



NOVA SCOTIA
BARRISTERS' SOCIETY

EMPLOYMENT EQUITY

IN THE LEGAL PROFESSION
IN NOVA SCOTIA



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This document was created by the Nova Scotia Barristers' Society to provide background information relating to employment equity in Nova Scotia.

In 1999, then-Premier Russell MacLellan assembled the Employment Equity Guidelines Committee, to review and consider employment equity in the legal profession. This group made recommendations to the Nova Scotia Department of Justice regarding employment equity and the commitments required in order to achieve equity within the profession.

Among these recommendations:

- creation of the Employment Equity Steering Committee (Steering Committee), to monitor and review employment equity in the legal profession
- creation of the mandatory *Policy on Employment Equity for Crown Law Agents*, requiring all legal workplaces acting as Crown Law Agents to collect certain data and to ensure the policy was available to all employees.

The Steering Committee was established in 2001, with representatives from the Department of Justice, Dalhousie Law School and the Nova Scotia Barristers' Society. That same year, the provincial government formally adopted the Policy on Employment Equity for Crown Law Agents. Since that time, the Steering Committee has been committed to improving employment equity in legal workplaces and addressing the historic under-representation of African Nova Scotian and Mi'kmaq lawyers in Nova Scotia.

The upcoming **Leadership Symposium on Employment Equity**, developed by the Steering Committee partners, is the first step in relaunching an employment equity strategy in Nova Scotia. We appreciate the leadership and support from the Minister of Justice in putting together this important day.

Moving forward, the Society and the Schulich School of Law at Dalhousie University will carry out a three-year strategy aimed at encouraging a renewed commitment to employment equity in legal workplaces.

Over the next three years, we will focus on the following initiatives:

YEAR ONE:

- gather information relating to current programs and practices
- encourage a commitment to employment equity in Nova Scotia's legal workplaces
- support nominations for the new CBA equity award

YEAR TWO:

- renew the process of employment equity data gathering
- assess how we are doing with employment equity in the legal profession
- inventory our own organizations and share this experience
- continue to highlight best practices and policies

YEAR THREE:

- increase participation of legal workplaces in data collection and policy and best practices adoption
- develop a strategy to share data and build long-term commitments

Our hope for this Symposium and the three-year strategy is to renew and strengthen a commitment to employment equity among legal workplaces across Nova Scotia.

Definition of Employment Equity

Employment equity has these essential components:

1. Removal of discriminatory barriers to employment and promotion. This includes elimination or modification of all human resource practices and systems, not otherwise authorized by law, which cannot be shown to be *bona fide* occupational requirements;
2. The introduction of positive policies and practices and the establishment of internal goals and timetables towards the achievement of employment equity by increasing the recruitment, hiring, training and promotion of designated group members¹;
3. Improvement in the participation of designated group members throughout the contractor's organization through hiring, training and promotion.²

¹ Designated group members include: women, members of visible minority communities, Aboriginal peoples and persons with a disability. Employment equity in the legal profession includes consideration of other underrepresented groups such as French Acadians and the lesbian, gay, bisexual and transgendered communities.

² Taken from the Dalhousie University Policy: *Employment Equity through Affirmative Action at Dalhousie: A Policy* (1989)

Why employment equity in the legal profession Nova Scotia?

The Marshall case

In 1971, Donald Marshall Jr., a 17-year-old Mi'kmaq youth, was arrested and wrongfully convicted of murdering an African Nova Scotian man. Mr. Marshall served 11 years in jail before his case was successfully appealed in 1983. In 1986, the Royal Commission on the Donald Marshall, Jr. Prosecution was established to investigate how and why this miscarriage of justice occurred, and to make recommendations to prevent such tragedies from happening in the future.

The Commission's report concluded that racism existed at every level within the justice system and included extensive recommendations for the various stages of the justice process. Below are excerpts from some of the recommendations related to employment equity:

Recommendation #9: Policy on Race Relations

We recommend that the Departments of the Attorney General and Solicitor General adopt and publicize a Policy on Race Relations that has, as its basis, a commitment to employment equity and the elimination of inequalities based on race in these Departments and their agencies, and the reduction of racial tensions between these Departments and the communities with which they interact.

Recommendation #10: Cabinet Committee on Race Relations

We recommend the establishment of a Cabinet Committee on Race Relations, which would include the Attorney General and Solicitor General. This Committee should meet regularly with representatives of visible minority groups, in order to assure the input of these groups in matters of criminal justice.

Recommendation #12: Appointment of judges and board members

We recommend that governments consider the needs of visible minorities by appointing qualified visible minority judges and administrative board members whenever possible.

Recommendation #13: Programs for law students, lawyers, judges

We recommend that the Schulich School of Law at Dalhousie University, the Nova Scotia Barristers' Society and the Judicial Councils support courses and programs dealing with legal issues facing visible minorities,

and encourage sensitivity to minority concerns for law students, lawyers and judges.

Recommendation #27: Liaison with the Bar

We recommend that a program of ongoing liaison between the Bar – prosecutors, private defence and legal aid – and Aboriginal peoples, both on and off reserve, be established through the Nova Scotia Barristers' Society. The Society must also educate its members concerning the special needs of First Nations clients.

While the recommendations of the Commission are varied, what unites them is the idea that, in order for the justice system to best serve racialized and Aboriginal people, racialized and Aboriginal people must be a part of that justice system in every respect. Yet while this report was published over 20 years ago, the goal of creating an equitable justice system and legal profession remains elusive.

In 1997, a report was commissioned, entitled *Pursuing the Law: The Experiences and Perceptions of African, East Indian, and Caucasian Canadians in Becoming Lawyers and in Practice in Nova Scotia*³. This report identified several key findings, including the impact of race and the racist attitudes of employer firms and the many negative experiences endured by African Nova Scotians and other racialized peoples. The report also recognized the absence of Aboriginal persons in law at that time.

It is clear that the legal profession continues to struggle with the issue of employment equity today. While some numerical increases have been made, representation of Aboriginal and African Nova Scotian lawyers continues to lag behind the available workforce.

In addition, members of underrepresented groups have experienced a disproportionate level of negative career experiences, discrimination and harassment. In 2003, the Canadian Bar Association revisited the Gender Equality Task Force report that had been published in 1993. Unfortunately, many of the issues of gender equality, as well as the low representation of racialized groups and other equity-seeking communities, remained present 10 years later, and still persist in Nova Scotia.⁴

3 Produced by the Nova Scotia Barristers' Society (1997)

4 Bertha Wilson, Touchstones for Change, Ten Years Into the Future - Where are we now after Touchstones, CBA, http://www.cba.org/cba/equity/pdf/Annual_Report_Equality_2003_2.pdf

The ethical case

Lawyers in Nova Scotia are bound by the Nova Scotia Barristers' Society *Code of Professional Conduct*. The *Code* sets out statements of principle followed by exemplary subrules and commentaries, which contextualize the principles enunciated. The principles are important statements of the expected standards of ethical conduct for lawyers. The *Code* assists in defining ethical practice and in identifying what is questionable ethically.

From these duties, we draw the imperative for a commitment to employment equity. Chapter two of the *Code* outlines the duties lawyers owe to their clients, including duties to be competent and provide quality of service. In particular, these two rules stress that lawyers must take care in communicating with their clients and possess the necessary knowledge, skills and capacities to carry out the work requested. Examined through an employment equity lens, this requirement goes beyond simply knowledge of the law, and suggests a need for a diversity of lawyers to meet the needs of a diverse Nova Scotian public.

In fact, failure to competently represent someone because of a lack of knowledge about their background, culture, religion or other factors can result in inaccurate or even negligent advice. For example, the *Indian Act* contains a number of specific provisions respecting ownership of lands on reserve, wills and estate, taxation and garnishment and a number of other issues that are specific to Aboriginal peoples. These provisions are paramount to provincial law and introduce different legal regimes on reserve in a number of areas that affect status Aboriginal people in their day-to-day lives, from holding property to dealing with separation and divorce, drafting a will, dealing with creditors and more. Failure to understand which laws apply in which situations could result in negligent legal advice.

Rule 5.03 (5) is also important when considering employment equity, as this rule indicates that lawyers must not discriminate against any person. This rule requires the removal of any recruitment or promotion practices that cause discriminatory barriers.

5.03 EQUALITY, HARASSMENT AND DISCRIMINATION

5.03 (1) The principles of human rights laws and related case law apply to the interpretation of this rule.

5.03 (2) A term used in this rule that is defined in human rights legislation has the same meaning as in the legislation.⁴

5.03 (3) A lawyer must not sexually harass any person.

5.03 (4) A lawyer must not engage in any other form of harassment of any person.

5.03 (5) **A lawyer must not discriminate against any person.**⁵

The business case

The value of a strong commitment to employment equity is not limited to fulfilling an ethical obligation. Employment equity has value from a business perspective. In our increasingly diverse society, the competent lawyer must have sound cultural competence and an appreciation of the differing experiences of racialized and Aboriginal peoples.

As examples: Aboriginal communities are also seeing significant population increases. From 2001 to 2006, the Aboriginal population in Canada increased by 20 per cent. Clearly, there are significant business incentives for a legal community knowledgeable in Aboriginal culture, Aboriginal rights and Aboriginal law.

In Nova Scotia, the Black Business Initiative (BBI) continues to strengthen and empower Black entrepreneurs, helping to ensure the growth of businesses owned by members of the African Nova Scotian community. As a result, there is a strong business case for lawyers who understand the specific needs and concerns of Black entrepreneurs and business owners in Nova Scotia.

Finally, Arabic is the second most frequently spoken language in Nova Scotia and Muslims make up the largest growing population in Canada. Statistics Canada predicts this population to grow by 160 per cent by 2017. Developing a more diverse group of lawyers, knowledgeable in many areas of law, is an effective strategy to service the needs of these prospective clients.

Increasing representation of equity-seeking communities in the profession will enable lawyers to effectively service the growing racial diversity in society, which will increase our collective success.

It will also be important to provide educational opportunities in cultural competence so lawyers can learn how to better work with people from diverse

5 The Nova Scotia Barristers' Society *Code of Professional Conduct* (January 1, 2012)

cultures. Cultural competence refers to an ability to interact effectively with people of different cultures and comprises four essential capacities:

1. an ability to understand our own cultural positions and how they differ from and are similar to others;
2. an understanding of the social and cultural reality in which we live and work and in which our clients live and work;
3. an ability to cultivate appropriate attitudes towards cultural difference; and
4. an ability to generate and interpret a wide variety of verbal and non-verbal responses⁶.

Building cultural competence learning opportunities into workplaces will be an important component of employment equity.

Programs and initiatives

Employment equity initiatives and programs have been developed in Nova Scotia and Canada to encourage the recruitment and retention of under-represented communities in the profession.

Since 2008, Burchells LLP has been offering The Burchells Summer Scholarship and Internship Program to qualifying African Nova Scotian and Aboriginal high-school students attending Citadel High. The goal of the program is to provide real-life work experience that will build confidence and expose the recipients to a variety of possible careers. Each summer, the selected candidate is paid for the six-week internship and receives a contribution towards tuition, as well as a clothing allowance to ensure the student has proper office attire. This type of program is one way to provide greater opportunity for African Nova Scotian and Aboriginal students to enter the legal profession, and helps to achieve a more diverse workforce in the future.

In 2007, the Nova Scotia Legal Aid Commission passed a resolution creating a policy on employment equity. Earlier policies and resolutions on equity matters dating back to 1991 were consolidated into the 2007 policy. The Commission recognizes that Indigenous Black and Mi'kmaq lawyers have historically been under-represented in the legal profession in Nova Scotia. Therefore, as part of its employment equity policy, the Commission commits to looking for opportunities to direct work to Indigenous Black and Mi'kmaq lawyers. It also states it will be proactive in seeking opportunities to hire Indigenous Black and Mi'kmaq law students and lawyers as articled clerks and staff lawyers.

6 Robert S. Wright, "Cultural Competence for Lawyers" (2010)

Best practices

The Canadian Bar Association *Equity and Diversity Guide and Resource Manual for Successful Law Firms and Legal Organizations* offers a guide to analyzing employment equity in law firms, describing areas in which barriers to employment of equity-seeking communities may be present. Problems may become apparent by determining the present employment of equity-seeking communities within the law office. This quantitative analysis can be enriched by investigating the experiences and satisfaction of employees during annual performance reviews and exit interviews. Current business, advancement and interview policies should be reviewed to determine if they reflect principles of employment equity. For instance, the Nova Scotia Barristers' Society cautions against using "fit" as a criterion for hiring because it may exclude individuals who differ from the customary candidate profile. More broadly, the norms and assumptions of the office should be scrutinized for practices that appear innocuous but may present barriers to equity-seeking communities (for instance, examining which days of religious or cultural significance are celebrated and which are not).

http://www.cba.org/cba/equity/pdf/Equity_and_Diversity_Guide_Eng.pdf
http://www.nsbs.org/sites/default/files/ftp/EQ120407_HiringIntrvwGuide.pdf

The Canadian Bar Association also recommends positive strategies to promote equality, which are reflected in the best practices of Ontario firms. These include emergency childcare and support for new parents; dedicated committees to promote equity and diversity; leadership training, mentoring and networking opportunities for equity-seeking communities; alternative and flexible work schedules; regular bulletins on equity and diversity; and sponsorship of community outreach programs designed to foster diversity in the community.

http://www.cba.org/cba/equity/pdf/Equity_and_Diversity_Guide_Eng.pdf
<http://www.blakes.com/english/equity.asp>
<http://www.stikeman.com/cps/rde/xchg/se-en/hs.xsl/12244.htm>
<http://www.osler.com/AboutUs/Diversity/>
http://www.mccarthy.ca/Fostering_Gender_Diversity.aspx

Appendix 1: Data on Equity

Representation of racialized and Aboriginal Lawyers in Ontario*

Years since call	% of all lawyers	Racialized lawyers as % of total lawyers	Aboriginal lawyers as a % of total lawyers	Lawyers with a disability, as a % of total lawyers
0-10	41%	11%	1.0%	1.1%
Over 10	59%	5.4%	0.8%	1.9%

*denotes the members in a specific category as a percentage of total lawyers. For instance, 10% of all lawyers in Manitoba are female with less the 5 years experience.

Representation of racialized and Aboriginal Lawyers in Nova Scotia

Years Since Call	% of all lawyers	African Nova Scotian (as %)	Racialized (as %)	Aboriginal (as %)	Lawyers with a disability (as %)
0-10 Yrs Since Call	34.1%	1.2%	0.6%	1.1%	0.5%
>10 Yrs Since Call	65.9%	0.9%	0.4%	0.8%	0.7%
Partner	23.5%	0.2%	0.05%	0.05%	0.1%
Associate	16.0%	0.5%	0.5%	0.3%	0.2%

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Seniority of equity-seeking communities †

	% of all lawyers	% of Racialized lawyers	% of Aboriginal lawyers
Ontario			
Partner	13%	6%	6%
Associate	13%	15%	11%
Nova Scotia			
Partner	23.5%	0.05%	0.05%
Associate	16.0%	0.5%	0.3%

† denotes the members in a specific category as percentage of the total number of members. For instance, 6% of all racialized lawyers are partners.

Data from:

www.nsbs.org/statistical-snapshot-0

<http://www.lawsociety.sk.ca/media/1642/ar2010.pdf>

www.lawsociety.mb.ca/publications/annual-reports/2011_Annual_Report.pdf/view

www.lawsociety.bc.ca/page.cfm?cid=2189&t>About-the-Profession

www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147485403

Appendix 2: Lived experience

The following are some personal accounts from a case study of individuals working in government, large law firms, smaller law firms and Schulich School of Law at Dalhousie University.

Reported obstacles for racialized peoples in the legal profession in Nova Scotia:

- feelings of isolation (in private firms)
- the notion that we are all the same
- the assumption that we all require the same type of response to racial diversity
- being looked at/treated differently in the workplace
- not being accepted

“It is important to have role models. Having so few makes it difficult for others to follow.”

When considering the comments below, it is important to keep intersectionality in mind and recognize that racialized and Aboriginal women may experience discrimination in relation to both their race and gender and, as a result, the discrimination they experience may be particularly acute.

What are some of the unique obstacles, barriers or challenges facing women practising law in Nova Scotia?

- a perception that women should be softer, and thus take on less difficult or adversarial files than male lawyers (may impede skill development and promotion)
- a tendency to give female lawyers more administrative, paper writing work, which means less billable work
- treatment from senior women lawyers, which includes an attitude of “if it was difficult for me, then it will be difficult for you too”
- work overload: the perception that a successful female lawyer needs to be the “everything” woman (i.e., mother, successful lawyer, volunteer, etc.); it seems to be those women who do it all receive recognition awards, while their male counterparts tend to be more one-dimensional.

“It is difficult to address the issue of harassment or bullying, as it is a small world in the legal profession and you don’t want to burn your bridges.”

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