

WTO Paper

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Meeting Canada's Current Obligations for the Legal Profession under the General Agreement on Trade in Services (GATS) of the World Trade Organization (WTO)

Prepared by the

National WTO Committee

Federation of Law Societies of Canada
<http://www.flsc.ca/english/committees/wto/wto.htm>

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Executive Summary ¹

In response to a request from Industry Canada, the Federation of Law Societies of Canada established the National WTO Committee to examine the impact of regulatory standards on the legal profession. This report, which has been approved by the Federation's member law societies, is intended to assist the Canadian government in its consultations with the profession, and to inform the Canadian legal profession and its regulatory bodies of both the current and future impact of the GATS.

The legal profession in Canada has a significant history of successful self-regulation. In signing the General Agreement on Trade in Services (GATS), the Canadian government has committed the legal profession to being supervised by the World Trade Organization (WTO), as least to the extent the regulation of the legal profession may affect international trade in legal services. The primary goal of regulating the delivery of legal services in Canada is to ensure the public receives competent legal services.

The WTO Committee believes that it is possible to have both international trade in legal services and a standard of professional regulation that properly protects the public interest. This paper reviews the unique structure and values of the legal profession and discusses how these features present challenges to regulating the legal profession and the delivery of legal services.

This paper examines three key issues: how the Accountancy Disciplines generally apply to regulation of the legal profession in Canada, the extent to which current regulation of Foreign Legal Consultants by Canadian Law Societies is compliant with the kind of regulation described by the Accountancy Disciplines, and how self-regulation of the legal profession will coexist with the GATS.

It has been proposed that the balance between expanded international trade in legal services and a standard of professional regulation that properly protects the public interest be articulated and regulated using the Disciplines adopted by the WTO for the Accountancy Sector. The Committee is of the view that the role of the legal profession differs from other professionals in a number of significant ways, which will require a modified set of the Disciplines if they are to be effectively applied to the legal profession.

Recognizing that Canada will likely want to expand its compliance with GATS beyond the current commitments, the Paper provides a detailed analysis of how the regulation of Foreign Legal Consultants in Canada fits with the general provisions of the GATS. For the sake of convenience, this analysis uses as its framework the disciplines adopted for the Accountancy Sector.

The Paper notes that little attention has been paid to the vital role local law societies play in ensuring, through both formal and informal regulation, that lawyers practising within their

¹ The Executive Summary was inserted in the WTO Paper in April 2001.

jurisdictions are competent, ethical and independent. In our view this issue needs to be addressed by Canada, in conjunction with the Federation and its members, in order to achieve an effective model of regulation that provides for international mobility while protecting the public interest. The report suggests that as part of this discussion law societies will have to broaden their view of how lawyers can achieve appropriate standards of competence, and how to actively support the local culture of lawyering and the way local and visiting lawyers relate to one another and to local institutions.

This paper is premised on our understanding that Canada's current GATS commitments relating to the legal profession will not be expanded in the near future. Those commitments extend only to regulation of Foreign Legal Consultants in Canada. As described in this paper, the practice of law is highly variable from one jurisdiction to another. This may create barriers to the kind of international mobility proposed, which though viable for other professions in which the roots of professional knowledge are grounded in more universal principles, may not be as easily applicable to the legal profession. We believe there must be significant dialogue between the profession and the Canadian government before the government makes any further commitments.

If our understanding of the government's intentions is incorrect, we would like to be informed immediately so that consultation can be held on an urgent basis.

1 Introductory Comments

1.1 *The GATS*

The GATS provides for an environment in which international trade in services is restricted only by bona fide regulatory measures rooted in legitimate policy objectives. The GATS also requires process transparency, fairness, and objectivity in regulatory processes.

Although intended to be of general application to all forms of trade in services, the GATS allows signatory national governments to restrict their commitments, and thus specify areas in which the Agreement does and does not apply.

In the case of legal services, the Canadian government at this time has only committed to apply the GATS to the regulation of the services of Foreign Legal Consultants (FLCs): lawyers from outside Canada who wish to deliver legal services in Canada, with those services being restricted to advising on the law of the Consultant's home jurisdiction.

It is anticipated that the GATS may at some time in the future be applied to a broader range of legal services than FLCs. Later in this paper we explain our current understanding of what that might mean for the legal profession in Canada, and seek confirmation that our vision of the future is one shared by the Government of Canada.

1.2 *Structure of GATS Regulation*

The GATS anticipates the development of standards for the regulation of professions; these standards are called Disciplines. To date, the WTO has developed Disciplines for the Accountancy Sector. One of the issues to be discussed is whether it is appropriate to apply the Accountancy Disciplines to other professional services as well. Our sense is that the Canadian government is in favour of developing one set of disciplines which would apply to all services. While we agree that this would simplify implementation of the GATS, we have concerns that, over the long run, this will not adequately reflect the underlying policy objectives of regulation of the legal profession. This point is discussed in detail later in this paper.

The GATS also anticipates the development of agreements between signatory member nations, called Mutual Recognition Agreements (MRAs). These agreements, which ideally would be multilateral, would set out the arrangements for the reciprocal recognition of professional credentials between WTO member countries. Although most Canadian law societies have developed a regulatory regime that recognizes FLCs, this has not been carried out through MRAs. Instead, law societies have opened their borders to international trade without requiring reciprocity from those countries whose lawyers wish to offer legal services in Canada.

1.3 Structure of the Canadian Legal Profession

Canadian law is based on English common-law and, in the case of Quebec, on French civil law.² In the Canadian constitutional arrangements, the federal and provincial governments have defined areas of legislative competence. Regulation of the legal profession is a matter of provincial and territorial (“provincial”) competence, and Canadian law societies (which include 13 law societies and the *Chambre des Notaires du Québec*) are creatures of provincial statutes. The ability to enter into international treaties and other agreements is vested in the federal government.

In carrying out legal transactions and advocating for clients, Canadian lawyers play two roles: the first, as officers of the provincial and federal courts, and the second, as advocates for their clients. These roles carry with them professional and legal obligations that are codified in each provincial jurisdiction. In general, the structure of those legal and professional obligations is intended to safeguard the integrity of the system for resolving disputes. Specific attention is paid to representing citizens in disputes with government: their representation must be untainted by government control of the lawyer.

The knowledge applied by lawyers while acting for their clients will typically encompass both federal and provincial law, and may involve municipal law and entirely local practices created by local circumstance. Although many of the legal principles involved are similar, the manner in which those principles are implemented in local law is frequently the very issue for which the lawyer’s advice and counsel is required. This distinguishes the practice of law from professions in which the roots of professional knowledge are based on more universal bodies of knowledge such as human physiology, physics, mechanics, or highly developed international standards like accounting.

Because regulation of the legal profession is provincially based, lawyers are members of the law society in one or more provinces. The last decade has seen a liberalization of internal mobility rules between law societies. A lawyer from one province can offer legal services in another province. Traditionally, a lawyer who delivers legal services in a province on more than an occasional basis must be a member of the law society in that jurisdiction. However, these rules are in a state of flux, and lawyers in Western Canada will soon be able to practise outside of their home province for up to 6 months in any 12 month period.

1.4 Unique Values of the Legal Profession

The legal profession in Canada, as regulated by the provincial law societies, shares a number of unique values. These values are also, in large part, shared by the legal profession globally. The unique values include:

Independence – The profession as a whole, and individual lawyers, are independent of external influence over the nature of their representation of individual

² The WTO briefing paper *Legal Services: Background Note by the Secretariat (WTO, July 6, 1998, S/C/W/43, Document number 98-2691)* summarizes the world’s legal systems and the role lawyers play within it.

clients. Lawyers are regulated in their professional ethical values by independent law societies and not by the state. They are otherwise unconstrained in the positions their clients can take, and specifically are not constrained by government control. They are officers of the court, which is part of the judicial branch of the state; they are not agents of the state.

Self-governing – The independence of the profession is implemented through a system of self-governance, in which the central principle is that the legal profession must be governed in the public interest.

Client confidentiality – In order to advance the interests of clients, lawyers are able to receive confidential client information, and then must protect that information from disclosure to other parties, and to the state. In certain circumstances lawyers are protected by law from disclosing client confidences.

Conflict of interest – When representing clients, lawyers must also be unconstrained by factors which might influence that representation and undivided in their loyalty to their clients. Accordingly, lawyers are governed by strict standards precluding them from acting when there are conflicts of interest.

As stated by the International Bar Association,

“The legal profession differs from other service professions in at least three major respects that are relevant to the question of recognition of professional qualifications.”

A. The Special Role of the Legal Profession

The legal profession fulfills a special role or function in democratic societies, facilitating the administration of and guaranteeing access to justice and upholding the rule of law. Lawyers are at the same time officers of the courts and guardians of the rights of citizens, public responsibilities that call for the utmost integrity and the strictest compliance with rules of ethics and professional conduct if effective operation of and public confidence in the system of justice are to be maintained. Accordingly, it is essential that standards and criteria for mutual recognition of qualifications for the practice of law include not only the requisite elements of intellectual qualification, such as competence and ability to supply the service, but also those elements of ethical and moral qualification that are essential to the preservation of the integrity of the profession and, indeed, of the legal system itself.

B. Heterogeneity of Substantive Knowledge

The education, practical training and other qualifications of a lawyer relate, to a substantial extent, to a particular national legal system. Thus, unlike medicine or engineering, where the applicable principles are exactly the same from one country to another, or accounting, where the rules tend to vary somewhat in their details but are readily subject to reconciliation in accordance with common

principles, law is highly variable from one jurisdiction to the next and, as an expression of the mores and mutual expectations of the citizens, is significantly cultural in its content.

C. The Regulatory Structure of the Legal Profession

For historical reasons, regulation of the legal profession is carried out in many countries at the level of political subdivisions rather than at the national level. Even where the regulatory framework is established on a national basis, authority for admission to the profession and professional discipline frequently rests with local, state or provincial bodies, in some cases governmental and in others professional, acting pursuant to delegated authority. In consequence, implementation of the provisions of the GATS relative to legal services will necessarily involve cooperation between local, regional and national authorities of the Members involved. The term “competent authorities” when used with reference to any Member must be read in this light.”³

³ From “*Proposed Standards and Criteria for Recognition of the Professional Qualifications of Lawyers*,” International Bar Association, July 31, 2000.

2 History of FLSC Involvement in the GATS

The Federation of Law Societies of Canada (Federation) is the umbrella organization of 13 of the 14 Law Societies in Canada.⁴

Since 1996, Industry Canada has kept the Federation apprised of the work of the Working Party on Domestic Regulation (formerly the Working Party on Professional Services) of the WTO with respect to the Accountancy Sector. As that work progressed, the message was always clear that the negotiations conducted under the GATS were limited to the Accountancy Sector and that the legal profession might be dealt with at a later date. For the reasons set out in this paper, we believe it is important to clarify a number of fundamental regulatory issues before the Canadian government makes any further commitments relating to the legal profession.

The Accountancy Sector started its discussions with the Working Party on Professional Services around 1996 and these led to the Accountancy Guidelines, which were adopted by the WTO in May 1997 as a non-binding document. These in turn led to the adoption of the Accountancy Disciplines in December 1998, considered by the WTO to be a binding document on its 132 or so member countries.

Since the adoption of the Accountancy Disciplines in December 1998, there has been some indication from Industry Canada that the Working Party on Domestic Regulation would be looking at extending its mandate to other professions. Architects, lawyers and engineers were asked to enter into discussions on what Disciplines should be adopted for their sector. Industry Canada invited the Federation and other national organizations representing these various professions to first indicate whether the Accountancy Disciplines would be acceptable to their respective profession.

To comply with this request from Industry Canada and to look at the broader regulatory and licensing requirements issues under the GATS, the Federation established a National WTO Committee in August 1999. Each member of the Federation is represented on the Committee.

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Law Society of British Columbia
Law Society of Alberta
Law Society of Saskatchewan
Law Society of Manitoba
Law Society of Upper Canada
Barreau du Québec
Chambre des Notaires du Québec

Law Society of New Brunswick
Nova Scotia Barristers' Society
Law Society of Prince Edward Island
Law Society of Newfoundland
Law Society of Yukon
Law Society of the Northwest Territories

On April 1, 1999, the Territory of Nunavut came into being and at the same time the Law Society of Nunavut became the 14th Law Society in Canada. The Law Society of Nunavut is not yet a member of the Federation.

3 Compliance with the GATS

This section of the paper describes the current state of compliance with the GATS, and the application of the Accountancy Disciplines to the legal profession in Canada.

3.1 *The Current Canadian Commitments: Foreign Legal Consulting and the GATS*

As noted above, Canada's current commitment under the GATS extends only to permitting foreign lawyers to advise clients in Canada about the law of their home jurisdictions. These are known as Foreign Legal Consultants.

In 1994, 10 of the then 13 law societies of Canada executed the Interjurisdictional Practice Protocol (the Protocol). As at February 2001, all Law Societies to the exception of those from the 3 territories, i.e. Northwest Territories, Nunavut and Yukon, had executed the Protocol.

The Protocol includes agreements about standards for the temporary and permanent mobility of lawyers within Canada, as well as standards for the regulation of Foreign Legal Consultants.⁵ Article VII of the GATS describes the regulation of professional services. While Article VI deals more generally with regulation of trade in services, Article VII requires that regulation be fair, reasonable and objective. We have reviewed the current regulatory regimes for Foreign Legal Consultants in Canada, using the standards of the GATS and of the Accountancy Disciplines.⁶ In general, the current regime is compliant with the GATS standard, with the following exceptions:

- Some jurisdictions require a form of bond to protect the clients of FLCs against misappropriation of trust funds. This requirement provides FLC clients with the same protection as afforded to clients of Canadian lawyers by the client protection funds in each province. However, the marketplace may make it impossible to purchase the required bond, thus creating a barrier for some potential FLCs.
- All Canadian jurisdictions restrict the forms of association through which practitioners can practise. Specifically, some forms of corporation are not permitted, and associations with non-lawyers are restricted.
- One jurisdiction requires that FLCs become residents as soon as practicable.

Our detailed analysis of the Accountancy Disciplines and their applicability to Canadian regulation of FLCs is presented in **Appendix A**.

⁵ The text of the Protocol can be found at www.flsc.ca/english/committees/protocol/reports/protocolreports.htm Appendix 3 of the Protocol dealing with Foreign Legal Consultants is found in Appendix B of this paper.

⁶ We have used the Accountancy Disciplines for the sake of convenience only, subject to our reservations about its application to the legal profession as expressed elsewhere in this paper.

3.2 The More General Application of the GATS

The GATS gives a general direction that global trading in services is to be radically increased. Beyond that general direction the Canadian government has not yet provided a vision of how the world will look, and specifically, how the legal profession will function and be regulated. In our view, it is important that our discussion of the technical matters involved in professional regulation be firmly grounded in a shared vision of global trade in legal services.

We are also of the view that it is possible to have both international trade in legal services and a standard of professional regulation that properly protects the public interest. For discussion purposes, we propose the following guiding principles for our view of this new world:

- Provincially based law societies continue to protect the public interest by ensuring that lawyers delivering legal services within their jurisdiction are competent, ethical and independent.
- Law societies broaden their view of how lawyers can achieve the appropriate standard of competence by:
 - accepting non-Canadian educational qualifications as complete or partial fulfillment of the necessary standards
 - eliminating residence and citizenship requirements;
 - issuing licences restricted to those areas in which people can more easily transport their expertise and competence without risk to the public.
- Law societies support the local culture of lawyering, and the way lawyers relate to one another and to local institutions.

Readers should note that these principles have not been formally adopted by law societies in Canada.

3.3 Application of the Accountancy Disciplines to the Legal Profession

The Accountancy Disciplines, as developed by the Working Party on Professional Services, are being proposed as the model for WTO regulation of all other professions, including the legal profession.⁷ To the extent that the Disciplines require transparency, objectivity and fairness,

⁷ The Accountancy Disciplines are published by the WTO with the following Editorial Notes:

1. The Disciplines (attached) were created in accordance with the mandate of Article VI:4 of the General Agreement on Trade in Services (GATS), which states that the Council for Trade in Services shall develop "any necessary Disciplines" to ensure that measures relating to qualification

much of their current provisions can be applied to regulation of the legal profession, and, we expect, to many other professions as well. Indeed, the legal profession in Canada is by and large compliant with the Disciplines. However, as currently drafted, the Disciplines are an inadequate expression of the culture and values inherent in the legal profession. While we understand the desire for uniformity and simplicity, we are of the view that it is necessary to modify the architecture of the Disciplines to permit them to reflect the specific values and uniqueness of the legal profession.

In our view, the following matters need to be imported into the proposed Disciplines:

- The unique values and role of lawyers, as described in Section 1.4.
- The discussion of technical standards is unknown within the legal profession in Canada, and in our experience, within the legal profession worldwide. In the cultural context of the Canadian legal system (and, we think, the legal profession worldwide), these would be replaced by notions of professional competence, and, separately, of professional ethics.
- There needs to be some definition of 'law' and 'legal services'. The WTO Secretariat Briefing Note provides a good starting point for a definition.⁸
- The Accountancy Disciplines appear to be predicated on a notion that accounting standards and practices are global and overarching. As noted at the beginning of this paper and in sections 1.3 and 1.4, that conceptualization is only applicable at the highest level of generalization about legal systems, and is not applicable to the professional work most lawyers perform for their clients. The Accountancy Disciplines need to include the notion that law is local (within member countries and within internal jurisdictions of those countries), and that understanding and being able to work within these systems of law is central to the task of defining what it means for a lawyer to be competent.

We believe that it is possible to modify the architecture of the Accountancy Disciplines to retain much of what is and should be universal to the regulation of professions, and at the same time to reflect the unique values of the legal profession.

We have conducted a detailed review of how the Accountancy Disciplines would need to be changed to apply to trade in legal services beyond Foreign Legal Consultants. This may be useful once we have agreed on the more general issues set out above.

requirements and procedures, technical standards and licensing requirements "do not constitute unnecessary barriers to trade in services."

2. Accountancy is generally defined in the WTO context as including accounting, auditing and bookkeeping services. Members, subject to negotiations with trading partners, have the right to specify commitments in all or any part of these services within their GATS schedules.
3. The Disciplines apply only to measures not subject to scheduling under GATS Articles XVI and XVII. The excluded measures, which restrict access to the domestic market or limit the application of national treatment to foreign suppliers, are addressed in the GATS through the negotiation and scheduling of specific commitments.

⁸ See Footnote 1.

Appendix A - Applying the Accountancy Disciplines to the Licensing of Foreign Legal Consultants in Canada

The following commentary sets out the text of the Accountancy Disciplines 1-26, and an analysis of how the Disciplines apply to the implementation of the currently scheduled commitments for permitting Foreign Legal Consultants to practise in Canada.

Part 1 Objectives

Discipline 1 Objective

Having regard to the Ministerial Decision on Professional Services, Members have agreed to the following disciplines elaborating upon the provisions of the GATS relating to domestic regulation of the sector. The purpose of these disciplines is to facilitate trade in accountancy services by ensuring that domestic regulations affecting trade in accountancy services meet the requirements of Article VI:4 of the GATS. The disciplines therefore do not address measures subject to scheduling under Articles XVI and XVII of the GATS, which restrict access to the domestic market or limit the application of national treatment to foreign suppliers. Such measures are addressed in the GATS through the negotiation and scheduling of specific commitments.

Discussion The Working Party on Domestic Regulation might draft a similar Discipline for the legal services sector if the sector is invited to develop its own set of Disciplines.

Position Canadian Law Societies would be prepared to adopt a Discipline similar to Discipline 1 if it applied only to Canada's currently scheduled commitments regarding FLCs.

Part 2 General Provisions

Discipline 2 General Provision

Members shall ensure that measures not subject to scheduling under Articles XVI or XVII of the GATS, relating to licensing requirements and procedures, technical standards and qualification requirements and procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in accountancy services. For this purpose, Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil a legitimate objective. Legitimate objectives are, inter alia, the protection of consumers (which includes all users of accounting services and the public generally), the quality of the service, professional competence, and the integrity of the profession.

Discussion Discipline 2 sets out the general theme concerning the matters addressed in the remaining Disciplines. Its structure suggests that the GATS obligations take primacy over the obligation that local regulators of the legal profession have to protect the public interest. If this is the intent then it causes considerable difficulty in balancing the interests involved, particularly where the signatory to the agreement has no jurisdiction over the regulation of the profession.

Position Canadian Law Societies are of the view that Disciplines for Legal Services should more clearly identify the respective obligations of the regulators of the legal profession.

Part 3 Transparency Guidelines

Discipline 3 Transparency of Competent Authorities

Members shall make publicly available, including through the enquiry and contact points established under Articles III and IV of the GATS, the names and addresses of competent authorities (i.e. governmental or non-governmental entities responsible for the licensing of professionals or firms, or accounting regulations).

Discussion Canadian Law Societies already comply with Discipline 3 as they do make publicly available the names and addresses of competent authorities who licence and regulate lawyers within Canada. Such information can be obtained directly from the respective Law Society or from the Federation of Law Societies of Canada.

Position Canadian Law Societies can easily adopt Discipline 3 of the Transparency Disciplines for the Canadian Legal Services Sector.

Discipline 4 Information on Becoming a Member

Members shall make publicly available, or shall ensure that their competent authorities make publicly available, including through the enquiry and contact points:

- a where applicable, information describing the activities and professional titles which are regulated or which must comply with specific technical standards;
- b requirements and procedures to obtain, renew or retain any licences or professional qualifications and the competent authorities' monitoring arrangements for ensuring compliance;
- c information on technical standards; and
- d upon request, confirmation that a particular professional or firm is licensed to practise within their jurisdiction.

Discussion Canadian Law Societies already comply with Discipline 4. Most of the information referred to in the Discipline is contained in the respective Acts & Regulations of the Law Societies, which are publicly available. Information about whether a particular person is entitled to practise law in a particular province or territory is also provided by the respective Society upon request, or available on their website.

Position Canadian Law Societies have no difficulty adopting Discipline 4 of the Transparency Disciplines for the Canadian Legal Services Sector as they are already in compliance with its essential obligations. As described more fully in the commentary on Part 8 (below) in order to comply with the nature of the legal profession the reference to technical standards should be changed to reflect the fact that members in Canadian Law Societies are bound by rules of professional conduct and competence and not technical standards. The reference to obtaining, renewing or retaining a licence is acceptable for FLCs, but not for lawyers generally, since in Canada lawyers are not licensed per se (see general comments on Part 4, below). With respect to firms in paragraph d, the requirement should reflect the fact that currently only individual lawyers are licensed by being members of Law Societies. Law firms are not licensed per se, although specific corporate forms through which lawyers may practise, such as LLPs or professional corporations, may be issued permits. Canadian Law Societies can confirm that an individual lawyer is licensed to practice law in Canada or that a notary is licensed to practice the notarial profession in Quebec.

The following wording is suggested:

Members shall make publicly available, or shall ensure that their competent authorities make publicly available, including through the enquiry and contact points:

- a where applicable, information describing the activities and professional titles which are regulated or which must comply with specific practice requirements, rules of professional conduct and standards of professional competence;
- b requirements and procedures for being permitted to practise law;
- c information on practice requirements, professional conduct and standards of professional competence and the competent authorities' arrangements for ensuring compliance; and
- d upon request, confirmation that particular persons are authorized to practise law within their jurisdiction.

Discipline 5 Rationale behind Regulatory Measures

Members shall inform another Member, upon request, of the rationale behind domestic regulatory measures in the accountancy sector, in relation to legitimate objectives as referred to in paragraph 2.

Discussion The regulation of the legal profession in Canada complies with the legitimate objectives set out in Discipline 2 of the General Provisions Discipline: the protection of consumers, ensuring quality of service, maintaining professional competence and maintaining the integrity of the profession. Provincial and territorial governments enact the statutes which constitute or incorporate the Law Societies which are then empowered to make rules for the government of the Society, for the management and conduct of its business and affairs and for the exercise or carrying out of the powers and duties conferred or imposed on the Society or the Benchers under the respective statute.

Position Canadian Law Societies have no problem in complying with Discipline 5 of the Transparency Disciplines.

Discipline 6 Opportunity to be Heard on Measures which Affect Trade in Services

When introducing measures which significantly affect trade in accountancy services, Members shall endeavour to provide opportunity for comment, and give consideration to such comments, before adoption.

Discussion Measures adopted for legal services in Canada are introduced at two levels in Canada: firstly, by provincial and territorial governments who enact the constitutive legislation (Legal Profession Act or Law Society Act) and have the authority to amend such Act; and then secondly by Law Societies who have the authority to regulate the profession by enacting rules and regulations for their respective jurisdiction. This Working Paper only addresses the Disciplines as they would apply to the regulatory authority of the Canadian Law Societies and does not address the legislative authority of the provincial and territorial governments.

Canadian Law Societies have open governance schemes, which welcome consultation and input.

Position Canadian Law Societies consult on governance issues and as such would have no difficulty adopting Discipline 6 for the Legal Services Sector. The logistics of having Canada consult, as signatory to the GATS, are not clear, especially in light of the constitutional arrangements in Canada.

Discipline 7 Access to Procedures for Review of Administrative Decisions

Details of procedures for the review of administrative decisions, as provided for by Article VI:2 of the GATS, shall be made public, including the prescribed time-limits, if any, for requesting such a review.

Discussion Decisions made by Canadian Law Societies that are most likely to affect trade in services are those that relate to admission to membership in the Society and those that relate to granting permission to provide legal advice or services in a particular jurisdiction. Such decisions are frequently subject to internal appeal within law societies, and then to appeal or review by the courts. Details of these procedures are public.

Position Canadian Law Societies comply with Discipline 7 by virtue of the opportunity to appeal relevant administrative decisions

Part 4 Licensing Requirements

Comment on Parts 4 – 7

Parts 4 to 7 of the Accountancy Disciplines deal with various aspects of licensing and qualification requirements and procedures. They reflect the particularities of the Accountancy Sector. As applied to the licensing of Foreign Legal Consultants, and as may be noted elsewhere in this paper, these are generally acceptable. There are difficulties applying the licensing concept to lawyers in general in Canada, because the mechanism for regulating lawyers is one built around membership, and not licensing.

Discipline 8 Licensing Requirements

Licensing requirements (i.e. the substantive requirements, other than qualification requirements, to be satisfied in order to obtain or renew an authorization to practice) shall be pre-established, publicly available and objective.

Discussion Canadian Law Societies already comply with Discipline 8. The requirements for admission to membership in Law Societies or permission to practise as an FLC are set out in the respective legislation and rules. These are regulated matters and not subject to arbitrariness on the part of Law Societies. Most of these statutes, rules and regulations are readily available on the websites of the Canadian Law Societies and all of them can be obtained directly from the societies themselves.

Position Canadian Law Societies comply with Discipline 8.

Discipline 9 Residency Requirements

Where residency requirements not subject to scheduling under Article XVII of the GATS exist, Members shall consider whether less trade restrictive means could be employed to achieve the purposes for which these requirements were set, taking into account costs and local conditions.

Discussion – Excepting Ontario, none of the law societies in Canada has residency requirements for Foreign Legal Consultants. Ontario requires that Foreign Legal Consultants take up residency in Ontario as soon as possible after being licensed.

Position Canadian Law Societies comply with this Discipline.

Discipline 10 Membership in Professional Organization

Where membership of a professional organization is required, in order to fulfil a legitimate objective in accordance with paragraph 2, Members shall ensure that the terms for membership are reasonable, and do not include conditions or pre-conditions unrelated to the fulfillment of such an objective. Where membership of a professional organization is required as a prior condition for application for a licence (i.e. an authorization to practice), the period of membership imposed before the application may be submitted shall be kept to a minimum.

Discussion Foreign Legal Consultants are not required to be members of any Canadian law society, or any other organization. They need only hold a permit or licence from the relevant law society.

Position This discipline, as it applies to Foreign Legal Consultants, is acceptable to Canadian Law Societies.

Discipline 11 Use of Firm Names

Members shall ensure that the use of firm names is not restricted, save in fulfillment of a legitimate objective.

Discussion Canadian Law Societies typically impose restrictions on the use of law firm names as a matter of professional conduct in order to protect consumers from misrepresentations about the nature of the firm.

Position Canadian Law Societies have not considered in detail the use of firm names by Foreign Legal Consultants. In general, law societies impose restrictions on the use of law firm names as a matter of professional conduct in order to protect consumers from misrepresentations about the nature of the firm.

Discipline 12 Professional Indemnity Insurance

Members shall ensure that requirements regarding professional indemnity insurance for foreign applicants take into account any existing insurance coverage, in so far as it covers activities in its territory or the relevant jurisdiction in its territory and is consistent with the legislation of the host Member.

Discussion All members of Canadian Law Societies who are authorized to deliver legal services to the general public are required to maintain compulsory professional liability insurance to a minimum of \$1,000,000 CAD. This insurance must be purchased through the relevant law society.

Foreign legal consultants must maintain the same level and type of insurance, which they are permitted to purchase from a wide range of commercial insurers.

Apart from the professional liability insurance requirements, every Canadian Law Society manages a compensation/default fund, which provides protection to members of the public who suffer financial loss because of their lawyer's dishonesty. Foreign legal consultants in most Canadian jurisdictions must provide proof of insurance or a bond, indemnity or other security to protect clients from dishonesty by the Foreign Legal Consultant. This bond may not be available to all applicants, and thus may form a barrier to licensing as a Foreign Legal Consultant.

Position Canadian Law Societies take into account insurance coverage of Foreign Legal Consultants so long as it meets the same standard as that required of practising lawyers. Canadian law societies require bonding of Foreign Legal Consultants in order to provide protection against losses to clients caused by a Foreign Legal Consultant's dishonesty.

Discipline 13 Fees Levied by Law Societies

Fees charged by the competent authorities shall reflect the administrative costs involved, and shall not represent an impediment in themselves to practising the relevant activity. This shall not preclude the recovery of any additional costs of verification of information, processing and examinations. A concessional fee for applicants from developing countries may be considered.

Discussion Fees for Foreign Legal Consultants are commensurate with other fees charged by Canadian Law Societies, and are commensurate with the costs of administering this class of licence.

Position This discipline is acceptable to Canadian Law Societies

Part 5 Licensing Procedures

Discipline 14 Licensing Procedures

Licensing procedures (i.e. the procedures to be followed for the submission and processing of an application for an authorization to practise) shall be pre-established, publicly available and objective, and shall not in themselves constitute a restriction on the supply of the service.

Discussion Requirements and procedures required by Canadian Law Societies to become or remain a member or to become or remain an FLC are regulated matters, and are pre-established, publicly available and objective. These requirements and procedures do not constitute restrictions on the supply of legal services.

Position Canadian Law Societies comply with this Discipline.

Discipline 15 Licensing Requirements

Application procedures and the related documentation shall be not more burdensome than necessary to ensure that applicants fulfil qualification and licensing requirements. For example, competent authorities shall not require more documents than are strictly necessary for the purpose of licensing, and shall not impose unreasonable requirements regarding the format of documentation. Where minor errors are made in the completion of applications, applicants shall be given the opportunity to correct them. The establishment of the authenticity of documents shall be sought through the least burdensome procedure and, wherever possible, authenticated copies should be accepted in place of original documents.

Discussion Application procedures for membership in a Canadian Law Society or for permission to act as an FLC are not more burdensome than necessary.

Position Canadian Law Societies comply with this Discipline.

Discipline 16 Informing the Applicant of Decisions

Members shall ensure that the receipt of an application is acknowledged promptly by the competent authority, and that applicants are informed without undue delay in cases where the application is incomplete. The competent authority shall inform the applicant of the decision concerning the completed application within a reasonable time after receipt, in principle within six months, separate from any periods in respect of qualification procedures referred to below.

Discussion Canadian Law Societies notify applicants that their applications have been received, and if necessary that their applications are incomplete, and inform applicants of the decision concerning their applications within a reasonable period of time.

Position Canadian Law Societies comply with Discipline 16.

Discipline 17 Reasons for Rejection of Application/ Right to Resubmit Application

On request, an unsuccessful applicant shall be informed of the reasons for rejection of the application. An applicant shall be permitted, within reasonable limits, to resubmit applications for licensing.

Discussion Canadian Law Societies provide the reasons for rejecting an application for membership or permission to act as an FLC.

Position Canadian Law Societies already comply with Discipline 17.

Discipline 18 Right to Practice Law

A licence, once granted, shall enter into effect immediately, in accordance with the terms and conditions specified therein.

Discussion Licenses for Foreign Legal Consultants take effect immediately upon being granted.

Position Canadian Law Societies comply with Discipline 18.

Part 6 Qualification Requirements

Discipline 19 Foreign Qualifications

A Member shall ensure that its competent authorities take account of qualifications acquired in the territory of another Member, on the basis of equivalency of education, experience and/or examination requirements.

Discussion Foreign Legal Consultants are licensed on the basis of their foreign credentials and their membership in good standing of a law society or bar association of another country.

Position Canadian Law Societies take account of qualifications acquired outside of Canada when licensing Foreign Legal Consultants, and thus comply with Discipline 19.

Discipline 20 Qualification Requirements

The scope of examinations and of any other qualification requirements shall be limited to subjects relevant to the activities for which authorization is sought. Qualification requirements may include education, examinations, practical training, experience and language skills.

Discussion There are no qualification requirements of this nature required of Foreign Legal Consultants.

Position Canadian Law Societies comply with Discipline 20 as it relates to licensing Foreign Legal Consultants.

Discipline 21 Mutual Recognition Agreements

Members note the role which mutual recognition agreements can play in facilitating the process of verification of qualifications and/or in establishing equivalency of education.

Discussion In the belief that permitting Foreign Legal Consultants is good public policy, Canadian Law Societies have permitted the licensing of Foreign Legal Consultants without the necessity of Mutual Recognition Agreements.

Position Canadian Law Societies have no difficulty adopting this Discipline as it relates to Foreign Legal Consultants.

Part 7 Qualification Procedures

Discipline 22 Six Months to Render Decision

Verification of an applicant's qualifications acquired in the territory of another Member shall take place within a reasonable time-frame, in principle within six months and, where applicants' qualifications fall short of requirements, shall result in a decision which identifies additional qualifications, if any, to be acquired by the applicant.

Discussion Verification of foreign credentials for Foreign Legal Consultants typically takes place within six months.

Position Canadian Law Societies comply with Discipline 22 as it relates to Foreign Legal Consultants.

Discipline 23 Examinations of Foreign-qualified Applicants

Examinations shall be scheduled at reasonably frequent intervals, in principle at least once a year, and shall be open for all eligible applicants, including foreign and foreign-qualified applicants. Applicants shall be allowed a reasonable period for the submission of applications. Fees charged by the competent authorities shall reflect the administrative costs involved, and shall not represent an impediment in themselves to practising the relevant activity. This shall not preclude the recovery of any additional costs of verification of information, processing and examinations. A concessional fee for applicants from developing countries may be considered.

Discussion Canadian Law Societies do not require examinations of Foreign Legal Consultants

Position This Discipline does not apply to the licensing of Foreign Legal Consultants in Canada.

Discipline 24 Residency Requirements for Writing Exams

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

Discussion This is not applicable to the licensing of Foreign Legal Consultants in Canada.

Position This Discipline does not apply to the licensing of Foreign Legal Consultants in Canada.

Part 8 Technical Standards

Comment on Technical Standards

The term 'Technical standards' is not used in the context of the Canadian Legal Services Sector. A person who practises law in one of the 10 provinces or the 3 territories is bound to observe rules, regulations and by-laws made under the respective Law Society Act, to abide by ethical standards set out in Codes of Professional Conduct, and then to practise at a standard of competence appropriate to the transaction at hand. Given the unfamiliarity of technical standards in the context of the Canadian Legal Services Sector, it is suggested that this section be rewritten to refer to Rules of Professional Conduct and Standards of Competence

Discipline 25 Legitimate Objectives of Standards

Members shall ensure that measures relating to technical standards are prepared, adopted and applied only to fulfil legitimate objectives.

Discussion Canadian Law Societies have no difficulty establishing that the Rules of Professional Conduct and Standards of Competence fulfil legitimate objectives. These legitimate objectives are the protection of the public, ensuring quality of service, maintaining professional competence and maintaining the integrity of the legal profession.

Position Canadian Law Societies would adopt a Discipline similar to Discipline 25 of the Technical Standards Disciplines, subject to changing the language to refer to Rules of Professional Conduct and Standards of Competence.

Discipline 26 General Obligations on Trade Restrictive Measures

In determining whether a measure is in conformity with the obligations under [this] paragraph, account shall be taken of internationally recognized standards of relevant international organizations (1) applied by that Member.

(1) The term "relevant international organizations" refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.

Discussion There are no recognized relevant international organizations which set out internationally recognized standards for the legal profession, or recognized rules of professional conduct and standards of professional competence. As noted above in the main section of this paper, this is in part a result of the differing underlying legal systems. As a result, Foreign Legal Consultants must attorn to the standards of the jurisdiction in which they are licensed. This Discipline is therefore of no application to the legal services sector:

Position This Discipline should not be adopted for the Canadian Legal Services Sector, as it has no application to the legal profession.

Appendix B – Interjurisdictional Practice Protocol Provisions regarding Foreign Legal Consultants

Amendment to Legislation

- (1) The Benchers may permit a person who is qualified to practise law in a country other than Canada or in an internal jurisdiction of that country, to practise in the province the law of that country or internal jurisdiction, as the case may be, subject to any conditions, including the payment of a fee, required by the Benchers.
- (2) The provisions of this Act and the [Law Society Rules] respecting the competence, discipline and financial responsibility of members apply with the necessary changes and so far as they are applicable to a person given permission under subsection (1) to act as a Foreign Legal Consultant in the province, but the Benchers have no power to disbar that person.

Law Society Rule

Foreign Legal Consultants

- (1) In this Rule:

"Foreign Legal Consultant" means a person qualified to practise law in a country other than Canada or in an internal jurisdiction of that country, who practises in the province the law of that country or internal jurisdiction, as the case may be.

Application for Permit

- (2) A person may apply to the Society for a permit to act as a Foreign Legal Consultant in the province by delivering to it:
 - (a) a completed permit application in a form approved by the Benchers, and
 - (b) the permit fee fixed by the Benchers.

Issuance of Permit

- (3) The Society may issue to an applicant a permit to act as a Foreign Legal Consultant when satisfied that the applicant:
 - (a) is a member in good standing of the legal profession in his or her home country or in one of its internal jurisdictions,
 - (b) is a person of good character and repute,
 - (c) has practised the law of his or her home country or one of its internal jurisdictions for at least 3 complete years, or undertakes in writing to work, while acting as a Foreign Legal Consultant in the province, only under the direct supervision of a Foreign Legal Consultant from that country or internal jurisdiction who has satisfied the three-year practice requirement,

- (d) has delivered to the Society a written undertaking that he or she will:
 - (i) not accept, hold, transfer or in any other manner deal with funds which would, if accepted, held, transferred or dealt with by a member, constitute trust funds,
 - (ii) submit to the jurisdiction of the Society and will comply with the [*Legal Profession Act*], the Regulations, the Law Society Rules and the Professional Conduct Handbook, and
 - (iii) notify the Society promptly if he or she fails to complete satisfactorily whatever continuing legal education program is required of members of his or her home country or internal jurisdiction,
- (e) carries professional liability insurance or a bond, indemnity or other security:
 - (i) in a form and amount which is reasonably comparable with that maintained by the Society in its compulsory program, and
 - (ii) which specifically extends to services rendered by the Foreign Legal Consultant while acting as such in the province,
- (f) participates in a program or carries a fidelity bond or other security satisfactory to the Society and in an amount of at least [\$_____ (to be determined by each host governing body)], for the purpose of reimbursing persons who sustain a pecuniary loss as a result of the misappropriation or wrongful conversion by the Foreign Legal Consultant of money or other property entrusted to or received by the consultant in his or her capacity as a Foreign Legal Consultant in the province,

and the Society may, subject to subrule (4), attach conditions to the permit.

- (4) The [Credentials] Committee may fix conditions that may be attached to permits which are issued or renewed under this Rule.
- (5) Subject to subrule (6), a permit issued under subrule (3) is valid from the issue date shown on it until the last day of the same calendar month in the next year.
- (6) Notwithstanding subrule (5), a permit ceases to be valid if the Foreign Legal Consultant:
 - (a) is suspended as a result of proceedings under the [*Legal Profession Act*], or
 - (b) ceases to comply with any of the requirements of subrules (3) or

Qualification to Act as a Foreign Legal Consultant

- (7) Subject to subrule (8), a person may act as a Foreign Legal Consultant in the province only if he or she holds a valid permit under this Rule.

Dual Qualification

- (8) Subject to Appendix 4, subsection (4), a member of the Society who is also qualified to practise law in another country or in one of its internal jurisdictions need not obtain a permit to act as a Foreign Legal Consultant in the province, provided his or her activities as a consultant are insured

against in a form and amount which is at least reasonably comparable with that maintained by the Society in its compulsory program.

Marketing of Legal Services

- (9) A Foreign Legal Consultant, when engaging in advertising or any other form of marketing activity in the province:
- (a) shall use the term "Foreign Legal Consultant",
 - (b) shall state the country or internal jurisdiction in respect of which he or she is qualified to practise law, and the professional title used in that country or internal jurisdiction, and
 - (c) shall not use any designation or make any representation from which a recipient might reasonably conclude that he or she is a member of the Society.

Renewal of Permit

- (10) A Foreign Legal Consultant who intends to continue to act as such in the province shall, before his or her permit expires, apply to the Society for a renewal of the permit.
- (11) A renewal application shall include:
- (a) a completed permit renewal application in a form approved by the Benchers,
 - (b) evidence satisfactory to the Society that the applicant continues to comply with the requirements set out in subrules (3) and (4), and
 - (c) the renewal fee fixed by the Benchers.
- (12) The Society may issue to a Foreign Legal Consultant who has complied with the Act and these Rules a renewal permit.
- (13) Subject to subrule (14), a renewal permit issued under subrule (12) is valid for one year.
- (14) Subrule (6) applies to a permit which has been renewed under subrule (12).