

# NSBS Regulatory Objectives

---

The key components of the Nova Scotia Barristers' Society Legal Services Regulation model include six Regulatory Objectives, described below.

The Regulatory Objectives set out the purpose and parameters of the Society's legal services regulation, and provide guidance to the Society, those we regulate and the public. Council has determined that regulation of legal services in Nova Scotia should be carried out in a manner that is proactive, principled and proportionate.

The Regulatory Objectives help ensure clarity respecting the function and purpose of our *Legal Profession Act* and the Society's mandate, and how the Act and Regulations should be interpreted in future. They provide a basis upon which the Society will demonstrate compliance with its function and purpose.

Significantly, the Regulatory Objectives strive to enhance public understanding of and confidence in the regulation of legal services by the Society, and speak to the unique and important role the Society plays in promoting and preserving the independence of the legal profession in the public interest.

- 1. Protect those who use legal services.**
- 2. Promote the rule of law and the public interest in the justice system.**
- 3. Promote access to legal services and the justice system.**
- 4. Establish required standards for professional responsibility and competence in the delivery of legal services.**
- 5. Promote diversity, inclusion, substantive equality and freedom from discrimination in the delivery of legal services and the justice system.**
- 6. Regulate in a manner that is proactive, principled and proportionate.**

*As approved by Council on November 14, 2014*

## **1. Protect those who use legal services**

The Society's primary mandate is to protect the public.[1]

The Society has a duty to protect those who use legal services by ensuring the competence and integrity of those who provide legal services and fall within the Society's regulatory authority.[2]

The Society therefore has a duty to protect those who engage lawyers and legal entities by ensuring their competence, honesty and candour. Protection places a significant onus on the Society to establish appropriate and effective standards for admission to the Bar and the practice of law. [3]

The Society strives to remain abreast of changes in the legal services marketplace that may impact the profession and consumers in Nova Scotia; be aware of the expectations of consumers of 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.[4]

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

The legal profession plays a critical role in promoting the rule of law<sup>[5]</sup>. As a regulator, the Society carries 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>[6]</sup>

This Objective requires that the Society act in a manner that upholds the independence of the profession and promotes equality before the law, accountability to the law, fairness in the application of the law and procedural and legal transparency<sup>[7]</sup>. Courts have repeatedly emphasized and supported the critical role that law societies fulfil in maintaining independence of the legal profession through the creation and enforcement of standards of practice.<sup>[8]</sup> An independent profession is critical to safeguarding the rule of law. The Society must also assist the public in understanding the rule of law, its impact on the public and avenues within the justice system (broadly speaking) that may be available to them. (See Regulatory Objective 1.)

The Society seeks to improve the administration of justice and takes steps to ensure that the conduct of lawyers and the profession encourages public respect for the administration of justice, and public confidence in the regulation of the profession and the justice system.<sup>[9]</sup>

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

There is broad recognition of a serious access to justice problem in Canada<sup>[10]</sup>. The cost, complexity and inefficiency of the current system put meaningful justice out of reach for many Canadians<sup>[11]</sup>. To improve access, the Society strives to identify ways the justice system can be more equitable and effective.

Equitable access to justice is one of the most important attributes of a democratic society. Ethical duties of Canadian lawyers are premised on the existence of the duty to foster access to justice.<sup>[12]</sup> This includes a "general obligation for each lawyer to contribute to the availability of legal services."<sup>[13]</sup>

The Society has an important role to play in this regard, and strives to create a regulatory regime that supports new ways of offering legal services. This may include unbundled legal services, virtual law firms, multidisciplinary practices, use of technology and outsourcing of legal processes and services.<sup>[14]</sup> The Society has an obligation to promote affordable legal services<sup>[15]</sup>; effective remedies including through informal dispute mechanisms; the right to take proceedings before a court; the right to a fair and public hearing; and the right to be tried without undue delay.

## **4. Establish required standards for professional responsibility and competence for lawyers and legal entities**

This Regulatory Objective is integral to the Society's legislative purpose and mandate.<sup>[16]</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>[17]</sup>

Lawyers are admitted to practice as officers of the court and are obliged to serve the court and the administration of justice competently, ethically and professionally. The Society has a duty to ensure high standards of ethics and competency for those entering the legal profession. The regulatory regime encourages lawyers and legal entities to embed professional and ethical behaviour at all times in delivering legal services. The Society maintains a regulatory framework that supports ongoing education of the profession and the articulation of standards and best practices to promote competent, ethical, culturally competent<sup>[18]</sup> and professional conduct. The framework supports an approach that is proactive, principled, proportional and focused on risk prevention.

## **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 practice of law in Canada is well recognized.[19] The history of racism in Nova Scotia, as illustrated by Donald Marshall, Jr.'s wrongful conviction and imprisonment, continues to influence the Society's work.[20]

Consumers of legal services 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 shows leadership by promoting a diverse and inclusive legal profession that is representative of the full spectrum of the public it serves. The Society and the profession ought to identify, respect and promote the interests of the public and clients in a way that is culturally competent and non-discriminatory.[21]

To achieve this end, the Society engages with communities, collaborates with those engaged in the administration of justice including the courts, and provides education to eliminate barriers and prevent discrimination. Along with the ethical duties to provide competent, good quality of service, and to assist in making legal services available, the duties regarding discriminatory behaviour have been part of the Code of Professional Conduct[22] for many years.[23]

## **6. Regulate in a manner that is proactive, principled and proportionate**

The Society's governing statute, the Legal Profession Act, clearly articulates 'what' the Society is mandated to do in the public interest, but not 'how'. A regulator should carry out all its functions in a manner that complies with good regulation principles and instills both public and lawyer confidence in that regulation.[24]

"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." [25]

Good regulation by the Society is characterized by proactivity, principles and proportionality. Proactivity requires the Society to not simply react but to reach out to the profession and the community to ensure that the regulatory objectives are met. Principles require the Society to set a regulatory framework that is aspirational rather than based solely on narrowly focused rules. Proportionality calls for the application of efficient and effective regulatory measures to achieve regulatory objectives using, among others, risk assessment and risk management tools. It calls for a balancing of interests and a 'proportionate' response, both in terms of how the Society regulates and how it addresses matters of non-compliance.

-----

## FOOTNOTES

- [1] *Legal Profession Act*, S.N.S. 2004, c. 28 as am., Sections 4 and 33.
- [2] *Finney v. Barreau du Quebec*, 2004 SCC 36.
- [3] *Legal Profession Act*, S.N.S. 2004, c. 28 as am., Section 33.
- [4] *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869, 1991 CanLII 26 (SCC)
- [5] "...the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency." (S/2004/616) *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*.
- [6] Report of the National Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change (2003)*, at page 15 – "Access to justice must become more than a vague and aspirational principle. Law societies and lawyers must see it as part of a modern – "sustainable" – notion of legal professionalism." See also Alice Woolley, "Imperfect Duty: Lawyers' Obligation to Foster Access to Justice" (2008) 45 *Alta. L. Rev.* 107.
- [7] *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 the 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.

*Omineca Enterprises Ltd. v. British Columbia (Minister of Forests)* (1993), 85 BCLR (2d) 85 at para. 53:

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.

*Federation of Law Societies of Canada v. Canada (Attorney General)*, 2013 BCCA 147 at paragraphs [105] – [111] and [138]

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.

[8] *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 (4th) 285.

[9] *Lawyers' Ethics and Professional Regulation*, at p. 60-61, and Section 5.6-1 of the *Code of Professional Conduct* (NS)

[10] Rt. Hon. Beverley McLachlin, P.C., "The Challenges We Face", citing the former Chief Justice of Ontario (remarks presented at Empire Club of Canada, Toronto, 8 March 2007), online: Supreme Court of Canada . – "access to justice is the most importance issue facing the Canadian legal system"

[11] Report of the National Action Committee on Access to Justice is Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change (2003)*, at page 1 – "The civil and family justice system is too complex, too slow and too expensive. It is too often incapable of producing just outcomes that are proportional to the problems brought to it or reflective of the needs of the people it is meant to serve. While there are many dedicated people trying hard to make it work and there have been many reform efforts, the system continues to lack

coherent leadership, institutional structures that can design and implement change, and appropriate coordination to ensure consistent and cost effective reform.”

[12] Alice Woolley, *Imperfect Duty: A Lawyers' Obligation to Foster Access to Justice*, (2008) 45:5 Alberta L. Rev. 107, at page 1

[13] *Code of Professional Conduct* (NS), Section 4.1-1

[14] Section 3.1 of the *Code of Professional Conduct* (NS)

[15] “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.” 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

[16] *Legal Profession Act*, S.N.S. 2004, c. 28 as at Section 4(1).

[17] *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

[18] Rose Voyvodic, *Lawyers Meet The Social Context: Understanding Cultural Competence*, [https://www.cba.org/CBAMediaLibrary/cba\\_na/PDFs/Canadian%20Bar%20Review/Vol84\\_025.pdf](https://www.cba.org/CBAMediaLibrary/cba_na/PDFs/Canadian%20Bar%20Review/Vol84_025.pdf) and Richard Devlin and David Layton “Culturally Incompetent Counsel and the Trial Level Judge: A Legal and Ethical Analysis” (2014) 60 *Criminal Law Quarterly* 360-385.

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

[20] Royal Commission on the Donald Marshall, Jr., Prosecution Digest of Findings and Recommendations, 1989, at p.10

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

[22] Section 6.3 of the *Code of Professional Conduct* (NS)

[23] *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

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

[25] *Ibid*