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Students in Name Only: Improving the Working Conditions of Articled Students Via the Application of the BC Employment Standards Act

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Résumé de l'article

Au Canada, les stagiaires en droit sont souvent soustraits à l'application de la législation provinciale sur les normes d'emploi, laquelle régit les taux de salaire horaire minimum et les taux de rémunération des heures supplémentaires et des jours fériés. En raison de cette exclusion et de l'important rapport de force qui caractérise la relation entre le stagiaire en droit et le superviseur, les stagiaires sont souvent victimes de conditions de travail abusives. Afin de justifier l'exclusion des stagiaires en droit de la portée de la législation sur les normes d'emploi, les partisans du statu quo ont répandu l'idée que l'apport en travail du stagiaire en droit n'est pas le même que celui de l'employé, malgré les données indiquant le contraire. Au cours des dernières années, des porte-parole ont proposé diverses réformes pour améliorer les conditions de travail des stagiaires en droit, sans toutefois cibler la législation sur les normes d'emploi elle-même. Examinant notamment la situation de la Colombie-Britannique, l'auteur fait valoir qu'une solution par excellence pour améliorer ces conditions de travail consiste à appliquer les dispositions de base de la loi sur les normes d'emploi provinciale. De plus, une analyse plus approfondie de la situation montre que les affirmations selon lesquelles cette solution va à l'encontre de l'intérêt public tiennent davantage de la rhétorique que de la substance.

Students in Name Only: Improving the Working Conditions of Articled Students Via the Application of the BC *Employment Standards Act*

Chase Blair[*]

Articled students in Canada tend to be exempt from provincial employment standards legislation, which govern minimum hourly wages and overtime and statutory holiday pay rates. Exemption from these provisions, along with the strong power dynamic present in the articled student-principal relationship, has fostered exploitative working conditions for articled students. To justify the exclusion of articled students from employment standards legislation, supporters of the status quo have propagated the narrative that articled students' labour is not that of an employee, despite evidence to the contrary. In recent years, advocates have proposed various reforms to improve the working conditions of articled students, but they have not targeted employment standards legislation itself. With a focus on British Columbia, this article argues that a better solution to improve the working conditions of articled students is to apply the base provisions of the Employment Standards Act*. Further, on closer examination, assertions that such an approach is contrary to the public interest are more rhetorical than substantive.*

Au Canada, les stagiaires en droit sont souvent soustraits à l'application de la législation provinciale sur les normes d'emploi, laquelle régit les taux de salaire horaire minimum et les taux de rémunération des heures supplémentaires et des jours fériés. En raison de cette exclusion et de l'important rapport de force qui caractérise la relation entre le stagiaire en droit et le superviseur, les stagiaires sont souvent victimes de conditions de travail abusives. Afin de justifier l'exclusion des stagiaires en droit de la portée de la législation sur les normes d'emploi, les partisans du statu quo ont répandu l'idée que l'apport en travail du stagiaire en droit n'est pas le même que celui de l'employé, malgré les données indiquant le contraire. Au cours des dernières années, des porte-parole ont proposé diverses réformes pour améliorer les conditions de travail des stagiaires en droit, sans toutefois cibler la législation sur les normes d'emploi elle-même. Examinant notamment la situation de la Colombie-Britannique, l'auteur fait valoir qu'une solution par excellence pour améliorer ces conditions de travail consiste à appliquer les dispositions de base de la loi sur les normes d'emploi provinciale. De plus, une analyse plus approfondie de la situation montre que les affirmations selon lesquelles cette solution va à l'encontre de l'intérêt public tiennent davantage de la rhétorique que de la substance.

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I. INTRODUCTION

Since the turn of the millennium, the experiences of articled students[1] have rapidly shifted. In the late 1990s, the federal government slashed post-secondary education transfer payments to the provinces in the name of reducing the federal deficit.[2] Governments offloaded the cost of post-secondary education to students and the private sector, resulting in ballooning tuition levels.[3] In fact, since the turn of the century, law school tuition has increased by 321 percent, while inflation has risen 60 percent.[4] Naturally, the consequence of increasing tuition is soaring levels of debt for law school graduates, often approaching or exceeding six figures.[5]

Simultaneously, awareness of the low pay,[6] long hours,[7] and harassment[8] and discrimination[9] that articled students endure has also increased. In response, law students and articled students, particularly in British Columbia and Ontario, have increasingly advocated for better working conditions, voting to join a union,[10] signing an open letter and voicing support for a policy resolution aimed at affording articled students minimum and overtime wages,[11] and engaging in a hard-fought lobbying campaign for the

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1 The term "articled student" is used in British Columbia to describe a person who is enrolled in the Law Society of British Columbia's (LSBC) admission program. A "principal" is a lawyer who employs the articled student. See "Law Society Rules 2015" (April 2022), s 1, online: *Law Society of British Columbia* <www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/law-society-rules/definitions/> [*LSBC Rules*].

2 Theresa Shanahan, "Creeping Capitalism and Academic Culture at a Canadian Law School" (2008) 26:1 Windsor YB Access Just 121 at 132.

3 *Ibid* at 133.

4 "University Tuition Fees" (27 August 2001), online: *Statistics Canada* <www150.statcan.gc.ca/n1/daily-quotidien/010827/dq010827b-eng.htm>; "Average Undergraduate Tuition Fees for Canadian Full-time Students, by Field of Study, 2021/2022" (8 September 2021), online: *Statistics Canada* <www150.statcan.gc.ca/n1/daily-quotidien/210908/cg-a001-eng.htm>; "Inflation Calculator" (22 June 2022), online: *Bank of Canada* <www.bankofcanada.ca/rates/related/inflation-calculator/>.

5 "Just or Bust? Results of the 2018 Survey of Ontario Law Students' Tuition, Debt, and Student Financial Aid Experiences" (2019) at 5, online: *Law Students Association of Ontario* <s3.amazonaws.com/tld-documents.llnassets.com/0010000/10102/law%20students'%20society%20of%20ontario%20-%20just%20or%20bust%20report.pdf>.

6 Anita Balakrishnan, "LSO to Mandate Pay for Articling Students," *Canadian Lawyer* (11 December 2018), online: <www.canadianlawyermag.com/resources/legal-education/lso-to-mandate-pay-for-articling-students/275700>.

7 "Agenda" (29 January 2021) at 47–61, online: *Law Society of British Columbia* <www.lawsociety.bc.ca/Website/media/Shared/docs/about/agendas/2021-01-29_agenda.pdf> ["LSBC January 2021 Agenda"].

8 Isabelle Auclair et al, *Report: Survey on Sexual Harassment and Violence in the Practice of Law*, translated by Sabine Biasi (Quebec City: Université Laval, 2021), online: <espaceasaprod.blob.core.windows.net/media/1242/report-survey-sexual-harassment-violence-practice-law.pdf>.

9 "2019 Articling Survey Results Report" (27 September 2019), online: *Law Society of Alberta* <www.lawsociety.ab.ca/2019-articling-survey-results>; Alex Robinson, "Survey Finds 21 Per Cent of Articling Students Face Harassment, Discrimination," *Canadian Lawyer* (26 January 2018), online: <www.canadianlawyermag.com/resources/legal-education/survey-finds-21-per-cent-of-articling-students-face-harassment-discrimination/274865>.

10 Society of Energy Professionals, "Legal Aid Articling Students Vote to Unionize with Society of Energy Professionals," *Newswire* (16 November 2016), online: <www.newswire.ca/news-releases/legal-aid-articling-students-vote-to-unionize-with-society-of-energy-professionals-603825386.html>.

11 Jon Hernandez, "'Gruelling' Articling Jobs Prompt Calls from Law Students for Better Work Standards," *CBC News* (4 October 2020), online: <www.cbc.ca/news/canada/british-columbia/articling-law-students-call-for-better-work-standards-1.5748961>.

introduction of minimum levels of compensation during articling.[12] To date, articled students have directed their advocacy at provincial law societies rather than at provincial governments, most of whom exempt articled students from some or all provisions of employment standards legislation. However, as I argue, application of provincial employment standards legislation to articled students is the best solution to improve their working conditions. I focus specifically on articled students in British Columbia, drawing on recent efforts in support of basic labour protections for articled students.[13]

First, I briefly detail the history of articling in British Columbia and then describe the structure of the current articling process in this province. Second, I explain that articled students are exempt from the protections provided by British Columbia's *Employment Standards Act* [*ESA*][14] and provide context by reviewing the application of employment standards legislation to articled students in other provinces. Third, I argue that articled students are an exploited class of employees because they face difficult working conditions and there is strong evidence that their labour is best characterized as that of an employee. Fourth, I assert that the best solution to improving their working conditions is the application of the "base provisions" of the *ESA*, which I define as minimum wage, overtime and statutory holiday wages, and the enforcement provisions of the *ESA*.[15] Fifth, I argue that such a solution is preferable to the application of some, but not all, of the base provisions of the *ESA*, the implementation of a minimum salary, and the proposed solution of the Law Society of British Columbia [LSBC]. Finally, I address criticisms of this solution – namely, that it would not be in the "public interest" because it undermines the "independence of the bar," reduces articling positions, and negatively impacts the competence of the bar. I establish that such concerns are ill-founded or exaggerated.

II. HISTORY OF ARTICLING IN BRITISH COLUMBIA

Since the turn of the twentieth century, the articling process in British Columbia has changed considerably, though it has always included a practical training component, schooling, or a combination of both. Prior to 1914, British Columbia's articling process did not include a schooling component because there was no opportunity to obtain a formal legal education in the province prior to that year.[16] In the late 1910s, the LSBC began to include examinations and some form of experiential training as part of the licensure process. Robert Wootton, who articled in Victoria from 1918 to 1923, stated that the law society administered three examinations, "the first intermediate, the second intermediate and the final," though a

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12 Balakrishnan, *supra* note 6; Aiden Macnab, "Law Society of Ontario Defers Vote on Eliminating Mandatory Minimum Wage for Articling Students," *Law Times* (2 December 2021), online: <www.lawtimesnews.com/resources/professional-regulation/law-society-of-ontario-defers-vote-on-eliminating-mandatory-minimum-wage-for-articling-students/362266>; Amanda Jerome, "LSO Divided on Paying Articling Students Minimum Wage, Defers Decision to Provide Time for Input," *The Lawyer's Daily* (29 November 2021), online: <www.thelawyersdaily.ca/articles/31688/lso-divided-on-paying-articling-students-minimum-wage-defers-decision-to-provide-time-for-input>; Terry Davidson, "LSO Votes in Mandatory Minimum Pay for Articling Students," *The Lawyer's Daily* (29 April 2022), online: <www.thelawyersdaily.ca/business/articles/35569/lso-votes-in-mandatory-minimum-pay-for-articling-students>.

13 Below, I discuss the resolution I helped to draft for consideration at the LSBC's annual general meeting in October 2020, including why the resolution constitutes progress but is not the ideal solution to improve the working conditions of articled students.

14 *Employment Standards Act*, RSBC 1996, c 113 [*ESA*].

15 Though I assert that articled students are better characterized as "employees," I use the term "articled student" as it is used in section 1 of the 2015 *LSBC Rules*, *supra* note 1.

16 Wesley Pue, "A History of British Columbia Legal Education" (2000) University of British Columbia Working Paper No 2000-1 at 27 [Pue, "History of BC Legal Education"].

law degree was not required.[17] As far as practical training in the 1920s, articled students were required to spend five years in legal apprenticeship, though some college and university graduates "were allowed to qualify by only three years of servitude."[18] One theme woven through these early accounts is the low wages of articled students; students commented that it was "rare" to be paid in the mid-1910s and that, in the 1920s, they usually worked "for little remuneration, occasionally entirely without pay."[19]

In 1945, the articling process started to take a more recognizable form. The first graduating class from the University of British Columbia's law school was required to article for one year.[20] Alfred Watts suggests that these students were concerned with their working conditions, collectively bargaining for a higher honorarium.[21] During this time, the LSBC became "assiduous in arranging for article[s] and in attempting to ensure … that the principal was indeed a mentor."[22] By 1959, admission required that principals complete a confidential report detailing the student's ability and character prior to examinations.[23] During this period, the LSBC focused on whether a principal was a good mentor and the student was competent; however, it was not concerned with whether the principal was a fair employer. Though the articling process in British Columbia has become more formalized in recent decades, the LSBC's focus has not changed, and the employment aspect of the articled student-principal relationship remains a secondary concern.

III. ARTICLING AND EMPLOYMENT STANDARDS LEGISLATION

A. Current Articling Regime in British Columbia

The principal-articled student relationship contains two aspects: the employment relationship and the articling relationship.[24] The *Law Society Rules* [*Rules*] set out the admission requirements for articled students.[25] An articled student is required to complete their articling term, which consists of working "in the office of the student's principal for a period of not less than 9 months," as well as complete the Professional Legal Training Course and an online practice management course.[26] To be eligible as a principal, a member of the LSBC is required to have been a full-time legal practitioner in Canada for five of eight years preceding the articling start date, at least three years of which must have taken place in British Columbia.[27] The principal bears liability for the actions of an articled student.

Prior to starting their articling term, students must apply for enrolment in the Law Society Admissions Program, completing an application form, providing proof of academic qualification, paying an application fee, and submitting an articled agreement.[28] Articling agreements address "the nature of the relationship between the principal and student, the content of articles and reporting requirements."[29] They

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17 *Ibid* at 29.
18 *Ibid* at 11.
19 *Ibid* at 11.
20 Alfred Watts, *History of the Legal Profession in British Columbia 1869–1984* (Vancouver: LSBC, 1984) at 62.
21 *Ibid*.
22 *Ibid*.
23 *Ibid*.
24 *Ojanen v Acumen Law Corporation*, 2021 BCCA 189 at para 47 [*Ojanen*].
25 *LSBC Rules*, *supra* note 1.
26 *Ibid*, s 2-76.
27 *Ibid*, s 2-57(2).
28 *Ibid*, s 2-54.
29 "Agenda" (24 September 2021) at 124, online: *Law Society of British Columbia* <www.lawsociety.bc.ca/Website/media/Shared/docs/about/agendas/2021-09-24_agenda.pdf> ["LSBC September 2021 Agenda"].

do not, however, "include provisions relating to remuneration, hours of work or other matters relating to students' working conditions."[30] In fact, other than limiting the number of vacation days an articled student may take during their articling term to ten, no other part of the *Rules* or the *Code of Professional Conduct for British Columbia* [*Code*][31] addresses hours of work, days of work, or remuneration.[32]

B. Applicability of the *ESA* to Articled Students in British Columbia

The absence of regulation from the LSBC regarding the working conditions of articled students is coupled with the exclusion of articled students from the *ESA*. Pursuant to section 127(2)(a) of the *ESA*, the Lieutenant Governor in Council is permitted to make regulations "excluding … a class of persons from all or part of this Act or the regulations."[33] And pursuant to section 31(c) of the *Employment Standards Regulation*, [*ESA Regulation*], no part of the *ESA* applies "to an employee who is a member of the [LSBC] under the *Legal Profession Act* or a person enrolled as an articled student under that Act."[34] Since the introduction of the *ESA* in its present form in 1995, the *ESA Regulation* has exempted articled students.[35]

C. Applicability of Employment Standards Legislation in Other Provinces

For context, excluding articled students from minimum wage and overtime and statutory holiday pay protections – the "base provisions" of employment standards legislation – occurs in most, but not all, provinces in Canada. In what follows, I detail how articled students are exempt from all three of the base provisions in five provinces, including British Columbia, exempt from two of the base provisions in four provinces, and subject to all of the base provisions in one province.

1. Provinces Where None of the Three Base Provisions Apply

In Ontario, a student in training for law is exempted from Parts VIII, IX, and X of the *Employment Standards Act*, which govern overtime pay, minimum wage, and statutory holiday pay respectively.[36] In Manitoba, Divisions 1, 3, and 4 of the *Employment Standards Code* – which govern minimum wage, overtime pay, and statutory holiday pay respectively – do not apply to employees who are "enrolled or employed as a *student-in-training* in respect of [an Act of the legislature that applies solely to the profession]," such as the *Legal Profession Act*.[37] In Quebec, the minimum wage does not apply to employees who are "trainees under a programme of vocational training recognized by law."[38] The Bar of Quebec's professional training program is recognized under the *By-law Respecting the Professional Training of Advocates*, and completion of an articled period is part of the program.[39] Thus, the minimum

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30 *Ibid*.

31 "Code of Professional Conduct for British Columbia" (2013), online: *Law Society of British Columbia* <www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/code-of-professional-conduct-for-british-columbia/> [*LSBC Code*].

32 *LSBC Rules*, *supra* note 1, rule 2-59(2)(b); "LSBC September 2021 Agenda," *supra* note 29 at 124.

33 *ESA*, *supra* note 14, s 127(2)(a).

34 *Employment Standards Regulation*, BC Reg 396/95, s 31(c) [*ESA Regulation*].

35 British Columbia Law Institute, "Report on the Employment Standards Act, British Columbia Law Institute" (2018) CanLIIDocs 10529 at 7; *ESA Regulation*, *supra* note 35, s 31(c) (as it read on 14 December 1995).

36 *Exemptions, Special Rules and Establishment of Minimum Wage*, O Reg 285/01 s 2(1)(a)(ii) and 2(1)(e); *Employment Standards Act*, SO 2000, c 41.

37 *Employment Standards Regulation*, Man Reg 6/2007, s 5; *Employment Standards Code*, CCSM, c E110.

38 *Regulation Respecting Labour Standards Act Respecting Labour Standards*, chapter N-1.1, rule 3, ss 88, 89, 91, s 2(2).

39 *By-law Respecting the Professional Training of Advocates*, chapter B-1, rule 14, s 3.

wage does not apply to articled students.[40] Though articled students are not currently afforded statutory holiday pay, if they are required to work on a statutory holiday, they are entitled to a compensatory holiday.[41] Finally, in Newfoundland, minimum and overtime wage rates only apply to employees "who are parties to a contract of service,"[42] and "a contract entered into by an employee … *in training for qualification* in and working for an employer *in the practice of … law*" is not a "contract of service."[43]

2. Provinces Where Some or All of the Base Provisions Apply

Three provinces exempt articled students from overtime pay rates but require that they be paid a minimum wage. In Alberta, students-at-law are exempt from provisions governing overtime hours of work and pay.[44] However, students-at-law are subject to statutory holiday pay provisions[45] and minimum wage provisions.[46] In Saskatchewan, "students-at-law" are not subject to overtime hours or pay provisions,[47] but are subject to statutory holiday pay rates[48] and minimum wage provisions.[49] In Nova Scotia, "students while engaged in training for law" are exempted from the application of overtime pay rates,[50] but are subject to statutory holiday pay rates[51] and minimum wage provisions.[52]

In New Brunswick, unlike Alberta, Saskatchewan, and Nova Scotia, articled students are subject to overtime pay rates, with overtime applying to hours worked in excess of forty-four per week.[53] Further, articled students in the province are also subject to minimum wage provisions.[54] However, "persons employed in … law" are exempted from public holiday pay rates.[55] Finally, in Prince Edward Island, articled students are subject to minimum wage, and statutory holiday and overtime pay rates, making it the only province to currently do so.[56]

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40 "Minimum Wage" (2022), online: *Éducaloi* < educaloi.qc.ca/en/capsules/minimum-wage>.

41 *An Act to Ensure the Protection of Trainees in the Workplace*, SQ 2022, c 2, ss 9, 10.

42 *Labour Standards Regulations*, CNLR 781/96, ss 3, 8, 9.

43 *Labour Standards Act*, RSNL 1990, c L-2, s 2(b)(i) [emphasis added].

44 *Employment Standards Regulation*, Alta Reg 14/1997, s 2(h) (which exempts students-at-law from the sections of the *Employment Standards Code*, RSA 2000, c E-9 that govern overtime pay).

45 *Ibid* (section 3 lists employees exempted from statutory holiday pay, which does not include students-at-law).

46 *Ibid* (section 8 lists employees exempt from minimum wage requirements, which does not include students-at-law). "Articling Students: Paid Employees under Employment Standards" (6 April 6 2020), online: *Law Society of Alberta* <www.lawsociety.ab.ca/articling-students-paid-employees-under-employment-standards>.

47 *Employment Standards Regulations*, S-15.1 Reg 5, s 14(1)(a) [*Saskatchewan ESR*] (which states that students-at-law are exempt from sections 2-12, 2-17, 2-18, and 2-19 of the *Saskatchewan Employment Act*, SS 2013, c S-15 [*SEA*], which govern overtime pay).

48 *Saskatchewan ESR, supra* note 47, s 2-32 (which provides for statutory holiday pay rates and does not exempt students-at-law).

49 *Ibid*, s 14(1) (which does not exempt students-at-law from section 2-16 of the *SEA*, *supra* note 47, which governs minimum wage pay).

50 *General Labour Standards Code Regulations*, NS Reg 298/90, s 2(2)(c) [*GLSCR*] (which excludes articled students from section 40(4) of the *Labour Standards Code*, RSNS 1989, c 246, which governs overtime pay).

51 *GLSCR*, *supra* note 50, s 3, 4, 4A, 5 and 8 (which exempts certain employees from statutory holiday pay, but these provisions do not include articled students).

52 *Minimum Wage Order (General)*, NS Reg 5/99, sch A, s 2 (which lists employees exempt from minimum wage provisions of the *Labour Standards Code*, RSNS 1989, c 24, but does not include articled students).

53 *Employment Standards Act*, SNB 1982, c E-7.2, s 16 (which governs overtime pay, while section 5 of the *Minimum Wage*, NB Reg 2022-15 [*NB Minimum Wage*], does not exempt articled students from section 16).

54 *NB Minimum Wage*, *supra* note 53, s 3 (which applies to every employee unless exempted, and articled students are not).

55 *General Regulation*, NB Reg 85-179, s 3(1)(c).

56 *Exemption Regulations*, PEI Reg EC74/17 (which lists employees excluded from minimum wage, statutory holiday pay, and overtime provisions but does not list articled students).

In British Columbia, articled students occupy a regulatory vacuum, without protection from the *ESA* or the LSBC. No minimum standards regarding hours of work, days of work, or remuneration currently apply to articled students in British Columbia. A lack of comprehensive protections for articled students is common in Canadian provinces, and based on the available data, this lack of protection has contributed to difficult working conditions for many articled students.

IV. WORKING CONDITIONS OF ARTICLED STUDENTS IN BRITISH COLUMBIA

Ahead of the 2020 LSBC Annual General Meeting (2020 AGM), two members of the LSBC submitted a resolution, as is required by the *Rules*.[57] The resolution called on the LSBC to require that articling agreements "provide articled students with at least such rights and protections as are guaranteed under section 16 [on minimum wage] and Parts 4 and 5 [on overtime and statutory holiday pay] of the [*ESA*], and ensure that articled students are able to seek financial redress" if articling agreements contravene these minimum requirements.[58] The resolution passed, with 57 percent of LSBC members voting in favour.[59] Though Benchers are not bound by resolutions passed at AGMs,[60] the LSBC responded in this case, sending out two online surveys in October 2020. The LSBC sent the first survey to all current articled students and lawyers called in 2018, 2019, and 2020, and a second survey to "designated representatives of firms that currently have articled students or have hired an articled student in the past three years."[61]

The first survey asked articled students a number of questions regarding hours of work per day and week, days worked per week, statutory holidays worked, compensation, the location of their articling placement, and the size of their employer.[62] The second survey asked employers how many hours per day and week their students worked, how many days per week they worked, how much they compensated them, and how many articled students they currently employed and were likely to employ in the upcoming year.[63] A total of 897 articled students and recent calls completed the first survey, 350 of whom provided additional comments. A considerable number (181) of employers also completed the second survey.[64]

The results, published in January 2021, detailed the harsh working conditions that many articled students endure. In total, 35 percent of articled students reported working ten to eleven hours per day, 14 percent reported working eleven to thirteen hours per day, and 2 percent reported working more than fourteen hours per day.[65] However, due to the survey's methodology,[66] the data regarding the number of hours worked per week more accurately depicts how many articled students worked more than eight hours per day on average, the standard workday under the base provisions of the *ESA*.[67]

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57 *LSBC Rules*, *supra* note 1, rule 1-8(6)(a).

58 "LSBC January 2021 Agenda," *supra* note 7 at 47.

59 "2020 Annual General Meeting Voting Results" (7 October 2020), online: *Law Society of British Columbia* <www.lawsociety.bc.ca/about-us/news-and-publications/news/2020/results-of-the-annual-general-meeting/>.

60 *Legal Profession Act*, SBC 1998 c 9, s 13(1) [*LPA*]. "Bencher" is a term used to describe the board of directors that oversees the work of the LSBC, the bulk of whom are elected by members of the LSBC. See "Benchers" (2022), online: Law Society of British Columbia <https://www.lawsociety.bc.ca/about-us/benchers/>.

61 "LSBC September 2021 Agenda," *supra* note 29 at 127.

62 "LSBC January 2021 Agenda," *supra* note 7 at 51–54.

63 *Ibid* at 55–60.

64 *Ibid* at 48.

65 *Ibid* at 52.

66 *Ibid* at 52. The survey questions regarding hours worked per day asked respondents if they worked "eight to nine hours per day," making it difficult to ascertain whether articled students worked eight hours per day, the standard workday for employees in British Columbia, or more than eight hours. See *ESA*, *supra* note 14, ss 35, 40.

67 *Ibid*, ss 35, 40.

Interestingly, respondents to the second survey reported that their articled students worked considerably less than what respondents reported in the first survey. For example, 32 percent of employers responded that their articled students worked forty hours or less per week, which is twenty-one points higher than what was reported by articled students and recent calls,[68] and about 21 percent of employers reported that their articled students worked more than fifty-one hours per week, which is a full twenty-eight points lower than reported by articled students and recent calls.[69] See Figure 1 for survey results regarding the reported number of hours worked by articled students per week; the black bars represent the results from the first survey, and the grey bars represent the results from the second survey. Additional comments indicate that working long hours led to articled students feeling stressed,[70] exasperated,[71] and exploited.[72]

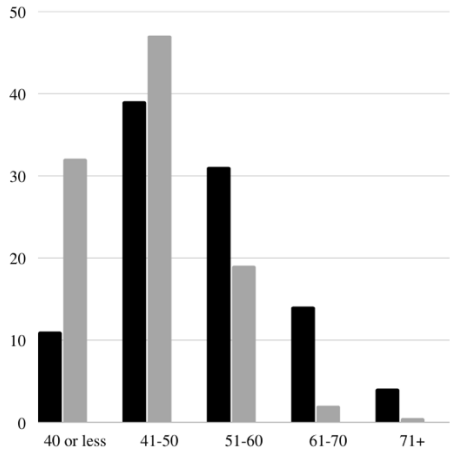

Figure 1: Survey Results on the Number of Hours Worked per Week by Articled Students

A majority of respondents to the first survey reported working more than the standard five-day workweek. Respondents to the second survey reported that their articled students were working fewer days per week than indicated by respondents to the first survey. For example, 76 percent of employers reported that their articled student worked five days per week, which was twenty points lower than that reported by the articled students and recent calls.[73] See Figure 2 for survey results regarding the reported number of days worked by articled students per week; the black bars represent the results from the first survey, and the grey bars represent the results from the second survey. Further, 55 percent of articled students and recent calls worked on statutory holidays.[74]

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68 "LSBC January 2021 Agenda," *supra* note 7 at 52, 57.
69 *Ibid* at 52, 57.
70 "Agenda" (4 March 2022) at 49, online: *Law Society of British Columbia* <www.lawsociety.bc.ca/Website/media/Shared/docs/about/agendas/2022-03-04_agenda.pdf> ["LSBC March 2022 Agenda"].
71 *Ibid* at 51.
72 *Ibid* at 47.
73 *Ibid* at 53, 57.
74 *Ibid* at 53.

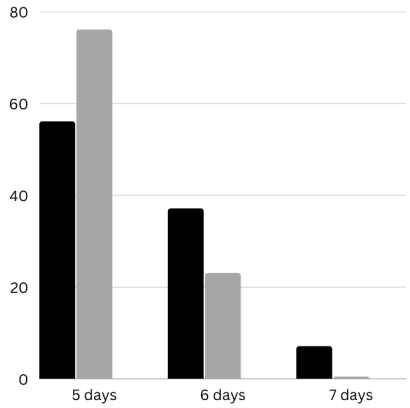

Figure 2: Survey Results on Days Worked per Week by Articled Students

Regarding compensation, almost all of the respondents to the first survey reported receiving pay during their articling term, but twenty-six individuals reported that they did not receive a salary.[75] In four cases, articled students paid costs associated with their articles.[76] Respondents to the first survey also reported their monthly pay. Again, responses to the two surveys differed substantially from one another, with respondents to the second survey providing higher estimates of their articled students' monthly pay than the respondents to the first survey. See Figure 3 for survey results regarding the reported monthly pay of articled students; the black bars represent the results from the first survey, and the grey bars represent the results from the second survey.

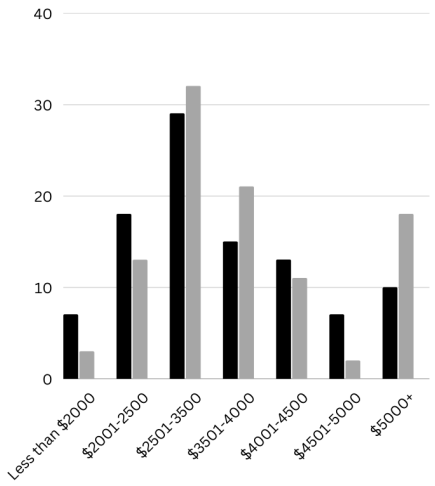

Figure 3: Survey Results on Articled Student's Pay per Month

[75] *Ibid* at 51.
[76] "LSBC September 2021 Agenda," *supra* note 29 at 128.

The true number of articled students paid below minimum wage remains uncertain since the October 2020 surveys did not cross-reference respondents' reported pay with their reported hours worked. About 25 percent of respondents to the first survey reported receiving less than $2,500 per month in pay, which is approximately the minimum wage for forty hours of work.[77] However, an articled student who worked sixty hours per week would need to earn $3,504 per month to be paid the equivalent of the minimum wage for each hour worked.[78] Given that 55 percent of respondents to the first survey did not earn more than $3,501, and a portion of that group likely worked more than sixty hours per week, the number of articled students paid below minimum wage likely exceeds 25 percent.

The October 2020 surveys exposed the harsh working conditions of articled students, and although the results were alarming, they were perhaps not surprising. Many worked long hours, weekends, and statutory holidays. Many earned a salary below the equivalent of the forty-hour-per-week minimum wage, with the true number likely higher than indicated by the data, given the hours articled students are working. The results of the first survey alone warrant the application of the base provisions of the *ESA* to articled students, but another factor buttresses the idea that such action is warranted – namely, the fact that they are best characterized as employees.

V. ARTICLED "STUDENTS" ARE EMPLOYEES

Workers must establish that they are employees, according to the legal test set out by the Supreme Court of Canada [SCC] in *671122 Ontario v Sagaz Industries Canada*, in order to enjoy minimum wages, overtime, and statutory holiday pay protections.[79] Accordingly, those who attempt to deny those legal rights seek to characterize the labour of that worker as different than that of an employee, a tactic that the legal profession has employed in relation to the labour of articled students. In this section, I assert that articled students are employees based on (A) the language used by the courts and the LSBC, (B) the nature of an articled student's work, and (C) the stark power dynamic between the principal and the articled student.

A. The Language Used by the Courts and the LSBC

The jurisprudence outlining the differences between employment and other forms of labour, along with the language used by the LSBC, also suggests that articled students are employees. In *Ojanan*, the British Columbia Court of Appeal found that the principles of employment law regarding wrongful dismissal apply to the articled student-principal relationship, just as they do to other employee-employer relationships.[80] Articling is not a "special" type of relationship that is more dignified than the labour of an employee or "unique" because of its association with the legal profession.[81] It is, in fact, just "like other jobs."[82]

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77 *Ibid* at 51.

78 This calculation is based on the statutory minimum of wage of $14.60, which was in force at the time the Lawyer Development Task Force released the survey results.

79 Judy Fudge, Eric Tucker & Leah Vosko, "Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada" (2003) 10:2 CLELJ 193 at 194; *671122 Ontario Ltd v Sagaz Industries Canada Inc*, [2001] SCC 59 [*Sagaz*].

80 *Ojanen*, *supra* note 24 at para 46.

81 Davidson, *supra* note 12.

82 *Ibid*; *Ojanen*, *supra* note 24 at paras 48, 50.

In *Sagaz*, the SCC discussed the legal test to distinguish an employee from an independent contractor, concluding that there is "no universal test."[83] Instead, the central question is whether the person engaged to perform particular services is performing them as a person in business or on their own account.[84] This question is determined by a number of factors, including the level of control the employer exercises over the worker's activities, whether the worker provides their own equipment or hires their own helpers, the degree of financial risk the worker takes on, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of their tasks.[85] High levels of employer control, employer-provided equipment, and an inability to hire helpers – along with a lack of financial risk, responsibility for investment, and opportunity to profit – suggest a worker is an employee.

In the case of articled students, the principal typically exercises a high level of control over an articled student's activities, assigning files, reviewing documents they produce, and setting their working hours. An articled student may provide their own equipment such as a laptop, but often the principal will supply a work computer and other office supplies. Articled students do not subcontract their assignments, nor do they take any financial risk, as the principal bears liability for their work. An articled student does not make an investment in the firm. Lastly, an articled student does not have an opportunity to profit from each assignment they complete. Based on the list of factors articulated in *Sagaz*, articled students are best characterized as employees.

The language used by the LSBC also suggests that articled students are employees. For example, Rule 2-67, which governs the application process for the assignment of articles from one principal to another, states that such applications "must be approved effective on or after the date on which the articled student began *employment* at the office of a new principal."[86] Further, Rule 2-68, titled "Other *employment*," states, "an articled student is not permitted to accept *employment from any person other than the student's principal*."[87] Both sections suggest that articled students are in an employment relationship during their articling term and are thus employees.

B. The Nature of an Articled Student's Work Product

The nature of an articled student's work product serves as further evidence that their labour is best characterized as that of an employee. Mischaracterizing the labour of workers to justify poor working conditions is a long-standing tactic of management[88] and has a history in the legal profession.[89] The ways in which the legal profession mischaracterizes the labour of articled students can be divided into two distinct groups: the "trivialization" perspective and the "professionalization" perspective.

First, the trivialization perspective posits that articled students are more akin to university students than employees. The term "articled student" itself is evidence of this position.[90] The descriptor of "student" is misleading because articled students must graduate law school prior to beginning their articling term.[91] In addition, this label characterizes the relationship between the articled student and the principal as one of

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83 *Sagaz*, *supra* note 79 at para 47.
84 *Ibid*.
85 *Ibid*.
86 *LSBC Rules*, *supra* note 1, rule 2-67(1) [emphasis added].
87 *Ibid*, rule 2-68 [emphasis added].
88 Fudge, Tucker & Vosko, *supra* note 79 at 195.
89 For example, Charles Hamilton, who articled immediately following the Second World War, stated that employers viewed articling as a "privilege" for the student rather than the performance of services in return for compensation. See Pue, "History of BC Legal Education," *supra* note 16 at 12.
90 *LSBC Rules*, *supra* note 1, rule 1.
91 *Ibid*, rule 2-54(1)-(3).

student and teacher rather than employee and employer. By using the term "student," their work product is reduced to a "learning opportunity" and part of their legal studies rather than being seen as a contribution to the labour force, thus justifying their exclusion from legislation protecting labour force participants. Granted, articling is a learning opportunity, but work that provides an opportunity to learn "does not transform what would otherwise be an employment relationship into a non-employment relationship."[92]

The trivialization perspective may also characterize the work product of articled students as a part of their studies rather than as a valuable contribution to the employer. While in law school, a student's work product – their exams and their research papers – does not generate a profit for the student. But while articling, an articled students' work product contributes to the principal's ability to obtain a profit. Attempts to blur the lines between law students and articled students seemingly ignore this important distinction, which suggests that articled students are members of the labour force rather than akin to university students.

Second, the professionalization perspective asserts that the nature of an articled students' work is one and the same as that of lawyers. This perspective seeks to blur the line between two distinct groups: articled students and lawyers. Under this perspective, since lawyers are not protected under the *ESA Regulation*, articled students should not be either. The *ESA Regulation* itself takes this perspective, excluding both "members of the [LSBC]" and "those enrolled as articled students" from its protections when each position is distinguishable.[93] Lawyers have the ability to start their own practice, allowing them to decide their file load and determine how much they want to charge clients, thereby deciding how many hours they want to work and how much they want to earn. However, no articled student can start their own practice, given their lack of liability insurance, and few decide their own file load, which factors into the number of hours they must work. A lawyer's ability to be autonomous distinguishes them from articled students, who are subject to a stark power differential during their articling term.

C. The Strong Power Dynamic in the Articled Student-Principal Relationship

The power differential between articled student and principal, similar to other employment relationships, further suggests that articled students be considered employees. Employment standards legislation recognizes "the inequality of the employment relationship," and the SCC has stated that the liberal interpretation of such legislation is necessary to "protect employees from the superior bargaining power of employers."[94] In addition, such legislation seeks to provide minimum standards for "the most disadvantaged and vulnerable labour market participants."[95] While articled students are not as vulnerable as many other workers, given that they almost always have previously obtained an undergraduate degree, the structure of articling increases their vulnerability and amplifies the superior bargaining power of employers.

As previously discussed, to be admitted to the bar in British Columbia, candidates for admission must complete the articling term, which is the final stage in the pathway to licensure.[96] Thus, an articling student's admission into the profession is largely dependent on their principal. Fears of sullying their reputation, along with the potential economic impacts of job loss, discourages articled students from

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92 *Canadian Union of Public Employees v Governing Council of the University of Toronto*, 2012 CanLII 1673 (ON LRB) at para 89.

93 *ESA Regulation*, *supra* note 34, s 31(c).

94 Fudge, Tucker & Vosko, *supra* note 79 at 209; *Rizzo v Rizzo Shoes Ltd*, [1998] SCR 27 at para 24.

95 David B Fairey, "New 'Flexible' Employment Standards Regulation in British Columbia" (2007) 21 JL & Soc Pol'y 91 at 93.

96 "LSBC September 2021 Agenda," *supra* note 29 at 129.

refusing long hours and accepting positions for limited or no pay. Employment standards legislation seeks to protect against strong power dynamics because they foster exploitative working conditions. The articling student-principal relationship – where the principal acts as the gatekeeper to licensure, and the potential financial and reputational losses of finding another principal are great – is a strong power dynamic, and as the data suggests, this situation has led to exploitative working conditions.

In British Columbia, a regulatory vacuum, coupled with a strong power dynamic, has fostered exploitative working conditions for articled students. In seeking to maintain this regulatory vacuum, those who seek to benefit from the exploitation of articled students' labour have mischaracterized their work as anything other than that of an employee. However, the evidence is clear that articled students are employees and that they are exploited, and thus, they deserve to be protected by the base provisions of the *ESA*.

VI. ASSESSING PROPOSALS TO IMPROVE THE WORKING CONDITIONS OF ARTICLED STUDENTS

The LSBC,[97] individual members of the bar,[98] the Law Society of Ontario,[99] and others have proposed well-intentioned but imperfect solutions to remedy the exploitation of articled students. In this section, I first review these proposed solutions and argue that the application of the base provisions of the *ESA* to articled students would be a more effective way to improve their working conditions. I discuss two related but distinct solutions – the application of only the *ESA*'s minimum wage provisions and the idea of a minimum salary – arguing that these proposals do not address the long working hours of articled students and may not address their financial needs. I then discuss the LSBC's proposed solution, contending that the application of the base provisions of the *ESA* is preferable because it is readily applicable, more fulsome, and most importantly, provides third-party oversight. Lastly, I address potential criticisms that the application of the base provisions of the *ESA* would not be in the "public interest," undermining the "independence of the bar," reducing articling positions, and negatively impacting the competence of the bar, arguing that such concerns are ill-founded or exaggerated.

Application of the base provisions of the *ESA* to articled students is the best solution, but it should not detract from the possibility that other measures – such as the unionization of articled students or holding employers accountable under the *Code* for offering unpaid articles – be considered in addition to this solution.[100] Further, this proposal is not meant to cast aside the actions taken by the LSBC in aiming to address the poor working conditions of articled students, as any limits on hours and minimum levels of compensation are improvements to the status quo.

A. Apply the Minimum Wage Alone or Impose a Minimum Salary

One potential solution to improve the working conditions of articled students is to apply the minimum wage provisions of the *ESA* but not include overtime provisions. If British Columbia implemented such a proposal, it would mirror the approaches taken in Alberta, Saskatchewan, and Nova Scotia, jurisdictions

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97 *Ibid* at 134–135.

98 "2020 Annual General Meeting Voting Results" (7 October 2020), online: *Law Society of British Columbia* <www.lawsociety.bc.ca/about-us/news-and-publications/news/2020/results-of-the-annual-general-meeting>.

99 Davidson, *supra* note 12.

100 Harry Cayton, "Report of a Governance Review of the Law Society of British Columbia" (November 2021) at 20–21, online: *Law Society of British Columbia* <www.lawsociety.bc.ca/Website/media/Shared/docs/about/GovernanceReview-2021.pdf>.

where articled students are subject to minimum wage provisions but exempt from overtime wages.[101] If British Columbia adopted this model, students would be paid the statutory minimum wage for every hour of labour, but they would not receive one-and-a-half times the minimum wage – currently $22.80 per hour – for hours worked in excess of forty per week.[102] For example, under this model, an articled student could work sixty hours per week, each hour paid at the current minimum wage of $15.20, for a total of $912 per week. While this would likely improve the economic conditions of articled students, it does not address the work-life balance aspect of their employment.

The application of overtime provisions recognizes that labour in excess of forty hours per week warrants additional pay because of its impact on the worker. As one study of Canadian lawyers found, those individuals more likely to work forty hours or less during a typical week include those with more positive indicators of wellness and fewer negative indicators of poor work-life balance.[103] On the other hand, articled students, young lawyers, and those who work more than sixty hours per week are more likely than other demographic groups to say that their physical health and mental health is fair or poor.[104]

Publicizing a number of comments provided by articled students during the October 2020 surveys only confirmed the findings of this study. One articled student stated that they were "routinely at the office until 9 or 10 pm doing work" and "set a boundary where [they] wouldn't work on weekends because it would have been too depressing to think that all of my time was being put into a job where I felt like I was being taken advantage of, wasn't really appreciated – just a commodity."[105] In turn, articled students with poor physical, mental, and emotional health are more likely to produce a poor work product. This is neither in the interests of the articled student, whose reputation may be negatively impacted, the principal, whose liability may be negatively impacted, or the client, whose interests or liberty may be negatively impacted.

A second related but distinct proposal advocates for the introduction of a minimum salary for articled students. Reporting on efforts to improve articled students' economic conditions often confuses "minimum wage" with "minimum compensation," but the distinction between the two is important.[106] A minimum wage would pay an articled student a particular rate for each hour worked, while a minimum salary would pay an articled student a flat rate, usually per month, regardless of the number of hours worked. Similar to only applying a minimum wage without overtime provisions, this proposal fails to address work-life balance and the consequent impacts to an articled student's work product. Lastly, under this proposal, an articled student could be paid less than the minimum wage if they work long hours and the minimum salary is low. For example, if an articled student works sixty hours per week, but their salary is $3,500, they would be earning less than $15.20 for each hour they work, not considering overtime pay rates.[107]

Application of only the minimum wage without overtime provisions or a minimum salary fails to adequately address the work-life balance aspect of employment and perhaps even the compensation aspect of employment, while the application of the base provisions of the *ESA* manages to address both issues, making the latter the preferable solution.

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101 See notes 44–52 above.

102 *ESA Regulation*, *supra* note 34, s 15.

103 Ipsos Reid, "Survey of Lawyers on Wellness Issues" (2012) at 6, online: *Canadian Bar Association* <www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Wellness%20PDFs/FINAL-Report-on-Survey-of-Lawyers-on-Wellness-Issues.pdf>.

104 *Ibid* at 11, 12.

105 "LSBC March 2022 Agenda," *supra* note 70 at 47.

106 Davidson, *supra* note 12.

107 This calculation is based on $14.60 minimum wage, which was in force at the time of the resolution.

B. Create a New Framework Governing Compensation and Hours

The LSBC has proposed a third potential solution, which I detail below. However, the application of the base provisions of the *ESA* is preferable because it is readily applicable, more fulsome, and most importantly, provides third-party oversight. After the resolution passed at the 2020 AGM, the LSBC assigned the matter to the Lawyer Development Task Force [LDTF] to address "conditions of work in considering necessary changes to the current articling process and [providing] recommendations to the Benchers."[108] In September 2021, the LDTF published a memo containing three recommendations. The first recommendation was threefold. First, it called for the Benchers to establish "limits on the number of hours of work during articles, with limited exceptions."[109] Second, it called for the Benchers to establish the methods for calculating maximum hours and the circumstances for exemptions and for the recommendation to be referred back to the Benchers for final approval no later than September 2022.[110]

The second recommendation was also threefold. First, it called for the Benchers to establish "minimum levels of financial compensation during articles, with limited exceptions."[111] Second, it called for the Benchers to establish the methods for calculating minimum levels of compensation and the circumstances for exemption as well as for the recommendation to be referred back to the Benchers for final determination no later than September 2023.[112] However, the third recommendation stated that the new standards for financial compensation would not take effect until at least one additional pathway to licensure was in place, which the LDTF anticipated to be September 2023.[113] In December 2021, the Benchers unanimously approved a motion endorsing the LDTF's recommendations.[114]

My first concern with the LSBC's proposal is that, like the minimum salary proposal, it mischaracterizes the labour of articled students. Underlying the LSBC's proposal is a sentiment that the labour of articled students is not that of a "regular" employee, and thus, compensation should not be tied to hours worked, and overtime and statutory holiday pay should not apply. The LDTF memo employs both the trivialization perspective and the professionalization perspective in order to justify the need for a unique set of employment standards. The memo emphasizes the "educational experiences" of articling,[115] while simultaneously implying that articled students and lawyers are equivalent.[116]

My second concern, on a more substantive basis, is that the base provisions of the *ESA* provide more fulsome protections than those of the LSBC's proposal. Similar to the minimum salary model, where levels of financial compensation are divorced from hours worked, an articled student could be paid less than minimum wage if the maximum number of hours permitted is high but the minimum salary is low. Using the example from above, if the maximum number of hours of work for an articled student was sixty per week, and the minimum salary is $3,500 per month, the articled student would be paid less than the minimum wage per hour worked.[117]

The third reason why the application of the base provisions of the *ESA* is preferable is because it is not in the political or financial interests of the elected Benchers and the LSBC to establish and enforce strong

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108 "LSBC January 2021 Agenda," *supra* note 7 at 50.
109 "LSBC September 2021 Agenda," *supra* note 29 at 122.
110 *Ibid*.
111 *Ibid*.
112 *Ibid*.
113 *Ibid*.
114 "Agenda" (3 December 2021) at 11, online: *Law Society of British Columbia* <www.lawsociety.bc.ca/Website/media/Shared/docs/about/agendas/2021-11-03_agenda.pdf>.
115 "LSBC September 2021 Agenda," *supra* note 29 at 129.
116 *Ibid* at 131.
117 This calculation is based on $14.60 minimum wage, which was in force at the time of the resolution.

employment standards for articled students. Under the LSBC's proposal, the society would police rules governing maximum hours and minimum levels of compensation, presumably through Rule 2-57 of the *Code*, which allows the Discipline and Practice Standards Committees to "inquire into a lawyer's suitability to act or to continue to act as principal to an articled student."[118] The problem with the LSBC's approach is that the elected Benchers serve a representative function, representing legal employers but not articled students, and a regulatory function, setting the rules for articling and enforcing standards against the very members they represent, which will result in an inevitable clash.[119] In British Columbia, members of the legal profession elect twenty-five Benchers every two years, but as employees not yet called to the bar, articled students are ineligible to vote for Bencher.[120] The disenfranchisement of articled students disincentivizes the elected Benchers from addressing articled students' concerns and taking action. Meanwhile, the elected Benchers are incentivized to act in the interests of their constituents – the legal employers – who seek to minimize labour costs and maximize profits.

Thus, the elected Benchers have no electoral incentive to ensure the fair treatment of articled students and a countervailing electoral incentive to ensure that legal employers are able to extract maximum labour from articled students for minimal costs. Further, given that many elected Benchers are themselves employers, they may have a personal financial interest in setting low levels of minimum compensation, high thresholds for maximum hours, and maintaining relaxed enforcement. Having lawyers police and discipline lawyers thus becomes a difficult proposition given the political and economic interests at play.[121]

If the base provisions of the *ESA* applied to articled students, the Employment Standards Branch (ESB) would ensure that legal employers complied with minimum wage, overtime, and statutory holiday pay provisions. The first benefit of such an approach is that the ESB would operate not only reactively on the basis of complaints, but also proactively, responding to complaints and seeking out problematic behaviour and commencing audits without complaints.[122] In turn, this would help to counteract the pressures – fear of losing their position, sullying their reputation, financial ruin – that keep articled students from making complaints.[123] The second benefit is that there is no political or financial risk to the ESB if it polices and disciplines employers, as it does not represent employers and is not elected by employers. Its interests are in administering employment standards legislation, the purposes of which are to protect employees.[124]

If recent action is an indicator, articled students' labour will no longer exist within a regulatory vacuum in British Columbia. However, the regulations proposed by legal regulators, while they constitute progress, are still flawed. Application of the minimum wage without overtime compensation, the creation of a minimum salary, and the creation of a novel scheme to govern pay and hours continue to mischaracterize the labour of articled students. Further, these proposals are to be administered by bodies whose members have a political and financial interest in the lax enforcement of standards. Only the application of the base provisions of the *ESA* properly characterizes articled students' labour and provides third-party oversight of working conditions, and accordingly, is the best solution.

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118 *LSBC Code*, *supra* note 31, rule 2-57(4).

119 Richard Devlin & Porter Heffernan, "The End(s) of Self Regulation?" (2008) 45:5 Alta L Rev 169 at 190.

120 Cayton, *supra* note 100 at 13; Alice Woolley & Amy Salyzyn, "Protecting the Public Interest: Law Society Decision-Making after Trinity Western University" (2019) 97:1 Can Bar Rev 70 at 90.

121 John Pearson, "Canada's Legal Profession: Self-Regulating in the Public Interest?" (2015) 92:3 Can Bar Rev at 589.

122 *Ibid* at 591.

123 "LSBC September 2021 Agenda," *supra* note 29 at 129.

124 Fudge, Tucker & Vosko, *supra* note 79 at 209.

VII. PERCEIVED HARMS FROM THE APPLICATION OF THE BASE PROVISIONS OF THE *ESA*

According to those opposed to *ESA* regulation of articled students, the labour of articled students is not that of an employee, and any regulatory change will lead to a number of harms. Therefore, articled students should not be subject to the application of the base provisions of the *ESA*. However, neither of the premises of this argument hold true. As I discussed above, articled students are employees, and as I discuss below, the perceived harms to the "public interest" that would allegedly result from the application of the base provisions of the *ESA* are ill-founded or exaggerated.

In this section, I first examine the amorphous nature of the "public interest" and what it entails. I then discuss the LSBC's conception of the "public interest" – which appears to include the number of articled positions – concluding that fears of a reduction in positions are exaggerated. Next, I examine the "independence of the bar" and its component parts, concluding that the application of the base provisions of the *ESA* to articled students would have a negligible impact on the independence of the bar. Lastly, I discuss the idea that the application of the base provisions of the *ESA* to articled students would harm the competence of future lawyers, concluding that this is inaccurate.

A. Components of the "Public Interest"

The concerns of many opposed to the application of the *ESA* to articled students are focused on harms to the "public interest." However, since the concept is notoriously amorphous, to determine the true nature of their concerns regarding the public interest, a closer examination of the term is necessary. Across Canada, the purported objective of legal regulators is to operate in the "public interest."[125] However, the governing statutes of the legal profession usually state their public interest mandates in vague terms[126] since there is no universal "agreement on how to protect the public, nor what the public needs protection from."[127] In British Columbia, section 3 of the *Legal Profession Act* [*LPA*] states the overarching object and duty of the LSBC in the broadest possible terms: "[To] uphold and protect the public interest in the administration of justice."[128] The subparagraphs of section 3 set out the means by which the public interest in the administration of justice is to be upheld. These means are also vague, including "ensuring the independence … of lawyers,"[129] "ensuring the … competence of lawyers,"[130] "establishing standards and programs for the … competence of lawyers and of applicants for call,"[131] and perhaps the most general, "regulating the practice of law."[132]

The case of *LSBC v Trinity Western University* illustrates the broadness of the object and means of the *LPA* and the lack of a universal definition for the public interest.[133] In this case, the SCC determined whether the LSBC's decision not to recognize Trinity Western University's proposed law school proportionately balanced *Charter* rights and the LSBC's public interest mandate and was thus

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125 Adam M Dodek & Emily Alderson, "Risk Regulation for the Legal Profession" (2018) 55:3 Alta L Rev 621 at 626.
126 Woolley & Salyzyn, *supra* note 120 at 89.
127 Dodek & Alderson, *supra* note 125 at 626.
128 *LPA*, *supra* note 60, s 3.
129 *Ibid*, s 3(b).
130 *Ibid*.
131 *Ibid*, s 3(c).
132 *Ibid*, s 3(d).
133 *LSBC v Trinity Western University*, [2018] 2 SCR 293 [*TWU*].

reasonable.[134] The majority found that the "public interest is a broad concept and what it requires will depend on the particular context."[135] Because of the amorphousness of the term "public interest," both the majority[136] and the minority[137] cited the object and means of the *LPA* yet came to opposing conclusions on what was in the public interest. Based on the terms of the *LPA*, and the reasoning of the SCC, the LSBC's "public interest" mandate is broad and its definition can expand depending on the particular context.[138]

The expansive, context-dependent definition of the LSBC's "public interest" mandate is exemplified by the LDTF's comments in the LDTF memo, wherein the LDTF repeatedly invokes the "public interest" as a general reason to be cautious in implementing standard working conditions for articled students, but does not explicitly define what it considers to be in the "public interest."[139] However, the document infers that the definition of the "public interest," in the context of articled students, includes the number of articled positions available overall and the number of public interest law positions in particular.[140] Thus, based on the *LPA*, the reasoning of the majority in the *TWU* case, and the LDTF, the "public interest" mandate of the LSBC can include the independence and competence of lawyers and the number and types of articled positions available.

For clarity, the LDTF memo assesses the impact of the resolution on the "public interest," and as stated earlier in this article, the final version of the resolution did not call for the application of the *ESA* to articled students. However, both the application of the base provisions of the *ESA* and the resolution would apply minimum wage and overtime and statutory holiday pay to articled students. Therefore, the concerns outlined in the LDTF memo – a reduction in articling positions and an impact on the competence of the bar – must be addressed.

B. Concerns Regarding a Reduction of Positions Are Likely Exaggerated

The LSBC perceives the application of the *ESA* to articled students as a risk to the number of articling positions overall and the number of public interest legal positions in particular, and therefore, a threat to their conception of the "public interest." However, there is little data to substantiate such fears and a lack of consideration that the status quo may pose a threat to the number of available positions as well. The LDTF memo posits that the introduction of a statutory minimum wage is likely to have a significant impact on the availability of articles[141] and "could affect a number of law firms that have recently been providing articling positions," based on the results of the October 2020 surveys.[142] But, upon closer examination of the second survey, there is no data to support a link between the introduction of a minimum wage and a reduction of positions. The second survey asked law firms: "Do you expect that your firm will hire articled students in 2021?"[143] At no point did the LSBC ask employers whether they would not be able to hire an articled student if the base provisions of the *ESA* applied to articled students. Yet a deceptive inference is

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134 *Ibid* at para 3; *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
135 *TWU*, *supra* note 133 at para 34.
136 *Ibid* at para 40.
137 *Ibid* at para 269.
138 *Ibid* at para 34.
139 "LSBC September 2021 Agenda," *supra* note 29 at 121, 124, 127, 129, 130.
140 *Ibid* at 130, 133.
141 *Ibid* at 132.
142 *Ibid* at 130; "LSBC January 2021 Agenda," *supra* note 7 at 49.
143 "LSBC January 2021 Agenda," *supra* note 7 at 58.

made that if employers did not plan on hiring articled students in 2021, it was because of the potential implementation of basic employment standards.

Further, there is no data to support the notion of "significant" job losses.[144] The October 2020 surveys also neglected to ask employers why they would be unable to offer articling positions if the LSBC implemented new labour standards. How many employers could keep offering positions if they simply reduced their articled students' hours to forty per week? How many employers only work their articled student forty hours per week, but would still be unable to pay $2,432 per month? In how many cases can the employer truly not afford to pay, and in how many cases are they simply choosing not to pay?[145] In how many cases could the employer afford to pay an articled student $15.20 for every hour they work if they reduced their own six-figure-plus salary? We do not know the answers to these questions, but a much more precise analysis is necessary in order to use a word as strong as "significant" to describe potential job losses.

The LDTF memo also posits that the introduction of new standards for financial compensation would "likely have a disproportionate impact on … legal aid and public interest advocacy firms, as well as legal clinics and non-profit organizations."[146] This assertion assumes that many public interest advocacy firms, legal clinics, and non-profit organizations are offering unpaid or low paid articles, but the memo offers no data or testimonials to support this assertion. Further, the Law Foundation of British Columbia funded fourteen of such positions in 2020 and nineteen in 2021, and in all cases, employees were paid at least $5,000 per month.[147] Like the assertion that the overall number of positions would decrease, there is no data to suggest there would be a reduction in public interest articling positions by applying basic labour standards.

Additionally, the LSBC does not consider that the current regulatory vacuum may pose a threat to the number of available positions. During articling, articled students may decide that the articling process is so exploitative that they do not wish to enter the profession. For example, in response to the October 2020 surveys, one articled student commented that articling was "very stressful," that they felt "grossly underpaid," and that they "have decided not to practice law after [they] finish articling."[148] This response then begs the question, how many articled students have had such a gruelling articling experience that they are dissuaded from practising altogether?

Further, articled students may forego careers as public interest lawyers due to the articling status quo. Articled students may seek more lucrative private law positions to repay their debt, which has only further accumulated during poorly paid or unpaid articles, as research suggests that debt levels may influence career choice.[149] In these ways, the status quo may exacerbate the concerns outlined in the LDTF memo.

The current articling process may reduce positions overall, as some articled students are dissuaded from the profession due to the harsh working conditions they experience while articling, or decrease the number of public interest lawyers in particular, as students choose more lucrative positions to repay their

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144 "LSBC September 2021 Agenda," *supra* note 29 at 132.

145 Macnab, *supra* note 12.

146 "LSBC September 2021 Agenda," *supra* note 29 at 130, 133.

147 "Annual Report" (2020) at 26, online: *Law Foundation of British Columbia* <www.lawfoundationbc.org/wp-content/uploads/2021/09/LFBC-Annual-Report-2020-Sept-7-web.pdf>; "Annual Report" (2021) at 27, online: *Law Foundation of British Columbia* <www.lawfoundationbc.org/wp-content/uploads/2022/09/LFBC-2021-Annual-Report_2page.pdf>.

148 "LSBC March 2022 Agenda," *supra* note 70 at 49.

149 Eddy Ng & Jasmine McGinnis, "Game of Loans: The Relationship between Education Debt, Social Responsibility Concerns, and Making a Career Choice in the Public, Private, and Nonprofit Sectors" (2020) 49:2 Nonprofit & Voluntary Sector Q 292; Erica Field, "Educational Debt Burden and Career Choice: Evidence from a Financial Aid Experiment at NYU Law School" (2009) 1:1 American Economic J: Applied Economics 1 at 22.

debt. However, the LSBC does not consider this in its analysis. Instead, it casts an ominous shadow of widespread job loss to justify its concerns, but the lack of clear data to support such an allegation suggests that this concern is likely exaggerated.

C. Application of the *ESA* Would Not Undermine the Independence of the Bar

Under the *LPA*, the LSBC must act in the "public interest" by " ensuring the independence … of lawyers."[150] However, a definition for "independence" is not provided. Thus, before assessing whether the application of the base provisions of the *ESA* would undermine the independence of the bar, defining the concept is necessary, since much like the "public interest," the "independence of the bar" can be an abstract concept whose definition can vary considerably.[151]

According to the SCC, the broad version of the concept requires that lawyers be "free from incursions from any source, including from public authorities."[152] This version, largely adopted by the legal profession in Canada, inextricably ties self-regulation to the independence of the bar.[153] Narrower versions of the concept include barring the state from imposing "duties on lawyers that interfere with their duty of commitment to advancing their clients' legitimate interests"[154] and requiring that lawyers "be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state."[155] This version speaks to an understanding of the independence of the bar emphasizing independence from political control.[156] However, application of the base provisions of the *ESA* to articled students would have a minimal impact on both the broad and narrow conceptions of the independence of the bar.

1. The Impact on Self-Regulation Is Minimal

The legal profession has a history of reacting to the threat of outside regulation by invoking the sanctity of self-regulation, and its reaction to the resolution has been no exception.[157] After the first version of the resolution was made available for comment by LSBC members – calling for the LSBC to request that the provincial government amend the *ESA Regulation* to ensure that minimum wage, overtime, and statutory holiday pay applied to articled students – one of the most prevalent concerns centred on the impact of such a change on self-regulation. The drafters then amended the resolution to its current form – calling for articling agreements to be consistent with section 16 and Parts 4 and 5 of the *ESA* – to increase its political palatability and obtain some form of change, albeit not in the form the drafters of the resolution preferred.[158]

The application of the base provisions of the *ESA* to articled students would negligibly impact the broader conception of the independence of the bar, as many aspects of the articled student-principal

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150 *LPA*, *supra* note 60, s 3(b).

151 Alice Woolley, "Rhetoric and Realities: What Independence of the Bar Requires of Lawyer Regulation" (2011) 8:4 School of Public Policy Research Papers 1 at 6–7.

152 *Canada (Attorney General) v Federation of Law Societies of Canada*, [2015] 1 SCR 401 at para 77 [FLSC].

153 Paul D Paton, "Between a Rock and a Hard Place: The Future of Self-Regulation – Canada between the United States and the English/Australian Experience," *The Professional Lawyer* (2008) 87 at 87.

154 *FLSC* at para 77.

155 *Attorney General of Canada v Law Society of British Columbia*, [1982] 2 SCR 307 at 336 [*Attorney General of Canada v LSBC*].

156 Pearson, *supra* note 121 at 569.

157 Wesley Pue, "In Pursuit of a Better Myth: Lawyer's Histories and Histories of Lawyers" (1995) 33:4 Alta L Rev 730 at 751–753; *Canada (Attorney General) v Federation of Law Societies of Canada*, [2015] 1 SCR 401 at para 75.

158 "LSBC January 2021 Agenda," *supra* note 7 at 47.

relationship are already subject to outside regulation. For example, the *Code* prohibits discrimination as "defined in human rights legislation," and commentary of the *Code* states that lawyers have a "special responsibility to comply with the requirements of human rights laws in force in Canada, its provinces and territories."[159] In turn, the applicable legislation in British Columbia – the *Human Rights Code* (*HRC*) – prohibits discrimination in various aspects of employment.[160] There is no exemption from the *HRC* to employment relationships in the legal sector, or any other profession, because of their self-regulating status.

Another example is occupational health and safety rules, which are "designed to provide economic benefits to workers who suffer disabling or fatal work-related injuries and illnesses" on the job.[161] Under the *Workers Compensation Act* [*WCA*], occupational health and safety rules apply to all workers in British Columbia,[162] including articled students, who are considered "workers" under the Act.[163] The self-regulating status of the legal profession does not exempt its workers from such protections. Much like the *HRC* and the *WCA*, the base provisions of the *ESA* are baseline fundamental employment protections, and consequently, pose no threat to the ability of the profession to self-regulate.

Application of the *ESA* may in fact aid in the preservation of the profession's ability to self-regulate. As stated by the SCC, the overarching duty of the LSBC is to "maintain the public interest," which "necessarily includes upholding a positive public perception of the legal profession" and "promoting … public confidence in the legal profession."[164] Maintaining the status quo may create the perception that the LSBC is unduly focused on its members' interests – keeping labour costs low to increase their own profits – which may result in a loss of confidence and trust in the profession.[165] And when the public loses confidence and trust in the legal profession, it begins to question and re-evaluate its self-regulatory status.[166]

2. The Legal Profession Would Not Be Politicized

Second, the application of the base provisions of the *ESA* would have no impact on the narrower conceptions of the independence of the bar. This solution would not result in lawyers receiving instructions from government to only represent certain citizens and causes of action.[167] This solution focuses on the employment relationship between an articled student and a principal rather than the lawyer-client relationship. Employment standards officers would have the ability to sanction principals who breached minimum requirements, but the remedy would be to properly compensate their articled student. The decision to sanction and the subsequent remedy would not prohibit a principal from representing their clients' legitimate interests or challenging the actions of the state.[168]

The legal profession reflexively invokes self-regulation and the independence of the bar as reasons to oppose most outside regulation, reasoning that such regulation will necessarily lead lawyers to become vessels for the interests of government. However, allegations that the application of the *ESA* to articled students would erode the independence of the bar are more alarmist than substantive. Rather, this action

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159 *LSBC Code*, *supra* note 31, s 6.3-2.
160 *Human Rights Code*, RSBC 1996, c 210, ss 11–13.
161 Fudge, Tucker & Vosko, *supra* note 79 at 216.
162 *Workers Compensation Act*, RSBC 2019, c 1, s 2(a).
163 *Re WCAT-2008-03353*, 2008 CanLII 73215 (BC WCAT) at paras 27, 46.
164 *LSBC v TWU*, *supra* note 133 at paras 40, 47.
165 Woolley & Salyzyn, *supra* note 120 at 73.
166 Paton, *supra* note 153 at 91, 116.
167 *Attorney General of Canada v LSBC*, *supra* note 155 at 336.
168 *FLSC*, *supra* note 154 at para 77.

would provide baseline employment protections to articled students, would instill confidence in the bar's ability to self-regulate, and would not impair a citizen's ability to seek remedies against the state.

D. Application of the *ESA* Would Not Impair the Competence of Lawyers

Another concern that may be raised if the base provisions of the *ESA* applied to articled students is that the LSBC would not uphold the "public interest" by "ensuring the … competence of lawyers," as the articling experience would not reflect the "realities of practice."[169] However, as I argue in this section, this concern falsely equates hours worked with quality of mentorship, and it is the status quo that does not reflect the realities of practice. In the LDTF memo, the LSBC commented, "restricting a students' hours may fail to adequately prepare new lawyers for the realities of practice" and "would greatly misrepresent how lawyers have to work at certain points in time."[170]

The first problem with this perspective is it implies that articled students are not adequately prepared for practice if their standard workweek is consistent with the *ESA* – forty hours or less. By implication, those who indicated that they worked forty hours or less per week in the October 2020 surveys – 10.9 percent of respondents – did not receive adequate preparation and are not prepared for the "realities" of practice.[171] This is surely not the case, as the quality of the mentorship received is far more important than the number of hours logged. One articled student may receive stellar mentorship, where their principal or firm distributes precedents and demonstrates how to complete a task firsthand, while another may languish for hours to answer a legal question or prepare for a court appearance because of their principal's "trial-by-fire" style of mentorship. The former may only need to work forty hours per week to complete their tasks, while the latter may need sixty; however, because of the quality of the mentorship the former received, they are far more competent than the latter, despite working fewer hours.

The second problem with this view is it implies that the application of the base provisions of the *ESA* would "misrepresent" the practice of law as a member of the bar. However, it is arguable that the application of the base provisions of the *ESA* to articled students would better represent the realities of practice than the status quo. Under the current model, articled students are not typically paid for every hour that they work on a file or for a client; rather, they are paid a flat salary. This model of employment is rarely applicable in private practice law firms. In most firms, lawyers bill their clients at a particular rate for each hour that they work on their file. Their pay may include a base salary, but at some point, the lawyer can earn more if they bill more hours. Application of the base provisions of the *ESA* requires that articled students be paid a particular rate for each hour that they work. In this way, this solution more closely emulates the practice of law than the status quo.

Arguments that the imposition of basic employment standards would negatively impact the "public interest" by reducing articled positions, striking a blow to the "independence of the bar," or failing to prepare students for practice are spurious at best. Thus, one is left with the impression that invocations of the "public interest" are simply attempts to rebuff potential changes to the status quo, which allows the overwork and underpayment of articled students.

VIII. CONCLUSION

For too long, the labour of articled students has existed in a regulatory vacuum, governed by neither the LSBC nor the *ESA*, with no minimum standards in place regarding hours of work, days of work, or

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169 *LPA*, *supra* note 60, s 3(b).
170 "LSBC September 2021 Agenda," *supra* note 29 at 131.
171 "LSBC January 2021 Agenda," *supra* note 7 at 52.

remuneration. The lack of regulation – along with a strong power dynamic in the articled student-principal relationship and an incentive to extract the most labour for the lowest cost from the employee – has fostered exploitative working conditions for articled students. To preserve this regulatory vacuum and continue to exploit articled students, proponents of the status quo have continually pushed the narrative that articled students' labour is not that of an employee, despite evidence to the contrary.

But as the costs associated with licensure have ballooned, tolerance for the status quo has waned. Articled students have increasingly advocated for better working conditions through non-voting means, as they are unable to vote for those who regulate their working conditions. While many of the proposed solutions have merit, they fall short, and either fail to address the long working hours of articled students, continue to deny that articled students are employees, or fail to provide third-party oversight. However, the application of the base provisions of the *ESA* addresses these concerns, and criticisms of such an approach are more rhetorical than substantive. There is a notion that the application of the base provisions of the *ESA* would "fundamentally alter the articling experience."[172] But when the status quo is causing real harm, while also normalizing and perpetuating a larger culture of overwork, fundamental alteration is exactly what is needed.

[172] "LSBC September 2021 Agenda," *supra* note 29 at 131.