

# CRIMINAL DEFENCE ADVOCACY SOCIETY

## Report of the Committee on Improving Criminal Law Articles in British Columbia

“Better than a thousand days of diligent study is one day with a good teacher.”

Japanese proverb

September 2<sup>nd</sup>, 2016

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# Criminal Defence Advocacy Society

## WHO ARE WE?

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In 2014, a group of senior criminal defence lawyers identified the need for an organization to focus on criminal justice issues which affect defence counsel and their clients. Efforts were made to consolidate support for such an organization and, on February 3, 2015, the Criminal Defence Advocacy Society (C-DAS) was officially incorporated in British Columbia as a non-profit society. Its role is to engage in advocacy, law reform and education regarding matters relating to criminal defence work. To this end, C-DAS aims to lobby for changes in the justice system that reflect our concern for the rule of law, the independence of the bar, and the constitutional rights of accused individuals.

In the 18 months since incorporation, C-DAS has amassed a membership of 180 lawyers and students from across British Columbia. C-DAS is strongly committed to representing the interests of defence counsel from throughout the province.

C-DAS has solicited our membership to identify issues that specifically impact their practice. Through these efforts, a series of priority projects have been selected for law reform and advocacy. These projects include but are not limited to: exploring ways in which C-DAS can support the effort to improve *Gladue* funding and reporting in cases involving aboriginal accused, finalizing a report addressing the effect of maintaining innocence on obtaining parole, creating a web-based forum for cases in British Columbia involving “Mr. Big” investigations, and studying the state of criminal law articles in B.C.

As part of our project concerning criminal law articles, our organization surveyed students currently articling in the criminal bar, criminal defence counsel between 0-5 years call, judges of the Provincial Court, and senior counsel who hire (or would hire) criminal law articling students. Our surveys, which were conducted in a quasi-confidential setting, focused on the articling experience, issues with maintaining a criminal law practice as young counsel, obstacles to hiring criminal law articling students, and commentary from the bench regarding the perceived state of mentorship in this area of the profession.

This survey raised a number of concerns regarding the state of criminal law articles in British Columbia. In this report, we have outlined the main findings of the survey and some recommendations for improving both the number and quality of articling experiences in the criminal bar.

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## WHY ARE WE STUDYING CRIMINAL LAW ARTICLES IN BRITISH COLUMBIA?

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### To improve the representation of criminal law clients

Ultimately, the quality of representation by young counsel and students in court has the greatest impact on the clients whose interests are being represented. When students and young lawyers do not get adequate mentorship, it is difficult for them to learn how to be effective advocates. A lack of proper mentorship in the bar leaves fewer good lawyers to represent prospective clients and creates a real risk of wrongful conviction when clients are left with poorly trained counsel to represent them.

### To improve the assistance provided to criminal law counsel

Criminal defence practice is unlike any other area of legal practice. The stakes are high and the pace of practice is difficult to manage at times. An effective student or young associate can be a great asset or a great burden depending on the person and the training he or she has received.

### To improve the learning experience for young lawyers

To enter the criminal law arena having had a great mentor is an enviable position for a young lawyer. Unfortunately, the feedback we have received during this survey indicates that the profession could do a better job of teaching and welcoming young lawyers into this area of practice.

### To improve public perception of the administration of justice

The public is watching when students and young lawyers appear in court. A poorly trained and ineffective advocate is an embarrassment to the administration of justice and the reputation of the criminal bar. We believe that the public perception of the justice system will be enhanced by improving the mentoring and training of those who will eventually represent clients in important and often high-profile criminal matters.

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## INPUT FROM COUNSEL

In completing this report, we were able to obtain responses from a wide cross-section of practicing criminal lawyers. As expected, the vast majority of these lawyers do not hire articled students. A small number of lawyers we surveyed expressed that, in their view, it was their obligation to take on articling students and to do so despite the lack of financial incentive. Other lawyers felt equally obliged but their firms are simply too small to take on the cost of a student.

## QUESTIONS WE ASKED PROSPECTIVE ARTICLING PRINCIPALS

Do you take an articling student every year?

What factors do you look at in deciding to take a student?

At what point in the year, do you generally know if you will take a student?

What is the salary range for your articling students?

What skills or qualities do you look for in an articling student?

What work do you have articling students complete or participate in for the office?

Do you attend court with your articling student? If so, on what matters?

Does your articling student have contact with clients?

What would make it more likely for you to hire an articling student?

Would you be interested in sharing an articling student if arrangements could be made?

Do you have any other comments or suggestions?

Cost was the primary driving factor behind the decision to hire a student or not. The overwhelming majority of lawyers were prepared to hire a student if they had enough work and/or made enough income from their practice. We heard repeatedly that the cost associated with not only paying a student, but also covering their fees, PLTC tuition and other related expenses was simply prohibitive.

Lawyers surveyed who take students pay in the range of \$20,000-36,000/year (most lawyers pay students' wages throughout PLTC). All lawyers who hired articled students also paid for PLTC tuition which, in 2016, was \$2500.00 plus a \$250.00 enrollment fee. If the lawyer or firm decided to hire a student as an associate and pay for the student's initial call to the bar, this would cost an additional \$4457.05 (\$200.00 enrollment fee; \$2057.09 practice fee; \$1750.00 insurance fee).

Many lawyers expressed that if they want to help those in need of counsel who cannot afford to pay, they must accept legal aid clients and the legal aid tariff is not enough to cover their own costs, let alone the costs

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associated with hiring a student. This leaves the profession in an unfortunate situation where only (or mostly) those lawyers who take on predominantly private clients are able to hire students. This is unfair not only to legal aid clients and their counsel, but it also prevents students from participating in some of the most interesting and challenging cases. It also means that students do not learn the practical realities of running a legal aid practice, which is likely what they will be doing following their call should they remain in the criminal bar.

Other lawyers said that they simply do not have enough work to share with a student or that their practice is too narrow to provide the student with a well-rounded experience. Some said that assistance in finding students experience in other areas of practice would reduce some of the administrative burden associated with taking on a student. In this regard, almost all lawyers surveyed indicated that they would be interested in sharing a student.

With respect to articling generally, a number of senior and well-respected lawyers we spoke to seriously lament the current state of mentorship in the criminal bar. They see that the future of criminal law practice, including the prevention of wrongful convictions, relies on the education and proper mentoring of young counsel. As these senior lawyers retire, there will be only a handful of criminal law counsel in the province who have had the training and experience to handle serious and complex criminal law cases.

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## INPUT FROM STUDENTS AND YOUNG LAWYERS

Through in-person and written interviews, we heard from 33 students and young lawyers who had recently articulated. Their input was received on the understanding that they would remain anonymous.

### QUESTIONS WE ASKED STUDENTS AND YOUNG LAWYERS

- How did you find your articling position?
- Are there any resources that would have been useful to you for finding an articling job?
- Did you article with a sole practitioner or a firm?
- Did you have shared articles?
- Did your principal pay for PLTC?
- Did your principal pay your wages during PLTC?
- What kind of training, if any, was given to you by your principal or others during your articles?
- What did a typical day look like during your articling year?
- What skills do you think you learned or honed?
- What did you appreciate most about your articling experience?
- How could your articling experience have been improved?
- If applicable, has your principal assisted you in helping find work after articles?
- Do you plan to stay in criminal law?

Nearly every student and young lawyer mentioned how difficult it was to actually find articles focused on criminal law. They were among the few who obtained such positions, usually through their own networking and searching. Their law schools provided little to no assistance in securing an articling position. Career services offices typically only provided a list of firms and lawyers who had previously hired a student. These lists were often not current and, on occasion, included outdated contact information. The students surveyed reported that there was virtually no outreach performed by the law schools to assist students interested in criminal law.

These obstacles are not surprising. From our collective experience in working with students at UBC and in court, there are perhaps 10 articling positions available in the Lower Mainland in any given year. More research is needed to determine how many criminal law positions are available elsewhere in the province. Anecdotal reports from individuals who practice in more remote areas suggest that the number is likely very low.

Of the students who are able to find articles in criminal law, the experience is varied. Some received excellent articles and mentorship with lawyers who provide them with a wide variety of experiences and allow them to junior on more serious cases. Other students had a terrible time during articles with their experience consisting almost solely of driving to various courthouses throughout the day making appearances on minor matters.

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The main complaint was not being provided with a varied and meaningful articling experience. We also read deeply concerning accounts from some students who relayed stories of being exploited and mistreated during articles. These situations should not occur and the criminal bar has an obligation to address the issues underlying these accounts.

For students who had good articles, their work included a variety of court appearances, legal research, reviewing disclosure, interviewing clients, junioring counsel on serious trials, attending court to observe senior counsel, drafting submissions, memoranda and factums, and running their own trials or hearings with their principals or counsel from their office in attendance. They were paid a fair wage both during articles and PLTC and in some circumstances, their principals or firms paid for their robes as a gift.

For those whose articling experience was less than adequate, they described receiving little to no training or supervision in court, and spending their days traveling to various courthouses appearing on minor matters such as fix dates and adjournments. These types of articles are so common in the criminal bar that the unfortunate students who are in these positions are called “calendar jockeys.” Essentially, their articles consist of being glorified schedulers.

On the other end of this spectrum, a few students expressed that they spent all their time doing research and writing and spent very little time in court, if at all. Some students in these positions were never given the opportunity to even conduct a bail hearing let alone run a trial. One student stated she received so little training during her articling year that she felt like a fraud being able to call herself a lawyer when she was eventually called to the bar.

Other areas of concern for students and young lawyers included lack of guidance in running one’s own criminal law practice. For the few who obtain articles, even fewer are kept on as associates. As a result, they have to find their own way if they want to continue to practice criminal law. While the Law Society provides general guidance in this area, it is not very helpful because it is not specific to criminal law and a legal aid practice. These young lawyers expressed frustration about having to figure out substantive areas of criminal law, while navigating the pitfalls of setting up their business without much assistance. They are continually worried about running afoul of Law Society rules or regulations and properly being paid for their work through the highly bureaucratic legal aid system.

Some of those surveyed described a virtually untenable position upon being called to the bar. They are typically several thousands of dollars in debt from university, they have been paid a meager wage during articles that may or may not have resulted in a net debt after taking into account personal expenses not covered during the articling year (e.g. gas, cellular phone, etc.), and upon being called, are faced with a significant Law Society bill associated with their call, insurance and enrollment. The situation is well-illustrated by the response we received from one young lawyer who was recently called to the bar:

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*There must be a reduction of the fees we are expected to pay upon being called or as new lawyers in criminal defence. I know of many students who simply delayed or avoided being called because they could not afford it. For many of us, we are not paid for our gas or vehicle expenses. If the firm a student articling with is busy enough, you end up making barely enough to cover your gas, insurance, and food. I was lucky to have lived at home during articles. I cannot imagine how someone who had to pay rent in Vancouver would have fared.*

*I was called in May. Yet despite this and despite the lack of jobs, I had to pay \$2760.15 on April 30, as a call fee and insurance for May - December. I still had not secured a position at that point and was staying on at my firm and being paid just over \$1000 bi-weekly for two months. I would then be unemployed for the first time since I was 16. I remember writing to the Law Society to ask if there were any part of the fee that I could opt out of as a low-income individual and a criminal articling student who would be shortly jobless. The email I received back stated simply "there is no reduced rate and insurance fees are the same for all lawyers". I was told I could switch to non-practicing and pay the \$300 installment fee. Of course I couldn't afford to do that because I was trying to remain employable in a field where salaried or associate positions are virtually nonexistent.*

*I then received another bill from the Law Society for \$2955.75 on November 1, which was due November 30. I am fairly certain that I paid this bill late as I simply didn't have the money.*

Unfortunately this situation is not all that unusual. Many new criminal lawyers in Vancouver find themselves struggling to make ends meet if they want to stay in criminal practice. These observations do not fail to recognize that many lawyers struggle because there is not enough work to go around for the number of lawyers who want to practice in this area. However, in our view, there should be some recognition that it is especially difficult for newer lawyers, and assistance ought to be given to at least offer them a fighting chance to start a practice.

Below are some of the many suggestions offered by young counsel in their responses to our questions:

## Re: Finding Articles:

- The Career Services offices at the various law schools should be improved to better help students interested in criminal law navigate the criminal law bar in British Columbia.
- More information should be made available about criminal law practice in British Columbia for students at law schools outside of the province.
- Practitioners should be encouraged and supported in their efforts to take on criminal law articulated students.

## Re: Improving Articles:

- There should be education sessions for new criminal law articling students, either provided by the Law Society or by an organization like C-DAS.

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- Students entering criminal law articles should be given more and/or better training before beginning articles. A training manual or checklist would be extremely helpful.
- For lawyers who have never taken a student before, there should be some mechanism to ensure that they understand the types of experiences they need to provide to their articulated students.

## Re: Assisting New Criminal Law Calls:

- Reductions in fees and insurance costs for new lawyers entering criminal practice.
- An instruction manual or education session on how to set up your own criminal law practice, with input from the Legal Services Society.

Many of these recommendations could be achieved through changes initiated by the Law Society and through the help of organizations like C-DAS and the Canadian Bar Association. Making articles more meaningful and effective for those who would not otherwise have such an experience would be a huge step forward for the criminal bar and prospective clients would reap the benefits of better trained counsel. Furthermore, these types of recommendations not only serve students and lawyers, but the administration of justice as a whole.

It is no doubt because of a lack of meaningful pay and mentorship that many students and young lawyers have decided against pursuing a career in criminal law. On a regular basis, we are losing talented, hard-working lawyers who, absent the financial constraints inherent in this work, would be making a significant impact on the most marginalized people in our community.

It must be remembered that a good portion of legal aid work is done by young defence counsel. Senior counsel often reject these retainers for a variety of reasons. As a result, the mentally ill, drug addicted and other marginalized souls in our system are routinely represented by young lawyers. It is thankless work, as a Judge of the Ontario Superior Court recently reminded us:

[51] It is the role of criminal defence counsel, frequently a most difficult role, to fully and fervently represent those persons accused of criminal offences, recognizing that their efforts will often place them at odds with public sentiments, including a natural desire for retribution. As the intervener, The Criminal Lawyers' Association, said in its factum:

Defence counsel run the risk of unpopularity or misunderstanding about their role more than any other lawyer in the Canadian justice system. One reason is the defence lawyer represents a person accused of distasteful acts. Those charged with crimes are frequently unpopular or outside the "mainstream": the poor, addicted, mentally ill, racial and ethnic minorities.

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- *Groia v. Law Society of Upper Canada*, 2015 ONSC 686 at para. 51.

Nonetheless, every day in our courts, young lawyers are called upon to provide this important public service and are not properly compensated or supported in their work. They are regularly expected to work for free or nearly for free when dealing with subject matters like an individual's liberty, his or right to privacy, and other vital interests that protect everyone. As Leonard T. Doust, Q.C. recently explained, legal aid and *legal aid lawyers* are invaluable to the proper functioning of our system:

We are perhaps most familiar with legal aid in criminal matters. Persons who are accused of serious crimes and who cannot otherwise afford to pay for a lawyer must be provided with publicly-funded counsel in order to ensure their right to a fair trial and to safeguard the presumption of innocence. The underlying rationale for this protection of the presumption of innocence is two-fold. First, from the perspective of the individual, legal aid ensures that individuals who face the potential of incarceration have the means to adequately defend themselves. Second, from the perspective of the system, legal aid ensures that the criminal justice system can effectively avoid wrongful convictions, function fairly, and ensure that each and everyone one of us can be confident that we live in a society where we will never be punished for something that we did not do, or will any of our family, friends, associates, or fellow members of our society.

The rights of all of us are on trial in every criminal case. Without proper representation, pre-trial processes such as disclosure, admissions of fact, and plea bargaining are ineffective, and unrepresented accused are left floundering with complex processes, procedural, evidentiary, and legal issues...

- Leonard T. Doust, Q.C., *Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia*; March 2011 at p. 14.

Young defence lawyers do this work because they are passionate about these issues. However, as we have seen, the stark financial reality of practising in this manner eventually catches up with young lawyers and they are forced to pursue other alternatives. This is a failing of our system that we must take steps to rectify immediately.

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## INPUT FROM THE BENCH

We also asked provincial court judges for their input with respect to the state of criminal law articles. Most articling students appear on a daily basis in Provincial Court and the bench witnesses much of what goes on with students in this context. We were able to canvass approximately 40 provincial court judges from around the Lower Mainland. We asked them the following questions:

### QUESTIONS WE ASKED JUDGES

How many years have you been a judge?

What are some great mentoring moments you have seen between lawyers and their students?

What are some challenges you have identified with lawyers mentoring students / young counsel?

What recommendations would you make to lawyers who are considering taking on an articled student?

What recommendations do you have for students looking for lawyers to act as their articling principals?

Do you have any suggestions regarding how to make it more manageable for criminal lawyers to take on articling students?

While a number of great mentoring moments were noted, the judges also expressed concerns in their survey responses and had a number of recommendations for how the articling situation and experience might be improved.

The judges provided a list of common mistakes, many or all of which could be avoided with improved mentorship and training prior to or early on in articles:

- Unprofessional court attire.
- Unprofessional informality in comportment and submissions.
- Using electronic devices when clearly not engaged in scheduling court matters.
- Not understanding exhibits and how to enter them.
- Being late for court without explanation.

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- Not understanding the importance of informing and persuading the judge or understanding how this should be achieved.
- Not understanding courtroom etiquette and what to do with their client in the courtroom.
- Misstating evidence in submissions.
- Overly aggressive, unfocused and lengthy cross-examination.
- Poor witness preparation.
- Lack of understanding of pre-trial and trial procedures.
- Little ability to effectively speak to sentence.
- Making submissions that are too lengthy rather than focusing on the best 2 or 3 points.

With respect to easing the burden of hiring a student, almost all judges' responses included a recommendation for lawyers to consider some type of sharing arrangement, either sharing the articling student between criminal lawyers or between a criminal lawyer and a civil litigator / firm. Members of the bench also suggested seeking out retired judges to help with mentoring if the lawyer does not feel he or she has the time to spend with the student.

With respect to mentoring, members of the judiciary noted that articling students and young lawyers benefited considerably when principals supervised and provided feedback on their cross-examinations. In this regard, those surveyed encouraged meetings between junior lawyers, senior counsel and judges to discuss advocacy. Judges also recommended that senior counsel allow junior counsel to make oral argument under their supervision, and to provide young counsel with occasional opportunities to observe court.

## CONCLUSION AND RECOMMENDATIONS

As suggested throughout this report, criminal law articles are in need of improvement. Financial constraints and other related issues have negatively impacted the number and quality of criminal law articles for years. Capable senior counsel who could provide invaluable experience to young students and lawyers are simply unable to because of the financial reality of their practices. Others who do provide articles sometimes misunderstand the roles and responsibilities associated with this task. While still others provide excellent experiences, putting their students and lawyers at a distinct advantage over their peers.

What is clear is that when principals understand their role, and have the financial ability to properly support their students, amazing mentorship can and does take place. Students and young counsel surveyed for this report described wonderful learning experiences that will unquestionably shape their practice for years to come. To facilitate more of these kinds of articling experiences, we highlight some of the ideas and solutions that were frequently raised by those who were surveyed. These recommendations can be divided into two categories: making more criminal law articles available and improving the articling experience for all concerned.

### **Increasing the number of criminal law articles:**

1. Encourage the Law Society of British Columbia and local universities to develop mechanisms to promote shared articles. This may include allocating discretionary funding to create a forum through which criminal law counsel and students can post their interest and availability online for such positions;
2. Encourage the Law Society of British Columbia to investigate reducing and/or waiving PLTC tuition, bar admission fees and insurance fees for criminal law students and new calls with a predominantly legal aid based practice (initiatives which have had some success in Ontario);
3. Lobby provincial and federal governments to increase funding for legal aid;<sup>1</sup>
4. Consider and promote other incentives and benefits for counsel to encourage them to hire articling students. Some examples may include subsidized CBA membership for counsel and students, or waiver of CPD credits upon completion of satisfactory mentoring exercises.

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<sup>1</sup>C-DAS is aware that the Law Society has struck a Legal Aid Task Force and we will support the efforts of this Task Force if and when necessary.

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## Improving continuing legal education and mentorship in the criminal bar

1. Encourage the Law Society of British Columbia, the Law Foundation, and other institutions to support efforts by the criminal bar to educate and train students and young lawyers. This could be achieved through the funding of small projects which aim to improve mentorship and guidance for lawyers in their first years of practice.<sup>2</sup>
2. Provide administrative and substantive assistance to counsel who have taken on an articulated student for the first time to ensure the experience meets everyone's expectations.

C-DAS is committed to improving the criminal law articling situation in British Columbia and is willing to work with the Law Society of British Columbia or any other organization regarding the initiatives set out above.

## C-DAS Committee on Improving Criminal Law Articles in British Columbia

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<sup>2</sup>For example, C-DAS is in the process of planning a Criminal Law Bootcamp at which senior counsel will teach articulated students and new lawyers about courtroom etiquette and procedure. Another suggestion we have received is for LSS to develop a "Small Practitioner's Guide" equivalent for criminal lawyers.