



OBA Proposal to add Health Law as an Area of Practice

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Contents

I. Introduction	3
II. The OBA's Health Law Section.....	4
III. What is Health Law?	4
IV. Health Law as a Unique and Recognized Practice Area	5
V. Protection of the Public and the Promotion of Access to Justice.....	8
VI. Conclusion	9



I. Introduction

Every year, lawyers in Ontario are required by the Law Society of Ontario (the “**LSO**”) to file a report in respect of the licensee’s professional business, and other activities related to the licensee’s practice of law or provision of legal services during the preceding year.”¹ This is known as the Lawyer Annual Report (the “**LAR**”).

Section 5, question 1(b) of the LAR asks lawyers to indicate their “**Areas of Practice**” as follows:

Describe that portion of your law practice most directly relating to Ontario, by indicating the approximate percentage of time devoted by you while resident in Ontario in 2018 to each area of law listed below:

Aboriginal Law	____%	ADR/Mediation Services (see Notes 5 & 6 above)	____%
Administrative Law	____%	Bankruptcy & Insolvency Law	____%
Civil Litigation - Plaintiff	____%	Civil Litigation - Defendant	____%
Construction Law	____%	Corporate/Commercial Law (see Note 5 above)	____%
Criminal/Quasi Criminal Law	____%	Employment/Labour Law	____%
Environmental Law	____%	Family/Matrimonial Law	____%
Franchise Law	____%	Immigration Law	____%
Intellectual Property Law	____%	Municipal Law	____%
Real Estate Law (see Notes)	____%	Securities Law	____%
Tax Law	____%	Wills, Estates, Trusts Law	____%
Workplace Safety & Insurance Law	____%	Other Law	____%

The LAR further specifies that the percentages indicated by the lawyer must total “100%”.

¹ LSO Professional Regulation Committee, Report to Convocation, September 29, 2018. [Online](#).



Compared with the 22 areas listed above, the Ontario Bar Association (“**OBA**”) currently has 40 specialty groups, or Sections, that “focus on substantive areas of the law and the legal profession” including health law.²

The Health Law Section of the OBA therefore proposes that health law be recognized by the LSO as an area of practice in the next LAR. This proposal will set out the distinguishing features of health law as an area of practice that cannot be subsumed as a branch or subset of any other area, and will indicate how adding this practice area will promote the protection of the public and access to justice.

II. The OBA’s Health Law Section

Established in 1907, the OBA is Ontario’s largest voluntary legal advocacy organization, representing lawyers, judges, law professors and students from across the province, on the frontlines of our justice system and in no fewer than 40 different sectors. In addition to providing legal education for its members, the OBA provides input and expert advice on a broad range of topics that affect the administration of justice in Ontario, including submissions to the LSO, in the interest of the profession and in the interest of the public. This proposal has been developed by the OBA’s Health Law Section (the “**Section**”), whose members regularly represent a broad range of clients in Ontario’s health care sector.

In developing this proposal, the Section has considered the practice areas already recognized by the LSO, and any overlap that might exist with health law. As an example, consideration was given to legal issues that a lawyer working out of a hospital would regularly tackle, and how that experience would illustrate the unique skills and knowledge required of a health law practitioner. The Section also considered the gaps that exist for health law lawyers in completing the LAR with its current identified practice areas, the LSO’s Health Law Specialist Certification, and its relationship with the LAR.

III. What is Health Law?

Health law is a unique and dynamic area of law that requires specific skills, knowledge and experience. The LSO defines health law as a “*branch of the practice of law pertaining to the provision of legal advice and services in respect of the provision of health care.*”³ Health law sits at the intersection of public and private law. Some sub-specialties of health law are

² Ontario Bar Association, “About Sections”, <https://www.oba.org/Sections/About-Sections>

³ Law Society of Ontario, Certified Specialist Program Standards for Certification – Health Law, [online](#). Last accessed March 28, 2019.



squarely focused on advocacy, and others are more corporate and commercial in nature. For this reason, health law lawyers can be litigators, solicitors, or both.

The landscape of Ontario's health sector is varied, and each of its components require specialized legal services. Health law lawyers provide legal advice to health professionals, hospitals, family health teams, clinical research facilities, regulatory bodies, and the provincial government, to name a few.

IV. Health Law as a Unique and Recognized Practice Area

A. Health law is fragmented across practice areas and the "Other Law" option

Health law lawyers practice under a number of subspecialties that are specific to the key players in the health law sector. These include procurement, corporate and commercial law, civil litigation, administrative law, privacy law, employment and labour law, and intellectual property law. Health law legislation is also varied and diverse, including the *Personal Health Information Protection Act, 2004*, *Health Care Consent Act*, *Substitute Decisions Act*, *Mental Health Act*, *Public Hospitals Act*, *Health Insurance Act*, *Regulated Health Professions Act, 1991*, and *Coroner's Act*, to name a few.⁴

I. LSO's current LAR

Based on the current version of the LAR, a health law lawyer who works for a hospital, for example, would do work that touches on at least seven practice areas:

1. Municipal law - zoning related to hospital premises and performing regulated acts;
2. Administrative law - representing health professionals at formal hearings before administrative tribunals and boards;
3. Corporate /commercial - professional and corporate governance advice regarding director and officer's liability and conflict of interest, negotiating and drafting a wide array of contracts;
4. Employment /Labour Law - agreements with hospital staff;
5. Charity Law - establish charitable foundations and advice on issues related to charities and the implications of charitable status for health care facilities;
6. Family/Matrimonial Law – interpretations of surrogacy agreements; and
7. Intellectual Property Law - research, biotechnology and medical devices.

⁴ Ontario's Ministry of Health and Long-Term Care is responsible for over 68 pieces of legislation, [<http://www.health.gov.on.ca/en/common/legislation/>]; this is only a fraction of the health related law relevant to the sector that health law practitioners must be knowledgeable about.



II. Health law cannot be subsumed by LSO's enumerated practice areas

Given the above example, it is extremely difficult for many health law lawyers to estimate the percentage of time spent providing services in each of the LSO's current enumerated categories. Therefore, many health law lawyers are left with choosing the vague "Other Law" option as the legal issues that they provide advice on do not fall into any enumerated practice area. For example:

- (i) Privacy Law – health lawyers will often provide advice regarding the ways privacy law does or does not apply to private organizations and/or public entities that hold personal health information, including the permitted purposes for which such data may be shared to support individual patient access, research, or care and by what modality;
- (ii) Insurance Law – health lawyers provide advice as is relates to businesses and privatized health insurance; such advice would hinge on the division of powers and governing federal and/or provincial legislation;
- (iii) End of Life Choices;
- (iv) Ownership of DNA and human tissue;
- (v) Capacity and consent;
- (vi) Participation in medical/pharmaceutical trials; and
- (vii) Medical ethics.

In each of these examples, the currently enumerated practice areas would not accurately capture the services the lawyer is providing.

It is our view that that even though health law touches on several areas of practice that are already enumerated in the LAR, health law lawyers have special expertise on the application of the areas in the health law sector, such that the legal services they provide cannot be subsumed into the existing areas. Therefore health law should be recognized as a distinct and unique area of law included in the LAR.

B. Health Law is an already a recognized practice area by the LSO's Health Law Certified Specialist Program

The LSO has recognized health law as unique area of expertise since January 31, 2006, when the Health Law Certified Specialist Program was established. The specialist certification in health law not only enables health law lawyers to hold out that they are proficient in many traditional practice areas to which health law touches, but it also recognizes that the issues facing health care practitioners, patients and their families represent a unique area unto itself requiring specialized skills and knowledge.



Based on the LSO standards, the certification can be achieved in health law through one of two routes: i) advocacy or ii) general counsel, the latter of which is further sub-divided into three categories: a) corporate/commercial; b) opinions and advice; and c) development of health law, the requirements for two of which must be met for certification.⁵

I. Advocacy

The advocacy component of the health law specialization demands that the health lawyer have the expertise and ability to address core areas of health law advocacy including College complaints and disciplinary proceedings, medical negligence and professional liability litigation, hospital privileges matters, and may include such areas as class actions, coroner's inquests, and privacy matters in addition to varied administrative and regulatory health issues.

To satisfy the requirements under the advocacy component, an applicant must demonstrate knowledge and experience with concepts including duty of care, standard of care, causation, rules of civil procedure, and capacity. The applicant must also demonstrate that he/she has represented and made submissions at formal hearings before various levels of court as well as in front of administrative bodies – e.g., the Consent and Capacity Board, the Office of the Information and Privacy Commissioner, and Health Professional College Committees.

II. General Counsel

The general counsel component requires that the applicant be experienced and knowledgeable in corporate and commercial matters that are specific to the health care sector, including eight discreet areas of sub-specialty. The applicant must also be able to provide opinions and advice strictly related to health law issues.

a. Corporate / Commercial

This category recognizes that health law counsel draft and negotiates a broad range of contracts such as physician agreements, funding agreements, data sharing agreements, research agreements, health information network provider agreements, service and product agreements for medical devices, drugs and equipment, and asset/share purchase agreements. These agreements require a specialized understanding of how health care facilities such as long-term care facilities, health care clinics, hospitals, diagnostic facilities and other organizations in the provision of health and health related services function and operate in accordance with applicable laws and policies.

⁵ Substantial Contribution will not be discussed in this submission.



Health law counsel provides services to health care facilities related to business organization matters such as establishment of health care professional incorporations, integrations, amalgamations, implementation of restructuring initiatives, transfer of services, buying groups for procurement, and other corporate governance matters. Similarly, due to the unique legal role that hospitals occupy and operate within, health law counsel are required to establish charitable foundations and to advise on issues related to charities and the implications of charitable status, be up to date on zoning for regulated activities, provide interpretation of surrogacy agreements, and provide risk assessments and professional and corporate governance advice regarding director and officer's liability and conflict of interest; as such health lawyers need to know particular areas of municipal law, corporate law, charity law, as well as family / matrimonial law.

b. Opinions and Advice

The existence of this category, and the 27 areas contained within it, re-enforces that health law is a discreet practice area. The applicant “will have a broad and varied experience in providing advice and opinions in the area of health law,” this acknowledges that health law is far more than merely advocacy and corporate / commercial work. The issues a health law lawyer may be also opine on include health records management, public health, including emergency preparedness, communicable disease reporting obligations and quarantine, end-of-life issues, reproductive health issues, access to healthcare and patient safety issues.

c. Development of Health Law

This category requires that the applicant has made a substantial contribution to the development of health law, such as through drafting health legislation, teaching, writing, research, presentations and other academic qualifications.

V. Protection of the Public and the Promotion of Access to Justice

It is crucial that lawyers are identified as having experience and knowledge in health law to ensure access to justice for our clients. Clients in the health care sector include people with complex mental health issues, physicians and health professionals whose professional reputation and ability to practice are under review, regulatory authorities, not-for-profits, hospitals, long-term care facilities, and patients struggling to navigate the legal and health care system in Ontario.

The legal issues that health law practitioners address are numerous and complex. They relate to the regulation of the health care system as a whole, its institutions, and the health



care professionals within the system. Identifying lawyers who have limited their practice to health law is fundamental to ensuring clients are able to obtain a lawyer qualified to address the distinct and complex legal issues.

For example:

- Clients with malpractice issues are often involved in other legal proceedings, such as hospital and regulatory college complaints, which require a specialized skill set and knowledge which is distinct from most civil litigation practices;
- Clients with mental health issues may be challenging life altering decisions that impact their freedom and capacity to make proper health treatment or property decisions. Lawyers must be familiar not only with hospital policies and procedures, but with the legal procedure to ensure that such clients receive timely and adequate services in a manner that protects and balances their rights with the public's interest; and
- Clients, such as small and large health organizations dealing with a broad range of commercial agreements and negotiations, may require legal counsel that can skillfully navigate the various specialized legislation affecting such agreements and negotiations.

It is essential that a lawyer representing these clients has the ongoing up-to-date knowledge, skills, and experience to handle these unique issues.

The LSO's Law Society Referral Service ("LSRS") currently requires clients to identify a category of law in Step 4 of the LSRS, to enable the LSO to match an appropriate lawyer to address a client's needs. However, health law is not listed, which does not accurately reflect the unique and varied practice of health law, or assist members of the public in finding an appropriate lawyer to meet their need. While facets of health law may be capable of categorization in other areas of practice, clients navigating the healthcare system will be better served if health law is recognized as a distinct area of practice by the LSO. The recognition of health law in the LSRS will better facilitate access to justice by referring clients to appropriate lawyers who specialize in health law.

VI. Conclusion

Health law is a quickly growing field. The OBA currently has 500 health law members across Ontario. Legal associations like the OBA, and indeed the LSO itself, continue to offer professional development programs directed towards lawyers looking to deepen their health law knowledge. Many law schools across Canada are also offering health law courses, masters' degrees, and other certificate programs.



The recognition of health law by the LSO as an area of practice will properly reflect the unique area of law that health law lawyers practice on a day to day basis, and assist the public with their interactions in the health care sector. The OBA appreciates the opportunity to provide this proposal and looks forward to an opportunity to discuss it further with the LSO.