 2 per cent of the total membership in the Québec Bar.³³ Further research needs to be conducted to determine whether there is insurance coverage for retired lawyers providing *pro bono* services.

AUSTRALIA

There is no special emeritus lawyer category in Australian jurisdictions;³⁴ however, Victoria and Queensland allow lawyers to apply for a free practising certificate solely so they can provide *pro bono* services.³⁵ In other states and territories, lawyers wishing to obtain a

²⁶ Email from Nova Scotia Barristers' Society to H. Campbell (9 July 2010).
²⁷ Nova Scotia Pro Bono Study, *Pro Bono in Nova Scotia: Current Practice and Future Opportunities* (April 2009), online: <<http://www.nsbs.org/documents/equity/NovascotiaProBonoStudy.pdf>>.
²⁸ *Ibid.* at 32.

²⁹ Email from Law Society of Prince Edward Island to H. Campbell (8 July 2010) (the Law Society's Secretary-Treasurer, who may know whether the creation of the category has been discussed, is on vacation until the end of July 2010).
³⁰ Email from Law Society of the Northwest Territories to H. Campbell (8 July 2010).
³¹ Email from Law Society of Nunavut to H. Campbell (8 July 2010) (anyone practicing law in Nunavut must be a regular member or have a restricted appearance certificate).

³² Ogilvy Renault, Press Release, "Six Ogilvy Renault Lawyers Named 'Advocatus Emeritus'" (10 May 2007), online: <http://www.ogilvyrenault.com/en/mediaRoom_279.htm>.
³³ Heenan Blaikie, News Release, "Yvan Bolduc and Max R. Bernard awarded the title of Emeritus Lawyer" (19 April 2010), online: <<http://www.heenanblaikie.com/en/newsEvents/news/Item?id=661>>.

³⁴ Email from Law Society of Western Australia to H. Campbell (8 July 2010); email from Law Society of South Australia to H. Campbell (8 July 2010).
³⁵ National Pro Bono Resource Centre, "Engaging Retired and Career-Break Lawyers in Pro Bono" (February 2010), online: <http://www.nationalprobono.org.au/news_detail.asp?id=72> at 33.

practice certificate for the sole purpose of providing *pro bono* services have to pay for the certificate.³⁶ The high cost of a practising certificate may "discourage qualified lawyers, such as retired lawyers who may not otherwise need a practising certificate, from volunteering."³⁷

Further, before a lawyer with a practising certificate can provide *pro bono* services, he or she must have professional indemnity insurance coverage.³⁸ Lawyers without professional indemnity insurance (i.e. retired lawyers) can apply to the National Pro Bono Resource Centre ("Centre") to undertake *pro bono* services under the Centre's National Pro Bono Professional Indemnity Insurance Scheme ("Scheme").³⁹ In May 2009, the Centre introduced the Scheme:

to encourage lawyers without professional indemnity insurance ... to undertake *pro bono* legal work. The Scheme removes one of the major barriers faced by [retired] lawyers wanting to provide *pro bono* assistance. The Centre has taken out a professional indemnity insurance policy (Policy) with LawCover Insurance Pty Ltd that covers lawyers carrying out or involved in the provision of *pro bono* legal work with the approval of the Centre.

Lawyers with a valid practising certificate may seek cover under the Policy by completing an application form and submitting it to the Centre for approval. If the proposed *pro bono* work falls within the definition of *pro bono* legal work based on the definition used by the Law Council of Australia, and there is a solicitor with an "unrestricted practising certificate" willing to supervise the work, the application will be approved.

The Centre has paid the premium on the Policy and will cover the excess payable on any claim. The Policy provides a high level of cover of \$2,000,000 on any claim.

In February 2010, the Centre released a report entitled, "Engaging Retired and Career-Break Lawyers in Pro Bono."⁴⁰ The report is the culmination of research and consultations conducted by the Centre to:

establish the size of the retiring lawyer population and thus determine the number of potential *pro bono* volunteers, what current structures existed within the legal services sector through which lawyers could volunteer, whether there was a need for a specific project to engage retired and career-break lawyers, and how best to match those lawyers with unmet legal need.

[The] report examines the key legal service providers and the existing landscape of

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.* at 34.

³⁹ *Ibid.* at 35.

⁴⁰ National Pro Bono Resource Centre, "Engaging Retired and Career-Break Lawyers in Pro Bono" (February 2010), online: <http://www.nationalprobono.org.au/news_detail.asp?id=72>.

pro bono service provision in Australia. It details the constraints to pro bono service provision and explores how these constraints could be overcome. The report also considers how retired and career-break lawyers could best be matched with opportunities, and makes recommendations on future directions.⁴¹

In brief, the Centre made the following seven recommendations:

- 1.) Free practising certificates should be available for the sole purpose of engaging in *pro bono* work, provided that the practitioner is:
 - a) suitability qualified; or
 - b) supervised by suitably qualified lawyer; and
 - c) covered by appropriate professional indemnity insurance.⁴²
- 2.) Professional indemnity insurance should be available without charge to lawyers wanting to undertake *pro bono* work.⁴³
- 3.) The Centre should expand its website to provide more information for lawyers wanting to provide *pro bono* services.⁴⁴
- 4.) Legal professional associations should promote free practising certificates and professional indemnity insurance for lawyers wanting to provide *pro bono* services.⁴⁵
- 5.) Legal professional associations should collect nationally consistent data on lawyers, especially retiring and retired lawyers, and promote *pro bono* opportunities.⁴⁶
- 6.) Legal training providers, such as CLE, should permit retired lawyers whose sole purpose is to undertake *pro bono* work to attend training sessions without charge.⁴⁷
- 7.) The provision of and access to disbursement assistance in *pro bono* matters should be improved.⁴⁸

The Law Society of Tasmania is interested in the idea of retired lawyer *pro bono* services and the Executive Director has asked if I (we) have any thoughts on this issue that could be passed on to the *Pro Bono* Committee at its next meeting.⁴⁹

NEW ZEALAND

⁴¹ *Ibid.*

⁴² *Ibid.* at 58.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.* at 59.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ Email from Law Society of Tasmania to H. Campbell (8 July 2010).

The New Zealand Law Society does not have an emeritus lawyer category.⁵⁰ The Law Society states:

Retired lawyers wishing to provide *pro bono* [legal] services ... would need to hold a current practising certificate. The holding of a practising certificate is an important public protection measure, ensuring that lawyers are subject to proper regulation and oversight. The fact that services are provided free does not obviate the need for a process for complaints about the quality of those services.⁵¹

The Law Society notes there is a great deal of work that can be done without the title of lawyer and without a practising certificate. Retired lawyers can do anything *pro bono* that falls outside the "reserved areas of work" for lawyers and as along as they do not describe themselves as a lawyer.⁵² In essence, a retired lawyer can do whatever non-lawyers are allowed to do.

The Auckland District Law Society also does not have an emeritus lawyer category, and it appears there has been no discussion of the issue in recent years.⁵³

SUMMARY CHART

⁵⁰ Email from New Zealand Law Society to H. Campbell (8 July 2010).

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ Email from Auckland District Law Society to H. Campbell (8 July 2010).

Law Society	Emeritus lawyer category	Retired pro bono practice allowed	Retired insurance coverage for pro bono	Amount of Lawyer deductible	Comments
British Columbia	No	Yes	Yes	\$1 million	Started in 2002
Alberta	No	Yes	Yes		Can provide pro bono if offered through designated clinic
Saskatchewan	No	Yes	Yes	No	
Manitoba	No				
Ontario	Yes	Yes	Yes	\$250,000	Created in 2006
Quebec	No				Advocatus Emeritus (Ad. E.) award
New Brunswick	No	No	n/a	n/a	Study paper in April 2009 discussed issue
Nova Scotia	No	No	n/a	n/a	
PEI	No	No	n/a	n/a	
Newfoundland	No	No	n/a	n/a	
Yukon	No	No	n/a	n/a	
NWT	No	No	n/a	n/a	
Nunavut	No	No	n/a	n/a	
AUSTRALIA					
New South Wales	No	No			Professional Indemnity Insurance Scheme
Western Australia	No				
Queensland	No	Yes			Free practising certificate
Tasmania	No				Interested in idea and thoughts for next Pro Bono meeting
Northern Territory	No				
Victoria	No	Yes			Free practising certificate
NEW ZEALAND					
New Zealand Law	No				Need to hold current practising certificate
Auckland District Law	No				

FUTURE RESEARCH

This memorandum has identified at least four areas for future research:

1.) **Ontario's three-year review.** When the LSUC's Convocation approved the emeritus lawyer category in 2006, it agreed to review the category three years after implementation. There is no indication whether such a review has taken place. The LSUC has been contacted regarding the status of this review.

2.) **Insurance providers.** Insurance provides may play a role in consultations – and perhaps funding of research – in relation to establishing an Emeritus lawyer category.

3.) **National Pro Bono Resource Centre (Australia).** The Centre's February 2010 report provides a strong framework should similar research be conducted in British Columbia, and across Canadian jurisdictions generally.

4.) **Law Society of Tasmania.** The Executive Director of the Law Society has indicated an interest in the idea of retired lawyers providing pro bono legal services, and is looking for thoughts that could be passed on to the Pro Bono Committee at its next meeting. This may be a helpful knowledge exchange opportunity.

