



NOVA SCOTIA  
BARRISTERS' SOCIETY

## Draft Regulatory Objectives - 2014-05-16

### Purpose

Following the directions of Council, the Regulatory Objectives Working Group has created a series of guiding principles for the Society's work in all areas. These principles have been framed as Regulatory Objectives (ROs) or purposes, to use the language of the *Legal Profession Act* (s. 4(2)). In general, the rationale for ROs can be stated as follows:

ROs set out the purpose of lawyer regulation and its parameters and thus serve as a guide to inform those regulating the legal profession and those being regulated. For those affected by the particular regulation, they clarify the purpose of that regulation, and why it is enforced becomes clearer.

ROs assist in ensuring that the function and purpose of the particular legislation is clear. Thus, when the regulator administering the legislation is questioned—for example, about its interpretation of the legislation—the regulator can point to the regulatory objectives to demonstrate compliance with their function and purpose.

ROs can also help define the parameters of the legislation and of public debate about proposed legislation.

Finally, ROs may help the legal profession when it is called upon to negotiate with governmental and nongovernmental entities about regulations affecting legal practice. <sup>1</sup>

Each rationale above is relevant to the Society as it continues its work in Transforming Regulation and Governance. Once adopted, these ROs will assist in shaping the ultimate regulatory changes that occur. Council has already determined that our approach to regulation will be proactive and principles-based.\* These approaches are specifically addressed in proposed RO 6. Other ROs derive from the legislation, case law and the work of legal scholars, and reflect the work the Society is already doing or the approaches we have brought to our work. In putting them in writing and adopting them, they will become authoritative.

Comments on the proposed ROs are invited, so that the public and the profession have input into the ultimate regulatory regime that will govern the legal profession.

\*as opposed to detailed, prescriptive rules aimed at reacting to problems

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<sup>1</sup> Laurel S. Terry, Steve Mark and Tahlia Gordon, *Adopting Regulatory Objectives for the Legal Profession*, 80 *Fordham L. Rev.* 2685 (2012) at p. 2734

## ***1. Protect those who use and receive legal services\****

The Society's primary mandate is to protect the public. <sup>2</sup> Courts have repeatedly emphasized and supported this critical role that law societies fulfill in maintaining independence of the legal profession through the creation and enforcement of standards of practice. <sup>3</sup>

These standards are designed primarily to protect clients of lawyers. "Client protection is almost universally recognized as one of the key reasons why lawyer regulation exists."<sup>4</sup>

"Self-regulation is undertaken in the public interest to ensure that legal services are provided to the public ethically and competently by only those persons qualified to do so."<sup>5</sup>

It is important that the Society recognizes and protects those who use and receive legal services, and the many forms in which legal services can now be provided and delivered. This goes beyond the way traditional lawyer-client relationships have been created, and beyond traditional retainers and client meetings in brick-and-mortar law firms.

The Society has a duty to protect those who use and receive legal services by ensuring the competence and honesty of its members. <sup>6</sup> "Protection" places a significant onus on the Society to establish appropriate and effective standards for practice; to identify measureable outcomes for members with the goal of promoting competent and ethical practice by members; to understand current risks that may create barriers both to members in achieving these objectives and to the Society in fulfilling this key mandate; and to enforce adherence to these standards in the public interest. <sup>7</sup>

This Regulatory Objective requires that the Society, at a minimum, sets standards and implements mechanisms including articulation of best practices to achieve the mandate set out in Sections 4 and 33 of the LPA for 'entry and conduct regulation' <sup>8</sup> by means which allow for measureable achievement, with a priority on protection of those who use or receive legal services from members. This requires that the Society strives to:

- Remain current with changes in the legal services marketplace that may impact lawyers in Nova Scotia,
- Be aware of the expectations of those who use or receive legal services,
- Demonstrate commitment to educating and assisting lawyers in achieving the goals of competent and ethical practice, and
- Adopt clear and transparent means for enforcing adherence to these standards in the interests of those who use or receive legal services.

\*it remains a future task of Council to confirm the scope of regulation in terms of applying to 'lawyers', 'law firms', and/or 'legal services'

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<sup>2</sup> *Legal Profession Act*, S.N.S. 2004, c. 28 as am., Sections 4 and 33

<sup>3</sup> *Stewart McKelvey Stirling Scales v. Barristers' Society (Nova Scotia)*, 2005 NSSC 259; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869; *Law Society of Manitoba and Savino* (1983), 1 DLR (4<sup>th</sup>) 285.

<sup>4</sup> Laurel S. Terry, Steve Mark and Tahlia Gordon, *Adopting Regulatory Objectives for the Legal Profession*, 80 *Fordham L. Rev.* 2685 (2012) at p. 2734.

<sup>5</sup> Alice Woolley, Richard Devlin, Brent Cotter, and John M. Law, *Lawyers' Ethics and Professional Regulation*, 2<sup>nd</sup> ed. (Markham: Lexis Nexis, 2012, at page 67 ['Woolley, Devlin, Cotter and Law']

<sup>6</sup> *Finney v. Barreau du Quebec*, 2004 SCC 36.

<sup>7</sup> *Legal Profession Act*, S.N.S. 2004, c. 28 as am., Section 33

<sup>8</sup> Woolley, Devlin, Cotter and Law, at p. 76

## **2. Promote the rule of law and the public interest in the justice system**

“A notion of sustainable professionalism must maintain meaningful room for protection of the public interest ... .”<sup>9</sup>

The legal profession plays a critical role in securing the rule of law. As a regulator, the Society must carry out its duties in a manner consistent with the rule of law, taking steps to support the rule of law and encouraging lawyers to do the same.<sup>10</sup>

This Regulatory Objective is multi-faceted, and speaks to the broader responsibility the legal profession and the regulator have to occupy a pivotal place in promotion of the rule of law, and promoting the public interest in all aspects of the justice system. For purposes of this Objective, the ‘justice system’ extends to the many ways to resolve disputes and secure just outcomes within and outside our Court system.

Protection of the public interest necessarily requires an independent Bar in order to protect individual rights and civil liberties against incursion from any source.<sup>11</sup> Protection of the public interest is “one of the primary justifications for lawyer regulation.”<sup>12</sup>

“One of the great and often unrecognized strengths of Canadian society is the existence of an independent bar. Because of that independence, lawyers are available to represent popular and unpopular interests, and to stand fearlessly between the state and its citizens.”<sup>13</sup>

This Objective requires that the Society maintains its independence, and carries out its functions through a regulatory regime that is open, transparent, clear, and fair. The Society must ‘make good’ on its promise to protect the public and ensure that lawyer conduct encourages public respect for the administration of justice.<sup>14</sup> The Society has a role to play in educating the public about avenues within the justice system that may be available to them.

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<sup>9</sup> Woolley, Devlin, Cotter and Law, at p. 60

<sup>10</sup> Legal Services Board, Regulatory Objectives 2007, at p. 4; *Legal Profession Act*, S.N.S. 2004, c. 28 as am., Sections 4(1) and 4(2)(d)

<sup>11</sup> *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869

<sup>12</sup> Laurel S. Terry, Steve Mark and Tahlia Gordon, *Adopting Regulatory Objectives for the Legal Profession*, 80 *Fordham L. Rev.* 2685 (2012) at p. 2735.

<sup>13</sup> *Omineca Enterprises Ltd. v. British Columbia (Minister of Forests)* (1993), 85 BCLR (2d) 85 at para. 53. See also Lord Bingham, *The Rule of Law*, (London: Allen Lane, 2010) at pp. 92-93.

<sup>14</sup> *Lawyers’ Ethics and Professional Regulation*, at p. 60-61, and Section 5.6-1 of the *Code of Professional Conduct* (NS)

### ***3. Promote access to legal services and the justice system***

Rules governing the ethical duties of Canadian lawyers are premised on the existence of the duty to foster access to justice.<sup>15</sup> This includes a “general obligation for each lawyer to contribute to the availability of legal services.”<sup>16</sup>

As the regulator that sets and enforces these Rules and standards, we have a concomitant duty to facilitate and educate, or ‘promote’ access by the public to legal services specifically, as well as access to the justice system more broadly. Access to justice in the broadest sense has been increasingly recognized as an issue of critical importance for law societies to address.<sup>17</sup>

“Absent access to justice, law appears to be available for only the powerful or the wealthy. We live in a country where the rule of law is fundamental to our belief in a civilized society. Where citizens have little or no access to law to enable them to understand and, if necessary, advance our rights, their confidence in a just society based on law will be eroded.”<sup>18</sup>

Promoting access to legal services necessitates promoting access to affordable legal services, and assisting with the provision of widely available and accessible legal services. It involves empowering those who use and receive legal services, as well as the public, to make informed decisions about what services to access, by what means, and at what cost.<sup>19</sup> The Society has an important role to play in this regard, as affirmed in Council’s current Strategic Framework. The Society must strive to create a regulatory regime which is open to and supports new ways of offering legal services. Currently, this may include unbundled legal services, virtual law firms, alternative business structures, use of technology and outsourcing of legal services in order to facilitate affordability, while achieving consistent good quality work.<sup>20</sup>

Promoting access to the justice system obligates the Society to make intentional and ongoing efforts in community education, outreach and engagement to create awareness of and facilitate access to all components of the justice system. This also requires ongoing engagement with and facilitation of discussions among those involved in the administration of justice, in the public interest.

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<sup>15</sup> Alice Woolley, *Imperfect Duty: A Lawyers’ Obligation to Foster Access to Justice*, (2008) 45:5 Alberta L. Rev. 107, at page 1

<sup>16</sup> *Code of Professional Conduct (NS)*, Section 4.1-1

<sup>17</sup> Adam Dodek, *Canadian Legal Ethics: Ready for the Twenty-First Century at Last*, (2008) 46 Osgoode Hall L.J. 1, at pp. 16 – 17; The Right Honourable Beverly McLachlin, P.C., “The Challenges We Face”; and Justice T. Cromwell, *Access to Civil & Family Justice: A Roadmap for Change* (October 2013).

<sup>18</sup> Brent Cotter, *Thoughts on a Coordinated and Comprehensive Approach to Access to Justice in Canada*, (2012) 63 U.N.B.L.J. 54 at p. 67.

<sup>19</sup> Laurel S. Terry, Steve Mark and Tahlia Gordon, *Adopting Regulatory Objectives for the Legal Profession*, 80 Fordham L. Rev. 2685 (2012) at p. 2738; and draft *Legal Profession National Law 2011*, ch.1, pt.1, s. 1.1.3 (Austl.)  
<sup>20</sup> Section 3.1 of the *Code of Professional Conduct (NS)*

#### **4. Establish required standards for professional responsibility and competence in the delivery of legal services**

This Regulatory Objective occupies a central place in the Society’s legislative purpose and mandate. <sup>21</sup>

It is well established at law that a Law Society plays a unique and essential role in the independent regulation of lawyer conduct and public protection. <sup>22</sup> “Self-regulation is undertaken in the public interest to ensure that legal services are provided to the public ethically and competently by only those persons qualified to do so.” <sup>23</sup>

The Society’s role in this regard focuses primarily on ‘entry and conduct regulation’ (referenced in RO1), and fulfillment of our purpose as set out in ss. 4(1) and 4(2) of the *Legal Profession Act*, as well as Part 9 of the Regulations. In addition, it is important to recognize and address cultural practices and norms within firms and communities which can also impact lawyer competence and conduct. <sup>24</sup> There is therefore a role for the Society to play in creating a regulatory regime that encourages lawyers and firms to embed ethical behaviour throughout their practices and careers.

For the Society, the establishment of standards in this area goes well beyond adoption of the rules of conduct. It requires strategic and ongoing education for members, and the articulation of standards and best practices which should apply to law firms, legal entities as well as individual lawyers. This also requires a proactive and risk-based regulatory approach including the provision of tools and identification of resources to assist lawyers in achieving and maintaining an appropriate level of competence. Establishing these standards in relation to the delivery of legal services reinforces the need for the Society to regulate professional responsibility and competence wherever lawyers practice law and by whatever means legal services are provided.

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<sup>21</sup> *Legal Profession Act*, S.N.S. 2004, c. 28 as am., Section 4(1); Laurel S. Terry, Steve Mark and Tahlia Gordon, *Adopting Regulatory Objectives for the Legal Profession*, 80 *Fordham L. Rev.* 2685 (2012) at p. 2739

<sup>22</sup> *Skogstad v. The Law Society of British Columbia*, 2007 BCCA 310; *Andrews v. Law Society of British Columbia*, [1989 CanLII 2 \(SCC\)](#), [1989] 1 S.C.R.; *Canada (Attorney General) v. Law Society of British Columbia*, [1982 CanLII 29 \(SCC\)](#), [1982] 2 S.C.R. 307; *Finney v. Barreau du Québec*, [2004 SCC 36 \(CanLII\)](#), [2004] 2 S.C.R. 17, 2004 SCC 36; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991 CanLII 26 \(SCC\)](#), [1991] 2 S.C.R. 869

<sup>23</sup> Woolley, Devlin, Cotter and Law, at p. 67

<sup>24</sup> *Ibid*

5. ***Promote diversity, inclusion, substantive equality and freedom from discrimination in the delivery of legal services and the justice system***

The existence of discrimination in the legal profession has been recognized by many levels of Courts and adjudicative bodies. 25

Protection of those who use and receive legal services (RO1), promotion of the rule of law and the public interest in the justice system (RO2), and promotion of access to legal services and the justice system(RO3) all require a recognition and clear understanding of the ‘public’ and those who use and receive legal services.

The public and clients in Nova Scotia represent a rich and diverse fabric of cultures, races, and backgrounds. In order to understand and properly protect and promote the public interest, the Society must show leadership in this regard by promoting a diverse and inclusive legal profession, and being able itself and with members to identify, respect and promote the interests of the public and clients in a culturally competent and non-discriminatory manner. 26

“Substantive equality is achieved when one takes into account, where necessary, the differences in characteristics and circumstances of minority communities and provides services with distinct content or using a different method of delivery to ensure that the minority receives services of the same quality as the majority. This approach is the norm in Canadian law.” 27

“Inclusion is a state of being valued, respected and supported. It’s about focussing on the needs of every individual and ensuring the right conditions are in place for each person to achieve his or her potential. Inclusion should be reflected in an organization’s culture, practices and relationships that are in place to support a diverse workforce.” 28

A diverse legal profession is one that reflects and is representative of the full spectrum of the public it serves. On this foundation, a diverse, inclusive and non-discriminatory legal profession can be created, supported and maintained. Through engagement with communities, forming strategic partnerships and providing education the Society has the ability to help eliminate barriers and prevent discrimination. 29 This has been reinforced for many years in the *Code of Conduct*. 30 Tied to this ethical duty, are the duties to provide competent, good quality of service, and to assist in making legal services available. 31

Council has reinforced the Society’s role in this important area in its current Strategic Framework.

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25 For example, *Gichuru v. Law Society (British Columbia)*, 2011 BCHRT 185; *Law Society of Upper Canada v. Selwyn Milan McSween*, 2012 ONLSAP 3

26 Lucinda Vandervort, *Access to Justice and the Public Interest in the Administration of Justice*, 63 U.N.B.L.J. 125

27 <https://www.tbs-sct.gc.ca/olo/caldech/analytical-analyse-eng.asp>

28 <http://www.rbc.com/diversity/what-isdiversity.html>

29 Barbara Hall, Chief Commissioner for the Ontario Human Rights Commission, see <http://attorneygeneral.jus.gov.on.ca/english/news/2008/20080630-ohrc-nr.asp>

30 Section 6.3 of the *Code of Professional Conduct* (NS)

31 *Ibid*, Section 4.1; see also Alice Woolley, *Imperfect Duty: A Lawyers’ Obligation to Foster Access to Justice*, (2008) 45:5 Alberta L. Rev. 107

## 6. *Regulate in a manner that is efficient, transparent, and proportional*

The Society's governing statute, the *Legal Profession Act*, clearly articulates 'what' the Society is mandated to do in the public interest, but it does not state 'how'. There is little controversy that a regulator should carry out all its functions in a manner that complies with good regulation principles.<sup>32</sup>

"For regulation to be effective, it must include a constant questioning or assessment of the effectiveness of the regulation in terms of those that are regulated (lawyers) and those affected by the regulation (clients, consumers, and the general community). Regulatory objectives can have the effect of making this clear to the regulators so as to enhance their role in promoting professionalism, the rule of law and client protection."<sup>33</sup>

The Society's values, as articulated by Council, are commitment to excellence, fairness, respect, integrity, visionary leadership, diversity and accountability. These values underlie all aspects of the Society's work.<sup>34</sup>

By articulating clear values and the manner in which the Society will carry out its mandated functions as well as related programs and services, the Society is articulating expectations for its own performance, and should be expected to be held accountable for achieving these objectives by Council as well as the public. It is recognized that principles of good regulation may be somewhat fluid, and that the legal services marketplace will continue to evolve. Therefore, one of the Society's duties, as noted above, is to constantly question and measure whether it is carrying out its regulatory function efficiently, in a transparent and consistent manner, and in a way that is properly focused on risk and public protection while remaining proportional in response to these risks.<sup>35</sup>

"Through Better Regulation, government employees worked to help business be more competitive by creating simpler, more effective regulation, and reducing administrative burden without compromising protection for the public."<sup>36</sup> This speaks to the need for the Society to implement a principles-based regulatory regime which maintains a focus on public protection, while striving to reduce the regulatory burden on lawyers and law firms.

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32 Laurel S. Terry, Steve Mark and Tahlia Gordon, *Adopting Regulatory Objectives for the Legal Profession*, 80 *Fordham L. Rev.* 2685 (2012) at p. 2739

33 *Ibid*

34 Nova Scotia Barristers' Society 2013-2016 Strategic Framework, [www.nsbs.org](http://www.nsbs.org)

35 Cary Coglianese, *Measuring Regulatory Performance: Evaluating the Impact of Regulation and Regulatory Policy*, Organization for Economic Cooperation and Development, Expert Paper No. 1, August 2012; Claudio Radaelli and Oliver Fritsch, *Measuring Regulatory Performance: Evaluating Regulatory Management Tools and Programmes*, Organization for Economic Cooperation and Development, Expert Paper No. 2, July 2012

36 "Better Regulation 2005-2010 Summary Report. Costs Less. Accomplishes More." Province of Nova Scotia, 2011

## APPENDIX A

### Resources

*Legal Profession Act*, S.N.S. 2004, c 28, as am.

...

#### **Purpose of Society**

**4** (1) The purpose of the Society is to uphold and protect the public interest in the practice of law.

(2) In pursuing its purpose, the Society shall

- (a) establish standards for the qualifications of those seeking the privilege of membership in the Society;
- (b) establish standards for the professional responsibility and competence of members in the Society;
- (c) regulate the practice of law in the Province; and
- (d) seek to improve the administration of justice in the Province by
  - (i) regularly consulting with organizations and communities in the Province having an interest in the Society's purpose, including, but not limited to, organizations and communities reflecting the economic, ethnic, racial, sexual and linguistic diversity of the Province, and
  - (ii) engaging in such other relevant activities as approved by the Council

*Legal Profession Act*, S.N.S. 2004, c 28, as am.

...

#### **Protection of public and integrity of profession**

**33** The purpose of Sections 34 to 53 is to protect the public and preserve the integrity of the legal profession by

- (a) promoting the competent and ethical practice of law by the members of the Society;
- (b) resolving complaints of professional misconduct, conduct unbecoming a lawyer, professional incompetence and incapacity;
- (c) providing for the protection of clients' interests through the appointment of receivers and custodians in appropriate circumstances;
- (d) addressing the circumstances of members of the Society requiring assistance in the practice of law, and in handling or avoiding personal, emotional, medical or substance abuse problems; and
- (e) providing relief to individual clients of members of the Society and promoting the rehabilitation of members.

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*Code of Professional Conduct (NS)*, Section 4.1: Making Legal Services Available

#### **Making Legal Services Available**

**4.1-1** A lawyer must make legal services available to the public efficiently and conveniently and, subject to rule 4.1-2, may offer legal services to a prospective client by any means.

#### **Commentary**

[1] A lawyer may assist in making legal services available by participating in Legal Aid and lawyer referral services and by engaging in programs of public information, education or advice concerning legal matters.

[2] As a matter of access to justice, it is in keeping with the best traditions of the legal profession to provide services pro bono and to reduce or waive a fee when there is hardship or poverty or the client or prospective client would otherwise be deprived of adequate legal advice or representation. The Society encourages lawyers to provide public interest legal services and to support organizations that provide services to persons of limited means.

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*Code of Professional Conduct (NS)*, Section 5.6: The Lawyer and the Administration of Justice

**Encouraging Respect for the Administration of Justice**

**5.6-1** A lawyer must encourage public respect for and try to improve the administration of justice.

*Code of Professional Conduct (NS)*, Section 6.3: Equality, Harassment and Discrimination

Adam Dodek, *Canadian Legal Ethics: Ready for the Twenty-First Century at Last*, (2008) 46 Osgoode Hall L.J. 1.

Adam M. Dodek & Jeffrey G. Hoskins, *Canadian Legal Practice: A Guide to the 21st Century*, looseleaf (Markham: LexisNexis, 2009) at Ch. 22

Alice Wooley, *Imperfect Duty: Lawyers' Obligation to Foster Access to Justice*, (2008) 45:5 Alberta L. Rev. 107

Alice Wooley, Richard Devlin, Brent Cotter, and John M. Law, *Lawyers' Ethics and Professional Regulation*, 2<sup>nd</sup> ed. (Markham: Lexis Nexis, 2012)

Brent Cotter, *Thoughts on a Coordinated and Comprehensive Approach to Access to Justice in Canada*, (2012) 63 U.N.B.L.J. 54 at p. 67

Charles Wolfram, *Modern Legal Ethics* (St. Paul, MN: West Publishing, 1986) at 79:

Courts assert that the underlying purpose of disciplining lawyers is a broadly social one. The purpose is not to punish offending lawyers but to protect the public, the bar, and legal institutions against lawyers who have demonstrated an unwillingness to comply with minimal professional standards. There is reason to think, however, that a strong motivation for lawyer discipline is to reassure a doubtful public that notorious instances of lawyer depredation are being handled appropriately.

Competition Bureau Report, *Self-regulated professions: Balancing competition and regulation* (2007), pages 61-79

*Canada (AG) v. Law Society (BC)*, [1982] 2 SCR 307 at 335-336:

The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally. The

uniqueness of position of the barrister and solicitor in the community may well have led the province to select self-administration as the mode for administrative control over the supply of legal services throughout the community.

E. Iacobucci and M. Trebilcock, *Self-Regulation and Competition in Ontario's Legal Services Sector: An Evaluation of the Competition Bureau's Report on Competition and Self-Regulation in Canadian Professions*, (September 15, 2008)

### **Courts and Tribunals Must Be Accessible to and Reflective of the Society they Serve**

The Canadian justice system is currently served by excellent lawyers, judges, courts and tribunals. The problem is not their quality, but rather their accessibility. While many of the goals and recommendations considered elsewhere in this report focus on the parts of the justice system that lie outside of formal dispute resolution processes (see e.g. Fig. 1), there is still a central role for robust and accessible public dispute resolution venues. Justice — including a robust court and tribunal system — is very much a central part of any access to justice discussion. However, to make courts and tribunals more accessible to more people and more cases, they must be significantly reformed with the user centrally in mind.

While maintaining their constitutional and administrative importance in the context of a democracy governed by the rule of law, courts and tribunals must become much more accessible to and reflective of the needs of the society they serve. Put simply, just, creative and proportional processes should be available for all legal problems that need dispute resolution assistance

“Fostering Employment Equity and Diversity in the Nova Scotia Legal Profession”: 2000, Employment Equity Guidelines Committee Report

*Fortin v. Chrétien*, 2001 SCC 45

17 The special rules governing the practice of the legal profession are justified by the importance of the acts that advocates engage in, the vulnerability of the litigants who entrust their rights to them, and the need to preserve the relationship of trust between advocates and their clients. In *Attorney General of Canada v. Law Society of British Columbia*, [1982 CanLII 29 \(SCC\)](#), [1982] 2 S.C.R. 307, at p. 335, Estey J. explained as follows the need to regulate the professional activity of members of the Bar (cited with approval in *Pearlman v. Manitoba Law Society Judicial Committee*, [1991 CanLII 26 \(SCC\)](#), [1991] 2 S.C.R. 869, at p. 888) as follows:

There are many reasons why a province might well turn its legislative action towards the regulation of members of the law profession. These members are officers of the provincially-organized courts; they are the object of public trust daily; the nature of the services they bring to the public makes the valuation of those services by the unskilled public difficult; the quality of service is the most sensitive area of service regulation and the quality of legal services is a matter difficult of judgment.

As persons in whom public trust is invested, advocates play a very special role in the community when they perform these acts reserved to them (see *R. v. McClure*, [2001 SCC 14 \(CanLII\)](#), [2001] 1 S.C.R. 445, 2001 SCC 14, at paras. 2 and 31). It is the vocation of the Barreau, which, so to speak, makes up for litigants' lack of knowledge and oversees the quality of the professional services provided, to preserve this relationship of trust.

18 In doing this, the Barreau tends to protect the public not only against improper acts by its members, but also against non-members who provide no assurance of competence, integrity, confidentiality or independence. The [Code of ethics of advocates](#) and the provisions relating to fees or defalcation of amounts of money and to the management of complaints by the committee on discipline apply only to members of the Barreau. That is why it is important to deter others from performing acts that are reserved for advocates, by applying penalties...

Gavin MacKenzie, *Regulating Lawyer Competence and Quality of Service*, (2008) 45:5 Alberta L. Rev. 143.

Gavin MacKenzie, *Lawyers and Ethics: professional responsibility and discipline*, 3d ed. (Toronto: Thomson Carswell, 2001) at Part II

*Gichuru v. Law Society (British Columbia)*, 2011 BCHRT 185

219 I think it is fair to take notice that there remains a significant level of racial discrimination within Canadian society as a whole. Further, given the extent of the research and writing on this issue by Law Societies across Canada, and by the Canadian Bar Association, it is fair to take notice that there remains a significant level of racial discrimination within the legal profession. As highlighted in a number of the reports relied on by Mr. Gichuru, discrimination of this nature can be distinguished from outright racism and is much more likely to be subtle and systemic, premised on the notion of "fit" or appropriateness. This reality makes it more difficult for the issues to be addressed in the context of a human rights complaint, a reality which has frequently been recognized by the Tribunal: see, for example, *Pinazo v. Neverblue Media Inc.*, [2007 BCHRT 4](#), paras. 20-22; *Monsson v. Nacel Properties Ltd.*, [2006 BCHRT 543](#) (B.C. Human Rights Trib.), paras. 28-30.

H.W. Arthurs, *The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?*, (1995) 33 Alberta L. Rev. 800.

Laurel S. Terry, *Trends in Global and Canadian Lawyer Regulation*, (2013) 76 Sask. L. Rev. 145.

*Law Society of Upper Canada v. Selwyn Milan McSween*, 2012 ONLSAP 3  
[dissenting reasons for decision]

[78] We are not absolved of our responsibility to address these issues simply because we have chosen not to make ourselves aware of the extent of this problem or its causes. Examining race as a potentially mitigating factor is of particular importance for Law Society disciplinary hearings, because we have no institutional information to assure us that inequality has not impacted the regulatory process.

[79] There is evidence in the record to show that Mr. McSween faced challenges typically associated with racism, which is unfortunately typical of the experience of some black law students and lawyers. See paras. 6, 35, *supra*.

#### ANALYSIS

[80] The hearing panel erred by failing to give sufficient weight to the systemic disadvantage experienced by Mr. McSween as a lawyer of Afro-Caribbean descent. His employment and articling history of repeated rejection despite his impressive academic achievement signal this and can hardly be explained except on the basis of racial and age discrimination. The hearing panel failed to recognize this disadvantage as a mitigating factor.

[81] In its Reasons [2010 ONLSHP 111 \(CanLII\)](#), [2010 ONLSHP 111], the hearing panel stated at para. 19:

The Panel found, following a contested hearing, that Mr. McSween was a knowing participant in fraudulent activities that occurred over several months. While we have no doubt that Mr. McSween is remorseful, his case does not raise circumstances that would allow us to simply permit him to surrender his licence. Mr. McSween contested the hearing, blamed others, and continues, to an extent, to try to deflect blame for his actions. While we have given weight to his character references, the letters provided were from people who had not been given our earlier Reasons. The mitigating factors put forward by Mr. McSween are, quite simply, not exceptional or extraordinary enough to justify deviating from the presumptive penalty, revocation.

[82] Simply put, this is an error. Mitigating factors such as inequality need not be “exceptional”; indeed, they are commonplace. Nor must the effect of inequality be “extraordinary” in any degree: any effect of inequality must be weighed unless it is trivial or insubstantial. The hearing panel did not take into account the difficulties facing Afro-Caribbean Canadian lawyers and this particular lawyer. Nor does the panel weigh the effects of structural inequality on the lives of black lawyers, or on Mr. McSween.

[83] Taking into account all the mitigating factors in this case (including the unique difficulties faced by those who join the profession when they are older), it is appropriate to allow Mr. McSween to surrender his licence to practise law.

[84] Like sentencing judges, our hearing panels determine which disposition options are appropriate and just, and they should, where possible, use those “which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.” *Gladue, supra* at para. 65. It is only right that, with a proper evidentiary foundation, we give mitigating effect to systemic discrimination when it impacts the misconduct and influences the solicitor’s actions.

Lord Bingham, *The Rule of Law*, (London: Allen Lane, 2010) at pp. 92-93:

Scarcely less important than an independent judiciary is an independent legal profession, fearless in its representation of those who cannot represent themselves, however unpopular or distasteful their case may be.

Lucinda Vandervort, *Access to Justice and the Public Interest in the Administration of Justice*, 63 U.N.B.L.J. 125 at 129:

The specific outcome in a case may affect their interests, the ruling in the case may entail reinterpretation of a law of general applicability and affect them because they are similarly situated, or the case may be relied on as a case precedent in a subsequent case to which they are a party. Thus, the effects of lack of representation of one or more parties in one case may have a broad societal impact. Moreover, where the members of an identifiable group in Canadian society are disproportionately unrepresented or under-represented before the courts, laws regulating activities and issues affecting members of that group will often be interpreted and applied without the benefit of rigorous analysis in an adversarial process. This appears to describe the circumstances of a number of identifiable groups in Canada, is contrary to the collective public interest, and raises equality issues under s. 15 of the Charter and international human rights conventions. The failure of government to ensure that adequate legal aid or other forms of legal representation are available to women, children, aboriginal persons, and members of other vulnerable groups in Canada for the purpose of protecting and enforcing their legal rights continues to be the subject of negative comment by the Committee on the Elimination of Discrimination Against Women.

*Nova Scotia Human Rights Act*, RSNS 1989, c 214

...

**Purpose of Act**

2 The purpose of this Act is to

- (a) recognize the inherent dignity and the equal and inalienable rights of all members of the human family;
- (b) proclaim a common standard for achievement of basic human rights by all Nova Scotians;
- (c) recognize that human rights must be protected by the rule of law;
- (d) affirm the principle that every person is free and equal in dignity and rights
- (e) recognize that the government, all public agencies and all persons in the Province have the responsibility to ensure that every individual in the Province is afforded an equal opportunity to enjoy a full and productive life and that failure to provide equality of opportunity threatens the status of all persons; and
- (f) extend the statute law relating to human rights and provide for its effective administration.

...

*Omineca Enterprises Ltd. V. British Columbia (Minister of Forests)* (1993), 85 BCLR (2d) 85

*Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869 at 886:

It is appropriate at this juncture to mention the legislative rationale behind making a profession self-governing. The Ministry of the Attorney General of Ontario produced a study paper entitled *The Report of the Professional Organizations Committee* (1980) which, I believe, provides a helpful analysis of this rationale. The following extract from p. 25 is apposite:

In the government of the professions, both public and professional authorities have important roles to play. When the legislature decrees, by statute, that only licensed

practitioners may carry on certain functions, it creates valuable rights. As the ultimate source of those rights, the legislature must remain ultimately responsible for the way in which they are conferred and exercised. Furthermore, the very decision to restrict the right to practise in a professional area implies that such a restriction is necessary to protect affected clients or third parties. The regulation of professional practice through the creation and the operation of a licensing system, then, is a matter of public policy: it emanates from the legislature; it involves the creation of valuable rights; and it is directed towards the protection of vulnerable interests.

On the other hand, where the legislature sees fit to delegate some of its authority in these matters of public policy to professional bodies themselves, it must respect the self-governing status of those bodies. Government ought not to prescribe in detail the structures, processes, and policies of professional bodies. The initiative in such matters must rest with the professions themselves, recognizing their particular expertise and sensitivity to the conditions of practice. In brief, professional self-governing bodies must be ultimately accountable to the legislature; but they must have the authority to make, in the first place, the decisions for which they are to be accountable. [Emphasis added.]

The authors noted the particular importance of an autonomous legal profession to a free and democratic society. They said at p. 26:

Stress was rightly laid on the high value that free societies have placed historically on an independent judiciary, free of political interference and influence on its decisions, and an independent bar, free to represent citizens without fear or favour in the protection of individual rights and civil liberties against incursions from any source, including the state.

On this view, the self-governing status of the professions, and of the legal profession in particular, was created in the public interest.

*Pierce v. B.C. (The Law Society of)*, 1993 CanLII 765 (BC SC)

In my view the public interest or the best interest of the public is capable of being given a constant, settled or workable meaning. When the definition of conduct unbecoming is read in context, the best interest of the public clearly refers to the interest of the public in matters of conduct and competence. There are in existence guidelines on the question of what constitutes the public interest. The guidelines discussed provide a basis for legal debate within which the benchers are able to balance competing interests. It follows that the phrase "best interest of the public" is not impermissibly vague. The benchers are not entitled, as suggested by the petitioner, to pursue their "personal predilections". Legal debate can occur within the framework of the guidelines defining the public interest. There is no danger of a "standardless sweep" when the benchers consider whether the conduct of a member is contrary to the best interests of the public. The same framework also provides guidance for legal debate when considering the definition of "conduct unbecoming" in its broader aspects.

*Skogstad v. The Law Society of British Columbia*, 2007 BCCA 310

...

[8] The Law Society draws the connection between the protection of solicitor-client privilege and the fundamental importance to our legal system of the independence of the

legal profession from state interference (*Andrews v. Law Society of British Columbia*, [1989 CanLII 2 \(SCC\)](#), [1989] 1 S.C.R. 143 at 187-88, *per* McIntyre J. dissenting in part; *Canada (Attorney General) v. Law Society of British Columbia*, [1982 CanLII 29 \(SCC\)](#), [1982] 2 S.C.R. 307 at 335-36). It makes the point that if lawyers were subject to regulation by the state and the state had access to privileged information during an investigation of a lawyer, solicitor-client privilege would be a hollow right. The independence of the legal profession is in turn protected by self-regulation. (*Finney v. Barreau du Québec*, [2004 SCC 36 \(CanLII\)](#), [2004] 2 S.C.R. 17, 2004 SCC 36). Proper regulation by the Law Society of the competence and integrity of lawyers requires access to confidential, and occasionally, privileged information, such as client instructions.

[9] Over the years courts have examined the need to balance the competing values of protecting solicitor-client privilege, to enable clients to communicate freely with legal advisors and the need to ensure the integrity of the legal profession, which is a self-regulated body requiring public confidence.

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