# COUNCIL MEETING AGENDA

**CLASSE ROM, NOVA SCOTIA BARRISTERS' SOCIETY**

**Date**: Friday, February 15, 2019  
**Time**: 9:00 am  
**Chair**: Frank E. DeMont QC, President

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<tr>
<th>ITEM</th>
<th>TOPIC</th>
<th>TIME ALLOTED</th>
<th>SPEAKER</th>
<th>MATERIALS (Pg #)</th>
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<tbody>
<tr>
<td>1.</td>
<td>INTRODUCTORY MATTERS/CALL TO ORDER</td>
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<td>1.1</td>
<td>Introductory Remarks</td>
<td>5</td>
<td>F. DeMont</td>
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<td>2.</td>
<td>POLICIES/PROCESSES</td>
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<td>2.1</td>
<td>Budget Introduction</td>
<td>60</td>
<td>S. Walker</td>
<td>Presentation; discussion</td>
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<td></td>
<td>Sean Walker will introduce Council to the 2019-2020 Budget.</td>
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<td>3.</td>
<td>COUNCIL &amp; COMMITTEES</td>
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<td>3.1</td>
<td>Discussion with Credentials &amp; Finance Committees Chairs</td>
<td>10:30am</td>
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<td>Discussion; decision</td>
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<td>Chairs Cheryl Canning QC and Maurice Chiasson QC to join.</td>
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<td>3.2</td>
<td>Discussion with Standards Committees Chairs</td>
<td>11:00am</td>
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<td>Discussion; decision</td>
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<td>Chairs Jeanne Desveaux, Bob Carter, Brian Bailey, Elizabeth Haldane to join.</td>
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<td>3.3</td>
<td>Discussion with PRPPC, CPCC &amp; CIC Chairs</td>
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<td>Discussion; decision</td>
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<td>Chairs Ray Larkin QC, Frank DeMont QC and Elizabeth Wozniak to join.</td>
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<td>3.4</td>
<td>Discussion with REC, GEC &amp; GNC Chairs</td>
<td>12:00pm</td>
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<td>Discussion; decision</td>
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<td>Chairs Josie McKinney, Ryan Brothers, Nasha Nijawan, Sheree Conlon QC and Julia Cornish QC to join.</td>
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<td>4.</td>
<td>DISCUSSION OF BIG ISSUE – LSS</td>
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<td>4.1</td>
<td>LSS Status Update</td>
<td>30</td>
<td>J. Pink and R. McCleave</td>
<td>Discussion</td>
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<td>Jennifer Pink, LSS Manager, and Rob McCleave, LSS Officer will present Council with an update on the activities of the Legal Services Support office.</td>
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<td>POLICIES/PROCESSES CONT’D</td>
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<td>5.1</td>
<td>Introduction to CPLED 2.0</td>
<td>20</td>
<td>J. Mullenger</td>
<td>Presentation; discussion</td>
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<td></td>
<td>Jackie Mullenger, Director of Education &amp; Credentials, will introduce Council to the new</td>
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### 5. Code of Professional Conduct Committee – Policy Recommendation for Multi-disciplinary Practices (MDPs)

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<th>Number</th>
<th>Description</th>
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<th>Next Steps</th>
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<tr>
<td>5.2</td>
<td>Code of Professional Conduct Committee – Policy Recommendation for Multi-disciplinary Practices (MDPs)</td>
<td>F. DeMont</td>
<td>Discussion; direction</td>
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#### 5.3 Professional Responsibility Policies and Procedures – Policy Recommendation regarding Remuneration of Hearing Panels

**Discussion; approval**

- **5.3** Professional Responsibility Policies and Procedures – Policy Recommendation regarding Remuneration of Hearing Panels

- **F. DeMont**

#### 5.4 Elections Check-In

- **10 F. DeMont**

**Discussion**

### 6. APPROVALS

#### 6.1 2019 Activity Plan

**Presentation; approval**

- **6.1** 2019 Activity Plan

  - Executive Director Tilly Pillay QC will present the 2019 Activity Plan. The plan will be circulated for final approval via OnBoard following the meeting.

- **10 T. Pillay**

#### 6.2 Criminal Standards for Approval: Standard No. 2 – Lawyers’ Competence; Standard No. 3 – Defence Obligations Regarding Disclosure

**Approval**

- **6.2** Criminal Standards for Approval: Standard No. 2 – Lawyers’ Competence; Standard No. 3 – Defence Obligations Regarding Disclosure

  - Lawrence Rubin will present the final versions of the standards that came before Council in March 2018 and subsequently were circulated to the membership for comments.

- **5 L. Rubin**

### 7. FOR INFORMATION

#### 7.1 2018-2019 Council Calendar

**Information**

- **7.1** 2018-2019 Council Calendar

#### 7.2 Executive Director Report

**Information**

- **7.2** Executive Director Report

#### 7.3 Crossing the Border with Electronic Devices

**Information**

- **7.3** Crossing the Border with Electronic Devices

#### 7.4 December 31, 2018 Summary Financial Reports

**Information**

- **7.4** December 31, 2018 Summary Financial Reports

#### 7.5 “The Coming End of Lawyer Control Over Legal Regulation,” Jordan Furlong, Slaw

**Information**

- **7.5** “The Coming End of Lawyer Control Over Legal Regulation,” Jordan Furlong, Slaw

### 8. CONSENT AGENDA

The Consent Agenda matters are proposed to be dealt with by unanimous consent and without debate. Council members may seek clarification or ask questions without removing a matter from the consent agenda. Any Member may request that a consent agenda item be moved to the regular agenda by notifying the President or the Governance Officer (Julia Schabas) prior to the meeting.

#### 8.1 Minutes of January 18, 2019 meeting

**Approval of all**

- **8.1 Minutes of January 18, 2019 meeting**

#### 8.2 Resignations:

- Mr. Arthur Andrew Oskar von Kursell (effective 02/15/2019)

**F. DeMont**

#### 8.3 Committee appointments:

- Deanna Frappier – Gender Equity Committee
- Matthew Moir – Lawyers’ Fund for Client Compensation Committee

**F. DeMont**

#### 8.4 Committee Resignations:

- Jillian Barrington – Credentials Committee

#### 8.5 Technology for the Council Election
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<td>8.7</td>
<td>Criminal Standard for Introduction: Standard No. 4 – Withdrawal of Guilty Plea</td>
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### 9. IN CAMERA

9.1 There will be one item in camera

### 10. The 2 Minute Evaluation

*Council members are asked to complete the evaluation.*

### 11. MEETINGS

- March 15, 2019
- April 26, 2019 – **9:00 am to 11:00 am**
- **Strategic Planning:** May 9–10, 2019
- May 17, 2019
MEMORANDUM TO COUNCIL

From: Jennifer Pink, Manager, Legal Services Support

Date: January 30, 2019

Subject: Legal Services Support – update on activities and priorities

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<th>Date</th>
<th>Event</th>
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<td>February 8, 2019</td>
<td>Executive Committee</td>
<td>N/A</td>
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<tr>
<td>February 15, 2019</td>
<td>Council</td>
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Recommendation/Motion:

No motion required.

Executive Summary:

LSS efforts are ongoing to implement a ‘Triple-P’ approach and LSS mindset across the Society’s member facing services. Collaboration between LSS officers, credentialing, the trust account team, and the PR team was particularly active during December and January while working to support a number of lawyers in practice crisis.

The first of two ‘soft launch’ tiers completed the MSELP self-assessment tool in January. The feedback received was detailed and informative. The second tier will roll out in February while staff consider and address concerns about the length of the self-assessment tool.

Working with firms via New Firm Registration (and other credentialing processes) has brought to light the deficiencies of regulations addressing interjurisdictional law firms. These regulations were developed at a time that did not contemplate modern technology and ways of working remotely. Applying a Triple-P lens, the outcomes of the current rules are illogical and unduly restrictive. The Credentials Committee has taken this under review, as well as the Trust Account Working Group.
Analysis:

Practice support and advice

We continue working across the Society to bring a support-driven, Triple-P approach to the forefront of our professional regulation activities. The last couple of months have provided opportunity for staff to collaborate in this approach as staff responded to a defalcation and firm closure that resulted in six associates and an articled clerk seeking employment or registration of new firms.

The situation enabled us to ‘test’ the boundaries of information sharing and internal communications between what we might informally term ‘LSS processes’ vs ‘disciplinary processes’. This is a hazy line as the disciplinary process itself incorporates components of Legal Services Support (e.g. early resolution, mediation, Triple-P lens). This experience helped us give shape to the processes and policies that inform LSS programs.

Anecdotal feedback from the firms and lawyers we supported during this time – as well as the number of repeat calls and requests for support we received – suggest the LSS approach was well received and effective in expediting a minimally disruptive practice transition. While we can’t compare what the outcome would have been for these lawyers otherwise, it is encouraging to note that each of the impacted practising lawyers was successfully employed or registered to operate their own firm within nine business days of the firm’s custodianship taking effect.

In navigating this new approach we continue to focus on the key outcomes sought from LSS:

1. earlier risk identification and mitigation (within law firms);
2. earlier risk identification and mitigation by Society staff;
3. reducing stress / improving wellness in practice;
4. enabling a smoother entry to and exit from practice;
5. reducing custodianship costs to the Society and membership;
6. developing a more accurate understanding of the Society’s role
7. improving the experience of lawyers and firms in Society interactions;
8. enhancing Society staff morale (i.e. feeling engaged in work centered on delivering meaningful and proactive solutions to practice issues); and
9. reducing the number of ‘repeat’ complaints against lawyers and firms for quality of service issues.

MSELP self-assessment program update

Nine firms participated in the first batch of our “soft launch” and almost all have responded. Follow up meetings are being arranged to learn more about the program’s impact and reception as well as ‘test’ the process for providing a triaged support response.
A typical SAT submission so far includes 10-20 specific items selected where the firm sees room for development, three of which are identified “priorities.” Some firms conscientiously choose a larger number of areas where they see room for development. In our responses we encourage people to focus on priorities and to take on only what is reasonable.

After submitting their SAT, responding firms received back from us their MSEL Planner - a ‘takeaway’ product that lists their identified areas for development and top three priorities. Once we complete the outstanding programming work to the back end over the coming weeks, the Planner will be auto generated from the SAT results.

Staff will distribute a second “soft launch” batch of SATs in early February. For this group we are selecting firms expected to be more critical of the process so we are anticipating and addressing concerns, wherever possible, before full launch.

The plan is to distribute the SAT in about nine batches (of 15-20) per year, avoiding certain times (e.g. law firm end of year). We will focus efforts in the HRM in the winter months to avoid travel. Follow-up meetings will average 4/month in order to meet the program’s goal of 25% firms participating in follow up visits. Firms who are not visited in person after completing the SAT will have personalized follow up responses (email, phone, etc.), depending on their unique development goals.

**Interjurisdictional firms / interprovincial trust monies**

As reported to Council in November 2018, in recent months two interjurisdictional firms contacted us to open new offices in Nova Scotia through the new firm registration process. In both cases, they sought clarification as to whether trust monies could be held in their existing Ontario accounts regardless of ‘where’ the monies originate. This brought to light the deficiencies in our regulations which do not appear to contemplate the realities of modern interjurisdictional files or practices.

This issue was directed to the Society’s Trust Account Working Group for its consideration. From a risk perspective, our primary interest is in knowing that the monies are regulated appropriately in whichever jurisdiction they are held. But the issue requires further clarification, and there is potential impact to the Law Foundation’s income to be considered.

Since then, a further credentialing matter has brought to light the inconsistencies that result in applying the current rules around interjurisdictional practices. Staff are currently considering the risk priorities and applying a Triple-P lens to practising operating across provinces, with a view to bringing forward a recommendation to Council in due course.

**Next steps and priorities**

Priority activities for LSS over the coming months include:
1. Measuring and incorporating the feedback from the soft launch of the MSELp self-assessment program prior to full launch.
2. Completing outstanding IT programming to support MSELp data import.
3. Rolling out MSELp launch communications to the membership.
4. Refining the MSELp (administration) process.
5. Adapting the online SAT for in-house and government contexts and testing.
6. Advancing consideration of the regulations governing interjurisdictional law firms / trust accounts.

Ongoing and longer-term priorities include:

1. Continuing to develop opportunities and networks for external engagement and education (through County bar meetings, professional association conferences, law firm CPD sessions, etc.).
2. Continuing to bring key ‘issues’ identified through LSS engagement to Council for appropriate response (e.g. file destruction, succession planning, mentorship).
3. Developing and delivering tools, resources and programs in response to priority issues.
4. Continuing to nurture an LSS culture and approach among Society staff by implementing LSS infrastructure and processes.
5. Developing an evaluation strategy for LSS programs and outcomes.
6. Forming an MSELp advisory group.

Exhibits/Appendices:

N/A
MEMORANDUM TO COUNCIL

From: Jacqueline Mullenger
Date: January 31, 2019
Subject: Skills Course and CPLED 2.0

For: Approval

Introduction

Information X

CPLED is the organization that offers the Bar Admission Course in Alberta, Saskatchewan and Manitoba. The bar admission course offered by CPLED in the western provinces is similar to the course in Nova Scotia. It offers both in-person and on-line modules. Clerks are tested in all of the Skills that Nova Scotia currently assesses. Those include Legal Writing, Legal Drafting, Negotiation, Interviewing, Oral and Written Advocacy, Practice Management and Client Management. It follows the National Admission Standards that were agreed to by all provinces.

The Society has been collaborating with CPLED for many years now in the offering of the online portions of our Skills Course. The Society makes use of CPLED’s writing, drafting, practice management and client relationship modules.

Last year, after conducting a thorough review of the program it was determined that CPLED needed to be revamped and that it needed a different governance structure. As a result, CPLED now has its own Board of Directors and a CEO. The CEO is Dr. Kara Mitchelmore, who was previously the CEO and also VP of Program Development for CMA Alberta.

For many years now, Nova Scotia has been partnering with CPLED to offer our on-line portions of our course. These are Legal Writing and Drafting, Practice Management and
Client Relationship Management. These modules are modeled after the CPLED modules and are hosted on the CPLED server for an annual fee.

As part of the re-working of CPLED, it has been determined that CPLED will undergo a major overhaul. Nova Scotia has been invited to become a full partner in the new program. While the prairie provinces have committed substantial monies to the capital fund to create the new program, Nova Scotia has not been asked to contribute to the building of the program. We have however, been collaborating and assisting in focus groups, work groups and meetings to determine what the new program should look like and how it will be offered. Nova Scotia will need to decide if it wants to become a full partner in the new program. If we choose not to do so, we will no longer have access to the modules that we are currently using. As a result of the way the new course is being constructed a province will have to be “all in” or out altogether.

The new program is not entirely different from what we are currently offering. All of the same skills and competencies will still be taught and evaluated. There are advantages to moving in this direction for both the Nova Scotia public and for the students whose competency is being assessed. Dr. Mitchelmore will make a presentation to Council in March which will provide you with more detail of how the program will operate. CPLED is planning on piloting the new program in Alberta and Manitoba in the fall of 2019 and beginning the new program throughout the three provinces in 2020. If Nova Scotia is to join it will need to make a decision in the coming months.

First, as we move forward, it is important that as much as possible the bar admission programs across the country be harmonized. That was the vision when the National Admission Standards were created and agreed to by all provinces. The intention was that clients in any province could be assured that wherever they were in Canada their lawyers had been held to the same admission standards. It also gives more certainty to those being evaluated that the same standards of competency are being expected of them wherever they are articling.

Secondly, the program that is being designed will better test the student’s actual competency in readiness for practice because they will have more opportunity to demonstrate their competency in a manner that more closely resembles the real world. Students will be placed in virtual law firms and will learn and be tested in the competencies in an integrated fashion. They will be assigned a file and will work from retainer to closure incorporating all the skills listed. They will be assessed at four levels rather than simply testing interviewing or negotiation, etc. At each level as they move through the program they will be expected to become more and more competent. They will receive feedback along the way from lawyers trained as learning group facilitators. All students will be tested for competency at the same time, near the end of their articles rather than at all different stages which is now the case.

Thirdly, collaborating across provinces allows societies to create, implement and maintain a more effective program because of the integration of resources both human and financial.
Should Nova Scotia decide to do this work on its own it would involve far more money and additional human resources to develop and maintain our own on-line modules and competency assessments. Working with CPLED provides Nova Scotia the opportunity to capitalize on resources and perhaps realize some savings of our own, while offering an innovative and effective means of testing competency of new lawyers.

Finally, as mentioned earlier, four provinces working together and harmonizing their bar admission course is what the National Admission Standards actually envisaged. It supports the notion of national mobility and also responds to government’s concern that lawyers in each province are being subjected to the same requirements and that they have the same competencies. The more provinces who join, the more defensible the requirements will be for the profession. CPLED is currently talking to other provinces about the possibility of them joining as partners. In addition, the Society Executive Director will sit on the CPLED Board and therefore will have influence on the policies and governance of CPLED.

In working on this project, the Society has identified that the actual cost per student of the current Bar Admission Course, including the Bar Exam is $6,000 per student. At present, we charge each student $3750. From that analysis it’s clear that the Society is substantially subsidizing the program. The new course has not yet set a price for the course but it will be somewhere in the $6,000 range per student. That is a substantial increase, however, if we do not join CPLED the Society will need to create and run our own on-line components which will cost the Society substantially more money. In addition, our Exam consultant is preparing to retire which means we have to make decisions about our Bar Examination.

Either way, the cost of the Bar Admission Course is going to increase over the next few years. One main difference between Nova Scotia and most other provinces is that Nova Scotia receives no funding from the Law Foundation for our bar admission program. Almost all other law societies receive substantial funding/subsidies for their courses. Our Executive Director has reached out to the Law Foundation to discuss the possibility of the Law Foundation providing some type of funding for students who need assistance with the cost of the program.

I will be pleased to answer any questions you may have.

All of which is respectfully submitted.

Jacqueline L. Mullenger
Director, Education & Credentials
MEMORANDUM TO COUNCIL

From: Code of Professional Conduct Committee

Date: January 30, 2019

Subject: Development of Multi-Disciplinary Practices in Nova Scotia

Date – February 8, 2019  Executive Committee  N/A

Date – February 15, 2019  Council  For Decision

Recommendation/Motion:

The CPCC recommends that Council permit the Code of Professional Conduct Committee to continue down the path of designing a regulatory, policy and ethical regime to support the creation of MDPs in the near future. There are no legislative amendments required for this phase of development, nor any additional resources.

The CPCC also recommends that once a regulatory and policy framework has been developed and endorsed by Council at the end of the next phase, that there be consultation with the membership as well as other professional regulators and potential stakeholders to assess, among other things, whether the proposed framework would support and encourage the development of MDPs, rather than create barriers, and to discuss means for cooperation between regulators where that may be beneficial.

Executive Summary:

As the Nova Scotia Barristers’ Society continues to embed its new legal services regulation regime, the Society’s Code of Professional Conduct Committee was asked in 2017 to consider whether permitting the development of multidisciplinary practices (MDPs) in Nova Scotia would align with and support:

(i) the Society’s Regulatory Objectives,
(ii) Council’s Strategic Directions of excellence in regulation and improving access to justice, and, in particular,
(iii) the public interest.
If yes to one or more of these questions, the Committee was asked to consider the potential benefits and challenges that may arise if MDPs are permitted, both in terms of lawyers’ and law firms’ ethical duties under the Code of Professional Conduct, and whether there is any experiential data to demonstrate whether MDPs have in fact proven to be of benefit or not in relation to the goals above. Finally, if the Committee recommends to Council that MDPs be permitted in Nova Scotia, what amendments to the Code of Professional Conduct might be required, and would this place the NSBS problematically offside other Canadian jurisdictions?

This report provides a summary of the results of the work to date in this area by the CPCC and PR staff, and concludes with the recommendation that Council approve the next phase of work toward elimination of the ethical rule prohibiting fee sharing between lawyers and non-lawyers, thereby paving the way for permitting MDPs in Nova Scotia. In other words, the CPCC is recommending that Council give a green light to continuing down this path toward MDPs in principle, which will necessarily include discussion by Council over the next several months of various policy issues through the various lenses of Triple P, risk and equity and access, to assist in development of an appropriate regulatory and ethics approach to MDPs.

Analysis:

1. **What is a multidisciplinary practice (MDP)?**

A multidisciplinary practice, or ‘MDP’, is a practice which delivers legal and non-legal services together. It is not, from the perspective of a formal business and financial capital model, an Alternate Business Structure or ABS: the latter involves capital investment and ownership by non-lawyers, while MDPs remain controlled by lawyers. By pairing legal professionals with other professionals, MDPs purport to offer clients a more holistic solution for whatever issue they are seeking resolution or assistance. MDP models are varied and this will be explored in this paper.

Currently, the Code of Professional Conduct (both the Federation of Law Societies of Canada’s Model Code of Professional Conduct and the Nova Scotia Code of Professional Conduct) prohibits fee sharing between lawyers and non-lawyers, which has the effect of prohibiting one of the key benefits of MDPs.

The Code of Professional Conduct Committee concurs with a finding in the Canadian Bar Association’s Futures Report (2014) that,

> By loosening the rules on permitted business structures – for example, by allowing fee sharing, ownership, and investment by non-lawyers – regulators can encourage more innovation and business process improvement.1

2. **MDPs in Canada**

In Canada, the Law Society of British Columbia, the Law Society of Ontario and the Barreau du Quebec permit MDPs, but only the latter permits fee sharing. If the NSBS was to adopt MDPs and permit fee sharing, we would be taking a step which only one other jurisdiction has taken, but we would not be alone. If approved by Council, the Committee proposes to present the arguments in this paper, and the results of Council’s policy discussions, to the Federation’s Model Code of Conduct Standing Committee for consideration of an amendment to the Model Code to permit fee sharing, and encourage a more consistent national approach in this area. At this time, the Model Code Committee is maintaining a watching brief on developments in Nunavut and Nova Scotia in this area.

The MDP regulatory models in Ontario and British Columbia are very similar, as summarized below.

**Law Society of British Columbia**

The Law Society of British Columbia (“LSBC”) “defines “multi-disciplinary practice” as a partnership, including a limited liability partnership or a partnership of a law corporation that is

a) owned by at least one lawyer or law corporation and at least one individual non-lawyer or professional corporation that is not a law corporation, and

b) provides to the public legal services supported or supplemented by the service of another profession, trade or occupation.²

In B.C., practising lawyers maintain control over the delivery of legal services and non-lawyer members are prohibited from offering their services to members of the public except where these services support or supplement the practice of law.³ These services must also be provided under the supervision of a practising lawyer.⁴ The LSBC requires that all MDP lawyers obtain express permission from the LSBC in order to practice within the MDP; all non-lawyer members must be of good character and repute; all members of the MDP must agree in writing that they will not interfere with the lawyer members’ obligations to comply with the Code and to exercise their professional judgement; and all MDP members must agree to comply with the Code.⁵ The LSBC requires non-lawyer members to maintain liability insurance to the same extent as that required of a lawyer⁶.

Examples of MDPs in BC include:

**Munro & Crawford MDP** – offering legal and complimentary services in areas of personal injury, commercial and estate law; wills & trusts; taxation; and family law.

**TNG Legal Services MDP** – offering services by lawyers, notaries and estate planners in the areas of estate planning and administration, conveyancing, incapacity support, probate and incorporations.

**Law Society of Ontario**

In Ontario, MDPs are permitted only where lawyers partner with other professionals who practise a profession, trade or occupation that supports or supplements the practice of law or provision of legal services.⁷ Ontario also requires a MDP to apply to the Law Society and requires non-lawyer members to be of good character; to only provide services to the public through the MDP; to agree that the lawyer has effective control of the business; and that the Act and Rules of Professional Conduct apply to them.⁸

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³Ibid, p. 51.
⁴Ibid, p. 51.
⁵ Law Society of British Columbia, Code of Professional Conduct, R. 2-39
⁷Ibid, p. 33.
⁸Ibid, p. 33.
There is also a requirement that lawyers maintain professional liability insurance for all the professional partners in the business.9

The Code of Professional Conduct in Ontario has been amended to specifically include references to the ethical obligations of lawyers who choose to practice in such an arrangement.

An example of a MDP in Ontario is David Rosenblatt & Associates, which, according to their website, is the formation of “an association of different employment-related companies offering a variety of services in order to fill worker shortages with internationally trained skilled workers.” The Law Society would not share with me the names of other MDPs due to privacy concerns.

Quebec

In Quebec, MDPs consist of partnerships between lawyers and other professionals, and may take the form of a general partnership or a limited liability partnership. In a report from the Barreau de Quebec titled “Lawyers in Private Practice: Looking Ahead to 2021” (https://www.barreau.qc.ca/publications/synthese-pratique-privee-2021-en.pdf, at p. 64) it is stated as a ‘foregone conclusion’ that lawyers will ‘unavoidably’ and increasingly work with other professionals. This report noted that accountants and notaries were at that time the most common the professionals with whom lawyers collaborated in that province.

Examples of MDPs in Quebec include:

Grandpre Joli-Coeur – consisting of lawyers and notaries, this MDP provides services in real estate, co-ownership financing and realization of security, litigation and business law.

PSB Boisjoli – this MDP is primarily an accounting firm which operates in collaboration with lawyers to provide services in audit and assurance; taxation; business advisory services; corporate business structure and human resource management.

To date, uptake remains slow with respect to MDPs in Canada, with a total of about 18 in BC and Ontario, and a number of others in Quebec. Arguably this may be a result, in part, of the regulatory barriers created in those provinces, including a continued prohibition against fee sharing, which has the effect of discouraging rather than encouraging MDPs. That said, there is a growing appetite to permit this type of bundled service to clients and, as is explored in this discussion paper, there appears to be little risk to the public by allowing them.

In late November 2018, the NSBS had a request to authorize a MDP headquartered in Quebec to open a law office in NS: regretfully, because of the business model involving fee sharing, we were unable to give them the answer they would have liked. Innovative models of providing legal services in Nova Scotia are growing in number, and it is foreseeable that these innovators and others would welcome the opportunity to provide legal services in conjunction with other professionals. Types of law practice in Nova Scotia ripe for this model include personal injury, family and immigration law, as well as real property transactions.

9Ibid, p. 34.
3. **The Code of Professional Conduct and multidisciplinary practices**

In 2016-17, the Code of Professional Conduct Committee engaged in a review of our *Code* with a view to considering whether the current rules would capture all members of a MDP or otherwise apply to a law firm or other legal entity. This was part of the Committee’s efforts to assess the extent to which our current *Code* applies to law firms as opposed to only individual lawyers.

In terms of application of the rules to a law firm, there were questions about what particular risks the various rules are trying to address, and whether a firm should be drawn into responsibility for compliance with all the ethical rules. The culture of a law firm was considered, including the firm management or directing minds, and how this can impact the ethical conduct of its lawyers. It has been noted that the new requirement for law firms to have a management system for ethical legal practice (MSELP) will assist lawyers in implementing best practices in law firm, practice and client management (in some jurisdictions, known as an ‘ethical infrastructure’, a term coined by Prof. Ted Schneyer), and this is further strengthened with the requirements for registration and engagement by new law firms.

*What specific ethical rules are relevant to the formation of a multidisciplinary practice?*

The Code review that the Committee undertook led to the preliminary conclusion that the majority of the ethical rules in the *Code* do not pose a barrier to MDPs in Nova Scotia, although some rules will need to be carefully considered and transparently addressed when creating MDPs. The only rule identified as an actual barrier to MDPs is rule 3.6-7, which prohibits the ‘sharing, splitting or dividing of fees charged between a lawyer and a person who is not a lawyer.’ The purpose behind this rule is explained below.

Assuming that a MDP is created with a view to, among other things, collectively receiving and distributing income from clients, then the current fee sharing rule would prevent this. Any other arrangement would be considered simply space sharing by different professionals, which does, of course, currently exist in many forms: numerous arrangements in NS involve lawyers and firms sharing space with bankruptcy and insolvency businesses, immigration consultants, real estate agents, mortgage brokers, etc. These arrangements have already addressed many of the same ethical considerations that can arise with MDPs, including sharing a receptionist, file storage, phones, faxes and other systems that can impact client confidentiality and conflict of interest duties. What a MDP adds to the equation is simply the ability for different professionals and those providing something other than legal services to transparently share in the fees paid by clients of the various individuals involved in the MDP, with clients’ knowledge and consent.

**i. Fee sharing**

The CBA’s *Futures Report*\(^{10}\) noted the following regarding the prohibition on fee sharing and referral fees:

> Fee-sharing rules are relatively recent in Canada and there have been a number of initiatives to modify and reform them in various Canadian jurisdictions. The Policy 43 concerns underlying the prohibition of fee-sharing with non-lawyers are the protection of client representation against conflicting interests and pressures, and protection against clients being misled or pressured into retaining a lawyer.

\(^{10}\) [http://www.cba.org/CBAMediaLibrary/cba_n/](http://www.cba.org/CBAMediaLibrary/cba_n/PDFs/CBA%20Legal%20Futures%20FINAL%20ENG.pdf), pp. 42-43
Similarly, referral fees to non-lawyers are prohibited in the Model Code (Rule 3.6-7(b)). Historically, no referral fees were permitted (including to lawyers), but this was modified in recent years to create new business opportunities and to ensure that a client’s legal work is done by the best qualified lawyer.

The *Futures Report* concludes its review of fee sharing as follows:

… with suitable regulatory conditions, there would appear to be no valid reason for unnecessarily restricting fee-sharing with or paying referral fees to non-lawyers. They can indeed be permitted if the liberalized rules avoid substantial risks of material impairment to client representation and the duties owed by lawyers to clients. If fee-sharing and referral fees are expanded to non-lawyers, we envision real benefits in the delivery of legal services to clients and the opportunities available to lawyers.11

Rationally connected to any discussion of fees that are charged by lawyers, including lawyers in a MDP, are the following rules from the *Code*:

**Preservation of Client’s Property**

**3.5-2** A lawyer must:

(a) care for a client’s property as a careful and prudent owner would when dealing with like property; and
(b) observe all relevant rules and law about the preservation of a client’s property entrusted to a lawyer.

**Reasonable Fees and Disbursements**

**3.6-1** A lawyer must not charge or accept a fee or disbursement, including interest, unless it is fair and reasonable and has been disclosed in a timely fashion.

These rules are engaged in any discussion of MDPs, and the lawyers in the practice must ensure that these rules are strictly complied with by all those associated in the practice.

**ii. Confidentiality**

**Confidential Information**

**3.3-1** A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless:

(a) expressly or impliedly authorized by the client;
(b) required by law or a court to do so;
(c) required to deliver the information to the Society, or
(d) otherwise permitted by this rule.

If lawyers are permitted to deliver legal services to the public in partnership/association with other professionals, consideration of client confidentiality must be paramount. Additionally, when lawyers are

11 [http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/Futures-Final-eng.pdf](http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/Futures-Final-eng.pdf), pp. 42-43
considering entering into a MDP, they will need to carefully consider the issue of solicitor-client privilege at the outset, and in a transparent way with potential clients. While it may be possible to address confidentiality generally by obtaining the informed consent of the client to the particular business arrangement between lawyers and non-lawyers, the impact of information sharing on privilege is a separate issue. Further, questions arise in terms of how to protect privilege in the event of execution of a search warrant on a MDP by CRA or other authorities.

Lawyers who choose to practise in a MDP will need to adopt a clear process to ensure clarity in what information can be shared (and is therefore no longer privileged) and what continues to be held in strict confidence by the lawyer (thereby protecting privilege). These are important, but not insurmountable client protection issues (for example, see below under “Conflicts”).

iii. Conflicts

**Duty to Avoid Conflicts of Interest**

3.4-1 A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.

In response to concerns regarding conflicts, the CBA’s *Futures Report* proposed the following:

MDPs and other forms of ABSs should be permitted to deliver non-legal services together with legal services on the basis that the rules should require protection of privileged information by requiring that non-lawyers, including partners/owners, not have access to privileged information except with express informed client consent. The rule or the commentary should provide that:

(a) the confidentiality rules apply and privilege must be protected;
(b) the conflicts rules apply, including where other services are offered by the MDP to clients receiving legal services;
(c) the candour rule applies, including with respect to any conflicts of interest that may exist.

Breach should attract entity and individual sanction.

If the public interest demonstrably requires that some non-legal services should not be provided together with legal services, the rules should so provide. Otherwise there should be no restrictions.12

The Rules in British Columbia provide as follows with respect to conflicts:

**Conflicts of interest**

2-46 (1) A lawyer practising law in a MDP must take all steps reasonable in the circumstances to ensure that the other members of the MDP will comply with the provisions of the Act, these rules and the *Code of Professional Conduct* respecting conflicts of interest as they apply to lawyers.

(2) This rule applies when the MDP has provided legal services to a client or when a potential client has sought legal services from the MDP.

12 [http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/Futures-Final-eng.pdf](http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/Futures-Final-eng.pdf), p. 44
Ontario amended its *Code of Professional Conduct* to add the following in relation to conflicts:

**Multi-discipline Practice**

3.4-16.1 A lawyer in a multi-discipline practice shall ensure that non-licensee partners and associates observe the rules in Section 3.4 for the legal practice and for any other business or professional undertaking carried on by them outside the legal practice.

### 4. MDPs around the world

An increasing number of countries now permit MDPs in a variety of forms. However, it is still the case that a number of common law jurisdictions do not permit MDPs, including New Zealand, Hong Kong and South Africa, as well as a number of European Union Member States. MDPs have been the subject of much debate in the US, and despite numerous recommendations and studies in favour of amendments to the ABA Model Code of Conduct to permit them, this has not yet been adopted by many States.

Studies tracking the experiential pros and cons of MDPs in those countries which permit MDPs are limited, but a few provide some helpful insight. The most recent of these is a study conducted by Hook Tangaza for the Irish Legal Services Regulatory Authority dated March 2017, titled “Study into International Experience of Multi-Disciplinary Practices and the Likely Impact on Ireland of Adopting them.”

In addition to the countries listed above which permit MDPs, others impliedly permit MDPs because of the regulatory structure within which legal services can be provided. For example, “MDPs have never been perceived as an issue in countries like Chile for example, where the monopoly for lawyers is restricted only to court work. And in Norway, where the only absolute right of members of the Bar is the right to the title of ‘advokat’, new non-lawyer owned entrants to the market such as HELP [a Norwegian non-lawyer owned firm], have created consumer focused legal businesses based on entirely new business models.”

In the Netherlands, confidentiality has been addressed as follows:

- Lawyers in MDPs who are acting on a matter with another professional must open their own files and archive separately from those held by the other professionals. This is to protect legal privilege and the confidentiality of the client’s information in circumstances in which the other profession(s) involved in the matter do not have the concept of privilege or the same confidentiality requirements, or their interpretation is different.

- Lawyers in MDPs who are acting on a matter with another professional must keep a record of all the letters and documents that they have brought to the attention of the other professional. These documents would then be considered to be privileged as they originate from the lawyer and are therefore protected.

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14 Ibid, p. 19
The Tangaza study made the following observation about the main features of the MDP regimes in other countries:

All the non-lawyer ownership models that have been introduced elsewhere have put in place specific features designed to deal, to a greater or lesser extent, with the fundamental issues of lawyer independence and conflicts of interest. These models have been employed in order to enable lawyers to have control, at the very least, over the parts of the practice that are providing legal services. The approaches used have included:

- Majority lawyer ownership of the equity and voting rights in the firm;
- Application of lawyer codes to all partners and employees working in the firm;
- Contractual requirements in respect of non-lawyer partners that they must not interfere with the ability of the lawyers in the firm to follow their professional duties;
- Use of a ‘head of legal practice’ or authorized principal model as a mechanism for holding the firm overall to account for its compliance with ethical codes;
- ‘carve-outs’ of particularly sensitive modes of practice, for example amongst barristers, for example in Australia.  

5. Specific arguments for and against MDPs

Another helpful reference is a 2014 study prepared by the American law professor, Katherine L. Harrison titled, “Multidisciplinary Practices: Changing the Global View of the Legal Profession”. Harrison states:

Arguments for and against MDPs can be grouped into two categories: core values and one-stop shopping. The core value arguments, addressed below, focus on conflicts of interest, confidentiality, and independence of judgment, while the one-stop shopping argument centers on efficiency, quality of work, and effects of competition.

i. One-stop shopping

According to Tangaza, “MDPs permit ‘one-stop shopping’. There are potential temporal and financial savings that could be realized, for example, for small businesses if they could obtain their legal services alongside other services they require.”

Further:

MDPs can provide consumers with better access to legal services. Research suggests that a common aspect of unmet need may be that consumers do not recognize or define their problem as a ‘legal problem’ and may therefore not approach a legal practitioner for assistance. Some types of

15 Ibid, p. 30
17 Ibid, pp. 29-30
MDP could therefore provide new access points for individuals to receive legal help. MDPs can alter the risk profile of legal practices through diversification and access to new clients.19

A number of authors comment that a key benefit of MDPs is their ability to promote innovation ‘by enabling legal practitioners to work in partnership with others. New types of services can be created from the integration of different services that might otherwise arise.’20

Harrison states that,

Advocates of one-stop shopping endorse the formation of MDPS because they believe that different disciplines working together in MDPs will provide the client with greater convenience and access; by going to just one place, a client can receive assistance of all of his/her needs. Proponents argue that the restrictions banning the formation of MDPs are outdated. “In their view, these restrictions are the unfortunate relics of a regulatory system constructed in the early twentieth century that now impede the delivery of efficient and reasonably priced professional services.”

Supporters also argue that the ban on fee-sharing and on the formation of partnerships prevents law firms from taking advantage of the possible economies of scale that could result from combining legal and ancillary services within the same company. Clients would benefit from an MDP’s ability to combine legal and extralegal issues; this would result in increased efficiency and reduced costs. Moreover, because legal and law-related services can be substitutes, albeit imperfect ones, the ban may bias firms toward performing excessive legal services rather than referring clients to outside providers of less expensive but equally valuable law-related services.

In addition, MDPs promote more comprehensive solutions to client problems and “Big [Five]” accounting firms maintain that their worldwide offices enable them to satisfy the needs of multinational corporate and financial business consulting clients.21

However, there are those who argue against the ‘one-stop shopping’ concept, because of the perceived threat to core professional values. Harrison states:

Opponents of MDPs and one-stop shopping argue that lawyers’ competence and diligence may be threatened because they will be distracted from the practice of law. The opponents believe that the costs to the legal profession outweigh the possible convenience to the client.

Duty to client is impaired because the practitioners of each discipline or profession are not independent of each other. Therefore, the practitioners are not in a position to give the client one of the important components of professional service – an independent evaluation of one another’s qualification or performance.

Duty to society is impaired, because if such firms become characteristic of professional practice they are likely, over a period of time, to reduce the distinctiveness of law as a separate profession. Indeed, the multidisciplinary law firm may become indistinguishable from multidisciplinary groups

19 Ibid, p. 15
20 Ibid, p. 13
organized by members of other disciplines, such as accounting, business management, or financial management.” 22

ii. Core values

(a) Conflicts of Interest

As previously noted, one of the most significant concerns expressed about MDPs is the perceived heightened risk of conflicts of interest, a core value of the legal profession, when two or more different professions work together under one roof according to differing (and presumptively incompatible) sets of standards and codes of conduct. Harrison comments,

“Opponents of MDPs argue that work performed in multidisciplinary firms has a significant risk of conflicts of interest. The problem arises because non-lawyer professionals are not governed by lawyers’ ethics standards”. For example, while “accountants can do work for clients with competing interests, self-imposed conflict rules more often than not prohibit entire law firms from undertaking such representations, even if the conflict involves only a single lawyer in the firm.” These critics argue that at the Big Five level [of accountant firms], where firms are already competing for an elite and limited client base, “[c]onflicts thus pose a potentially insurmountable quandary.”23

However, those who advocate in favour of MDPs counter this argument by asserting that conflicts only become a more real risk with ABS, or business entities which can be controlled by non-lawyers. The American Bar Association’s recommendation in this regard is that only the lawyers in an MDP, not the non-lawyer professionals, should determine the application of the conflicts of interest rules to the clients of the MDP seeking legal services, thus ensuring that client conflict matters are properly handled.24 Therefore, the potential or risk of conflicts can be minimized or avoided for MDPs by ensuring that the lawyer professionals remain in control of these systems.

(b) Confidentiality

Harrison states:

Opponents of MDPs argue that accounting firms and lawyers are not governed by the same rules and that the integration of their services is incompatible; this is especially evident in areas such as the confidentiality of client communications. In the traditional legal setting, “[c]lients are expected to and generally provide candid communications with their attorneys. Clients rely upon and have the right to expect that those communications will remain confidential and will be used exclusively for their benefit.” The fear is that if a client uses the services of a MDP and the client’s dispute ends in a lawsuit, any communications the client had with an attorney would be protected under the attorney-client privilege but that same privilege would not be extended to communications with accountants. For instance, “the accountant with whom the client has shared information could be called as a witness – against the client.”25

22 Ibid, at p. 37
23 Ibid, p. 30
24 Ibid, p. 31
25 Ibid, pp. 31-32
The Tangaza report acknowledges this challenge, saying

MDPs could face a tough challenge in protecting client confidentiality when providing an integrated service involving legal and other services. The implications for legal privilege of providing legal services through a business with mixed ownership also needs to be thought through carefully. 26

It is noteworthy, however, that both Tangaza and Harrison agree that this risk should not become a barrier to MDPs, but simply requires more thought and guidance.

Advocates of MDPs point out that it would be possible to form business structures integrating the services of attorneys with other non-attorney professionals in such a way that the attorney/client privilege is retained. In addition, the problem of lack of privilege between non-lawyers and clients is not new. “[C]lients today may enter a traditional law firm and reveal their cases to non-lawyers such as clerks, and thus lose the attorney-client privilege. Attorneys deal with this problem currently in the traditional law firm and the same type of problem in not insurmountable in an MDP.27

The ABA Commission on Multidisciplinary Practice recommended that to effectively protect confidential client information in a MDP, the onus must be placed on the lawyer professionals within the entity. The lawyers should be responsible for assuring “(1) that the communications the lawyer and client intend to be protected by the attorney-client privilege satisfy the jurisdiction’s applicable requirements, and (2) that the client understands that all other communications are not privileged.” They note that any potential incompatibility should not serve as an ‘absolute bar’ to the formation of MDPs.28

(c) Independence

A key criticism of MDPs is the threat they are perceived to present to a lawyer’s exercise of independent, professional judgment on behalf of clients. The fear or assumption is that by entering into business with non-lawyer professionals, the desire to make decisions that support the business, rather than clients, will become paramount. In other words, there is fear that the entity and other professionals may exert unconscious or undue influence on the core value that a lawyer be able to exercise judgment independent of financial or other business imperatives.

Critics of multidisciplinary practice argue that MDPs threaten the independent professional judgment of a lawyer. Non-lawyers may influence lawyers’ decisions regarding law firm management, the firm’s involvement in legal activities, and the public role of the firm’s attorneys. “They say that if lawyers deliver legal services to non-employer clients … the influence of the bottom line will overpower the lawyers’ ability to be loyal to the client or to make independent decisions with judgment unclouded by considerations of profit.” Opponents further argue that


27 Ibid, p. 32

Model Rule 5.4’s ban on fee-sharing and partnerships with non-attorneys is the “only prohibition that is likely to be effective in maintaining [lawyers’] professional independence.

The rationale underlying the argument of those against the formation of MDPs is the belief that if a lawyer is answerable to a non-lawyer or share fees with a non-lawyer, “there is an overwhelming risk that the lawyer’s professional judgment could be swayed by his or her own economic interests or by other improper considerations.”

Tangaza concedes this argument, stating,

The potential for the independence of legal advice and representation to be undermined is possibly greater in a business in which not all owners, directors or members of the practice are governed by the same professional obligation to discharge their duties to their clients and to the Court, independently of other interests, personal or external.

Harrison challenges this thinking, expressing the view that the assumptions underlying it are incorrect:

First, “[t]o suggest that today’s law practice operates free of the influence of profit flies in the face of every recent trend. Even if accounting firms are concerned about cutting costs, this is not a new concern. There are competitive pressures in the legal industry for law firms to keep down costs as well.

Second, attorney subjection to pressures from non-lawyers is not new. In fact, it is currently happening in the legal industry. “[T]he bar has already recognized and approved situations in which lawyers may work for, and even be supervised and compensated entirely by non-lawyers, without compromising their professional integrity or judgment.” Examples of such situations include in-house counsel, government lawyers, and legal services attorneys. Thus, MDP advocates argue that the “concern about diluting the independent judgment of lawyers is only a matter of degree.”

This concern has extended into what has been referred to by the ABA Commission on MDPs as the ‘economic rather than ethical rule’.

All lawyers are required to place their clients’ interests above their own; this is also true of monetary interests. Attorneys cannot place the financial interests of their profession before the well-being of their clients. Maintaining the current Rule 5.4 which bans the formation of MDPs promotes the lawyer’s monopoly on the legal market. Removing the current prohibitions on MDPs will allow attorneys to compete more effectively in today’s market and “[s]uch changes might actually help law firms survive in the coming decades.” MDPs will create more effective delivery

30 Ibid, p. 34
models for legal services, more efficient investment in resources, and more comprehensive solutions to client problems.\(^{32}\)

Of import, having conducted the most recent research into the pros and cons of MDPs, and the status of MDPs around the world, Hook Tangaza conclude as follows:

So far, there appear to have been no problems arising from MDPs in relation to standards or ethical behavior, or any obvious undermining of independence. On the contrary, there is some evidence that models which require a law firm to think consciously about how it addresses ethical questions as “a business” can have a beneficial impact on discipline and standards.”

“Aside from this, perhaps the most common effect of introducing MDPS elsewhere has been the impact on the diversity of services available from the legal sector and the ability of clients to obtain bundled services which can offer economies of scope and scale.\(^{33}\)

In terms of whether MDPs have or may have a positive impact in the public interest in regard to access to affordable legal fees, which is often cited as an expected benefit of them, Tangaza states:

Any model of MDPs could potentially impact on each of these cost components. Firstly, if the model chosen for the introduction of MDPs were to increase competition in the legal market this might be expected to impact on the fees charged for legal services. Secondly, it is possible that an MDP structure could bring efficiencies by allowing legal practitioners to bring into their partnerships individuals with more experience in running businesses. This would enable the legal practitioners to focus on delivering legal services and the business managers on efficiently managing the business side of the practice… . Fourthly consumers may benefit from the convenience and fluidity that will flow from having providers of various legal and other services “under one roof.” “If a model for MDPs is chosen which involves very heavy regulation, which was the case in the first few years of the England and Wales experience, then any potential benefits of the model would be undermined.\(^{34}\)

The final conclusions in the Hook Tangaza report are relevant for our consideration:

Evidence from jurisdictions where there has been a reasonable take-up of MDPs suggests that there is no reason to believe that MDPs would have a negative impact in any of these areas and could quite possibly have a positive impact. For example, the most common outcome of introducing an MDP model is wider access to new specialist services. Research in the UK and Australia also suggests that MDPs would also improve service quality and access. Nonetheless, it will be important for the [Irish] Authority to establish early on through its own research, what are the priorities of the Irish consumer and how those might be supported.”\(^{35}\)

“It is worth noting that none of the other jurisdictions which have introduced MDPs or similar alternative business structures, have reported any concerns about professional standards, ethical


\(^{33}\) Ibid, p. 7

\(^{34}\) Ibid, p. 72

\(^{35}\) Ibid, p. 75
behavior or quality of service. In fact, the available evidence suggests that the ethical situation improves rather than deteriorates in MDPs and similar structures (especially those that are incorporated).

The reasons for this are hard to pinpoint from the available evidence but possibly arise from the following:

- The introduction of NLP structures [according to the Lawyers of Sydney website, NLP is “…the practice of understanding how people organize their thinking, feeling, language and behaviour to produce the results they do. NLP provides people with a methodology to model outstanding performances achieved by geniuses and leaders in their field. NLP is also used for personal development and for success in business] into MDPs or incorporated practices] seems to have made legal practices more consciously business-like in their operations, better in their handling of case flow (hence reducing risk to client funds) and clearer and more disciplined in their communications with clients.

- NLP structures allow legal practitioners to bring non-lawyers in to undertake the running of their businesses and allow the lawyers to focus on delivering legal services.

- The requirement imposed in jurisdictions adopting MDPs for those organizations to adhere to the professional standards and principles of the legal profession in the delivery of their legal services, requires conscious thought about how these standards and principles are to be accommodated into the day-to-day working practices of the organization. In contrast, within some law firms, especially smaller organizations, it is easy for the assumption to be made that adherence to the appropriate standards and principles will simply happen automatically.36

It is noteworthy that the latter conclusion ties directly into the stated benefits of our MSELP and self-assessment tool. Both require conscious attention to the business and procedures of a law firm.

Victoria Rees had the opportunity to meet with John Eliot, Director of Regulation with the Irish Solicitors’ Regulatory Authority earlier this year, and ask him whether they had moved forward with the recommendations from the Hook Tangaza Report. He advised that this initiative has had to be placed on the back-burner because of pressure from government to respond to concerns about solicitor competency and their education regime, as well as more pressing issues arising from Brexit, but are expected to be revived in due course.

_The SRA Experience_

Victoria Rees also met with Crispin Passmore, (now former) Executive Director, Policy and Education with the Solicitors’ Regulatory Authority in the UK (SRA), to obtain more information about their regulatory approach to and experience with MDPs.

Mr. Passmore stated simply that the SRA’s approach is to authorize all legal service businesses in the same manner, regardless of the form, which includes ABS, MDPs, LLPs and partnerships: what they regulate is the provision of ‘reserved’ legal services (those only a solicitor is authorized to undertake) by solicitors. They support solicitors in the delegation of legal services to others in any entity, but they strive

36 Ibid, p. 83
to only regulate the work carried out by solicitors and those whom they supervise. They work hard to remain within this regulatory scope.

A MDP must be clear with clients from the outset of the relationship what services are regulated and by whom; when different professionals may work together in the client’s interests, and how; and noting that each professional has their own regulator. Mr. Passmore noted that most clients of MDPs are corporations and/or sophisticated clients who understand what they are getting, from whom and the applicable ethical rules. These clients come to MDPs because they want one-stop shopping and solutions for their business matters, of which legal services are but one component.

For this reason, all of the Big Five accounting firms have now entered into the ABS or MDP realm. In Mr. Passmore’s view, accountants have already been essentially providing legal services for years; e.g. advice on application/interpretation of the tax laws, so the SRA is not interested in regulating legal services of this nature where accountants are actually better placed to provide this advice than many lawyers. In other words, this kind of advice is safely in the hands of accountants.

When asked whether permitting MDPs has added value given the comparably limited uptake with this legal services model globally (there are over 150 in the UK), Mr. Passmore expressed the view that MDPs:

- permit growth in earnings,
- reduce the cost of business transactions for clients, and provide one-stop shopping,
- help avoid gaps or overlaps in services as compared with having to separately engage different professionals, which also results in a reduction in costs and risks to clients and the MDP, and
- when businesses opt to go further and become an ABS, they then have the influx of capital to permit them to invest in innovation, among other things.

Mr. Passmore noted that MDPs are now starting to serve more vulnerable clients, such as the elderly seeking estate planning and financial management services. They are also popping up in rural agricultural areas in the UK where there is an identified need for contracts, land use planning, land surveying and financial assistance combined. Other MDPs are starting up to meet the needs of families in terms of family law (e.g. marriage contracts), tax planning, accounting services and estate planning. These models are seen as leading to more focused services and clients finding solutions in one place, which he feels provides enhanced client protection. These models can be seen to enhance access to justice by reducing barriers to obtaining all relevant information to make informed decisions about matters, and by providing a collection of related services in one location.

The SRA recently completed development of different Codes of Conduct for individuals and entities – some rules are the same for both, while others focus on the need to ensure appropriate ethical infrastructures are in place. Rule differences are apparent in the areas of systems, transactions, fees and confidentiality. The SRA examines whether the MDP has the proper systems and controls in place to minimize risk – in the case of complaints, the SRA will investigate the MDP as a whole in these areas as well as the individual solicitors. This relates to the SRA’s principled approach to regulation of legal services within different business models, and supports their efforts to identify risks in a proactive way before client risks arise.

In terms of risk, Mr. Passmore referred to the SRA’s recent studies which demonstrate that there have been no identified increased risks to clients or solicitors as a result of practising in a MDP, and in fact, the studies show a decrease in key risks. The insurance market in the UK favours MDPs and ABS because
they are required from inception to have and adhere to a carefully constructed business plan and model, and tend to have better checks and balances in their management systems than regular law firms.

6. Policy Issues

During the course of our Committee’s review of this research, we identified 11 specific policy issues for consideration during the development phase of this work, as the foundation for designing a regulatory approach to MDPs for Nova Scotia:

i. What is the role of the “responsible lawyer” in a MDP?
ii. What does the authorization process for a MDP look like? Is there an appeal process if authorization is rejected?
iii. Should there be a requirement for majority ownership by lawyers?
iv. What are the requirements for lawyers to supervise non-lawyers in a MDP? What does this supervision entail?
v. Would our current professional liability insurance coverage through LIANS apply to a MDP, and if not, how would this be handled?
vi. Should there be a restriction that a MDP consist only of lawyers working with other regulated professionals?
vii. How should potential conflicts of interest be addressed in the public interest?
viii. How is privilege and confidentiality protected? For example, what protections will be able to be enforced in the event of execution by the authorities of a search warrant on a MDP?
ix. Can a non-lawyer in a MDP also work outside the MDP?
x. How are matters of non-compliance and discipline handled for lawyers and non-lawyers within a MDP?
xi. What is the impact of discipline on a lawyer or non-lawyer within a MDP and vice-versa?

Attached as Appendix A is a chart briefly summarizing the manner in which these policy questions have been addressed by the SRA, the Law Society of BC and the Law Society of Ontario. The chart also includes a column on the right which represents this Committee’s preliminary thoughts on how the issues might be addressed in NS, and identifying questions for consideration as we move forward. These are the issues which Council will need to consider in the coming months if a green light is given to continuing down this path.

7. Recommendation

The CPCC recommends that Council permit the Code of Professional Conduct Committee to continue down the path of designing a regulatory, policy and ethical regime to support the creation of MDPs in the near future. The Professional Responsibility Policies and Procedures Committee will have a role to play in the regulatory and policy design as well. There are no legislative amendments required for this purpose, nor any additional resources for this phase of the work.

As noted previously, the review of the Code by the Code of Professional Conduct Committee did not identify any barriers to MDPs with the exception of rule 3.6-7 re Fee Sharing. The other rules that are specifically relevant to MDPs are those related to Confidentiality and Conflict of Interest.
Two options have been discussed thus far to address the fee sharing issue: one is to propose an amendment based on recommendations made in the CBA *Futures Report*; the other follows Ontario’s lead and provides a specific exclusion for MDPs.

With regard to confidentiality and conflict of interest, B.C. and Ontario have followed similar paths in adding specific reference to these areas in the rules/bylaws and by amending their Codes in an effort to clarify a lawyer’s obligation to adhere to these ethical principals regardless of the business structure that has been adopted.

In Nova Scotia, the requirement now exists for “law firms” (which would include MDPs) to establish management systems for ethical legal practice, and our request for legislation includes eventual consequences for failing to do so, which are primarily educational and supportive in nature. As well, any new firm is now required to register with the Society, which begins with a consultation process whereby the responsible lawyer and/or all members of the firm have an opportunity to meet with the Society’s Legal Services Support team to discuss all issues relevant to the firm’s model of practice. This process will provide the opportunity for the MDP to receive advice, guidance and resources from the Society that will enable the lawyers to establish a business model that meets their ethical obligations while still supporting innovation.

Firms now have triennial reporting obligations in relation to the management systems they establish, as well as the annual firm reports. These give lawyers further opportunity to engage with the Society about their business model, and permit the Society some oversight regarding the model and the firm’s compliance with the *Code, Legal Profession Act* and Regulations.

Should Council be favourably disposed to this Committee’s recommendation that it permit the development of MDPs in Nova Scotia, draft amendments to the rule 3.6-7 of the *Code* would be prepared in due course.

The CPCC also recommends that once a regulatory and policy framework has been developed and endorsed by Council, that there be consultation with the membership as well as other professional regulators and potential stakeholders to assess, among other things, whether the proposed framework would support and encourage the development of MDPs, rather than create barriers, and to discuss means for cooperation between regulators in areas where this may be beneficial.

8. **Conclusion**

In terms of the questions posed at the start of this paper, the CPCC believes that permitting the development of multidisciplinary practices (MDPs) in Nova Scotia would align with and support:

(i) the Society’s Regulatory Objectives,

(ii) Council’s Strategic Directions of excellence in regulation and improving the administration of justice, and, in particular,

(iii) the public interest.

**Regulatory Objectives**

In November 2014, Council approved the six Regulatory Objectives to guide the work of the Society in meeting its purpose, role and functions. They are:
- Protect those who use legal services.
- Promote the rule of law and public interest in the justice system.
- Promote access to legal services and the justice system.
- Establish required standards for professional responsibility and competence in the delivery of legal services.
- Promote diversity, inclusion, substantive equality and freedom from discrimination in the justice system.
- Regulate in a manner that is proactive, principled and proportionate

By permitting members to provide legal services through a properly authorized MDP, Council would be supporting virtually all of the ROs above. In particular, MDPs protect those who use their legal services in at least the same if not better way than some law firms, promote access to a combination of legal and related services under one roof, potentially at lower cost, and represent an innovative and proactive approach to regulation of legal services.

**Strategic Directions**

Council’s Strategic Directions for 2016 – 19 can be broadly stated as “Achieve Excellence in Regulation and Governance”, “Improve the Administration of Justice” and “Ensure the Financial Viability and Sustainability of the Organization”. For purposes of this discussion, the first two Strategic Directions are relevant, and encompass the Regulatory Objectives stated above. Under these subheadings, Council determined that activities supporting its Objectives include developing processes to support legal services regulation, together with Council’s stated desire to help lawyers foster innovation in the delivery of legal services.

**Public interest**

The Society’s purpose is “to uphold and protect the public interest in the practice of law.”

When Council directed in 2014 the development of a proactive and principles-based form of regulation, it also directed that the Society develop means to support lawyers and firms in establishing appropriate management systems to enhance the quality of legal services delivered, in the public interest. This led to creation of the MSELP and the self-assessment process. These developments help lay a solid foundation on which to build MDPs.

Based on this research, permitting MDPs would, in fact, align with and support the Society’s Regulatory Objectives and Council’s Strategic Directions, in the public interest. In addition, given that at least three other law societies currently permit MDPs and have adopted rules and regulations to permit the same, NSBS would not be offside other jurisdictions in doing the same.

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37 Legal Profession Act, S.N.S. 2004, c. 28, as amended by S.N.S. 201, c. 56, section 4(1)
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<th>Issue</th>
<th>SRA</th>
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<th>LSO</th>
<th>Proposed NS</th>
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<td>Role of responsible lawyer</td>
<td>Each MDP must have one lawyer/manager “qualified to supervise”, and an ‘authorized signatory’ responsible to maintain direct link with SRA and ensure filings done. Each must also have a COLP (compliance officer for legal practice) and COFA (compliance officer for finance and admin).</td>
<td>The practising lawyers who are members of the MDP must have actual control over the delivery of legal services by the MDP. The non-lawyer members of the MDP must agree, in writing, not to interfere, directly or indirectly with the lawyer’s obligation to comply with the Act, the rules and the <em>Code of Professional Conduct</em>.</td>
<td>Each licensee must satisfy themselves that they are in compliance with any applicable rules, guidelines or by-laws. This includes effective control over the non-licensee’s work for the MDP.</td>
<td>The Regulations currently require every law firm to designate a “Designated Lawyer” (reg. 4.7.1) who is responsible for all filing requirements of the law firm, receiving communications from the Society and maintenance of foundation documents. It is anticipated that this lawyer would also assume responsibility for ensuring all written agreements are in place between all partners of an MDP, but that all lawyer-partners of the MDP would bear responsibility for the work of the non-lawyers of the MDP.</td>
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<td>MDP authorization/application process</td>
<td>Must be a ‘licensable body’ which means: a partner, company or LLP, AND at least one manager of the body must be an England and Wales lawyer, AND at least one manager or interest holder must be a non-lawyer. Must not have a misleading name. Must have appropriate insurance. All owners, managers and compliance officers must be approved. Must meet the eligibility rules relating to its registered office, and have at least one manager who is ‘qualified to</td>
<td>A lawyer must apply for permission from the Executive Director before practicing law as a member of an MDP. The application may be approved with or without conditions or be referred to the Credentials Committee.</td>
<td>All lawyers and licensed paralegals, who are in good standing, may form an MDP with professionals who practise a profession, trade or occupation that supports or supplements their practice of law or provision of legal service (e.g., accountants, tax consultants, trademark and patent agents, etc.).</td>
<td>A draft application process has been prepared based largely on the by-laws from the LSBC.</td>
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<td>supervise’. Requires completion of application form, supporting documents, and any additional information requested. Once basic eligibility requirements met, SRA then assesses whether the applicant, its governance or business model poses a risk that requires further investigation. (see details below)</td>
<td></td>
<td>An MDP which must be approved by the Law Society by application. The licensee must comply with Part III of By-Law 7.</td>
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<td>Appeal process</td>
<td>Yes. The authorization rules include a right to appeal, and all of the decisions can ultimately be subject to an application for judicial review.</td>
<td>If the application for an MDP is not approved, the lawyer may appeal to the Credential Committee for a review. If the Credentials Committee approves the application with restrictions/conditions or if it refuses to approve the application, the lawyer may request written reasons.</td>
<td>If an application for an MDP is not approved, the licensee may either meet whatever requirement was found to be deficient or appeal to a committee of Benchers if the licensee believes the requirements have all been met. The appeal must be filed in writing within 30 days of notice of the Society’s decision.</td>
<td>The draft regulations include an appeal of the EDs decision not to approve an MDP</td>
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<td>Majority ownership by lawyers</td>
<td>No. The MDP as a whole is regulated by the SRA. Those who own it and work within it must comply with the rules for Legal Service Bodies as well as the Code.</td>
<td>No. An MDP is defined as a partnership that is owned by at least one lawyer or law corporation and at least one individual non-lawyer or</td>
<td>No. The MDP is regulated by the Society and the Code of Professional Conduct and By-Laws require all members of the MDP to comply with the duties therein.</td>
<td>This is not currently contemplated.</td>
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<td>professional corporation that is not a law corporation.</td>
<td>By-Law 7 18(2)... 2. The professional agrees with the licensee in writing that the licensee shall have effective control over the professional’s practice of his, her or its profession, trade or occupation in so far as the professional practises the profession, trade or occupation to provide services to clients of the partnership or association. ... 5. The professional agrees with the licensee in writing that, in respect of the practice of his, her or its profession, trade or occupation in partnership or association with the licensee, the professional will comply with the Act, the regulations, the bylaws, the rules of practice and procedure, the Society’s rules of professional conduct for the licensee and the</td>
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<td>NOTE: LSO has never required majority ownership; since the regulatory model was adopted in 1999, “effective control” by lawyers has been the required standard for MDPs.</td>
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<td><strong>Supervision of non-lawyers</strong></td>
<td>Non-lawyers cannot conduct activities reserved for lawyers, unless under authorized lawyer supervision. Any reserved legal work must be supervised by a lawyer. Unreserved legal work can be supervised by a lawyer or non-lawyer. Supervisor doesn’t need to be a partner or owner. Non-lawyers are also subject to their regulators’ own Codes and rules.</td>
<td>A lawyer may only practice law in an MDP if all non-lawyers have agreed that the lawyers will have actual control over the delivery of legal services by the MDP and specifically that non-lawyers will not provide services to the public except under the supervision of a practising lawyer.</td>
<td>Society’s policies and guidelines. 6. In the case of entering into a partnership with the professional, the professional agrees with the licensee in writing to comply with the Society’s rules, policies and guidelines on conflicts of interest in relation to clients of the partnership who are also clients of the professional practising his, her or its profession, trade or occupation independently of the partnership.</td>
<td>The CPCC should consider an amendment to the Code of Professional Conduct to specifically refer to MDPs.</td>
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<td>CPC Section 7.8.1: “A lawyer in a multi-discipline practice shall ensure that non-licensee partners and associates comply with these rules and all ethical principles that govern a lawyer in the discharge of their professional obligations.”</td>
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<td><strong>What does ‘supervision’ mean?</strong></td>
<td>Same as that required in NS. Lawyer is responsible for all ‘reserved’ (legal services) work undertaken by anyone in firm/MDP, and extent of supervision depends on many factors. Activity that falls outside of regulated activity is not subject to most of the Code, insurance coverage, and Comp Fund provisions, as well as trust accounts rules.</td>
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<td>In NS, the lawyers would be responsible for all legal work undertaken within the MDP and will be expected to supervise as set out in the draft regulations and pursuant to the Code.</td>
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<td><strong>Responsibility for actions of professional</strong> 19. Despite any agreement between a licensee and a professional, the licensee shall be responsible for ensuring that, in respect of the professional’s practice of his, her or its profession, trade or occupation in partnership or association with the licensee, (a) the professional practises his, her or its profession, trade or occupation with the appropriate level of skill, judgement and competence; and (b) the professional complies with the Act, the regulations, the by-laws, the rules of practice and procedure, the Society’s rules of professional conduct for the licensee and the Society’s policies and guidelines.</td>
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<td><strong>Insurance coverage</strong></td>
<td>MDPs and firms in UK are required to obtain own insurance – no single provider. MDPs are required to have same insurance coverage as firms, and are further urged to have same insurer for all MDP activities to avoid disputes about coverage. The SRA ‘expects that all legal activity, whether SRA regulated or within the external regulation exception, should be covered by a policy that meets the SRA’s minimum terms and conditions’.</td>
<td>A lawyer practising law in an MDP must ensure that every non-lawyer member of the MDP providing services directly or indirectly to the public on behalf of the MDP maintains professional liability insurance on the terms and conditions offered by the Society through the Lawyers Insurance Fund.</td>
<td>The non-licensee partners of an MDP are required to purchase professional liability insurance from the Lawyers’ Professional Indemnity Company (LawPRO), which is the professional liability insurer for lawyers in Ontario.</td>
<td>Have inquired whether CLIA has considered offering liability insurance to non-lawyer partners of an MDP as is offered in BC and ON. Will need to consider possible alternatives to non-lawyer partner insurance through CLIA/LIANS.</td>
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<td><strong>Only lawyers with other regulated professions?</strong></td>
<td>This limitation does not exist. S. 52 LSA provides that in any conflict between the rules of the SRA and those of another regulator, the SRA rules will prevail.</td>
<td>No. There is no defined category of non-lawyers who may become partners in an MDP. However, the rules provide that all members of the MDP who are governed by the regulatory body of another profession agree to report to the MDP any proceedings concerning their conduct or competence.</td>
<td>No. A lawyer may enter into an MDP with another “professional”. “Professional” is a defined term in the By-law, and means “an individual or a professional corporation established under an Act of the Legislature of Ontario other than the Law Society Act the services of whom or which a licensee may, under section 17, provide to a client in connection with the licensee’s licensed activity.”</td>
<td>If CLIA insurance is not available to non-lawyer partners, then NS would need to consider whether non-lawyer partners will be limited to members of a regulated profession with mandatory e&amp;o insurance.</td>
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<td>How to address conflicts?</td>
<td>If the lawyer and non-lawyer are involved in regulated activity (reserved legal services), their work will be supervised by lawyers and subject to the rules on conflict of interest in the Code.</td>
<td>Rule 2-46 provides that: A lawyer practising law in an MDP must take all steps reasonable in the circumstances to ensure that the other members of the MDP will comply with the provisions of the Act, these rules and the <em>Code of Professional Conduct</em> respecting conflicts of interest as they apply to lawyers.</td>
<td>A non-lawyer professional has to agree that the lawyer will have effective control over the professional’s practice of their profession, trade or occupation in so far as the professional practises their profession, trade or occupation to provide services to clients of the partnership. The non-lawyer professional also agrees to comply with the <em>Law Society Act</em>, the regulations, the by-laws, and all of the Society’s rules, policies and guidelines. See specifically CPC: <strong>Multi-discipline Practice 3.4-16.1</strong> A lawyer in a multi-discipline practice shall ensure that non-licensee partners and associates observe the rules in Section 3.4 for the legal practice and for any other business or professional undertaking carried on by them.</td>
<td>The CPCC should consider amendments to the Code to specifically include reference to MDPs.</td>
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<td>How to protect privilege?</td>
<td>All reserved legal services work must be carried out or supervised by a lawyer, and that lawyer in an MDP has the same duties re confidentiality and privilege as those working in a traditional firm. In addition, all MDPs must have procedures in place to ensure that clients are aware of their regulatory position – and which activities within the MDP are regulated by the SRA or not.</td>
<td>Rule 2-45 provides that: A lawyer practising law in an MDP must take all steps reasonable in the circumstances, including the implementation of screening measures if necessary, to ensure that no improper disclosure of privileged or confidential information is made to any person, including a person appointed by the regulatory body of another profession in relation to the practice of another member or employee of the MDP.</td>
<td>Same as above. The non-lawyer professionals agree in writing to comply with the Code etc as part of the MDP application process.</td>
<td>The CPCC should consider amendments to the Code to specifically include reference to MDPs.</td>
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<td>Can a non-lawyer also work outside MDP?</td>
<td>The rules of conduct do not apply to the actions of non-lawyers outside of the firm in which they are involved. The SRA only regulates those involved in providing legal services. If the non-lawyer is involved in regulated activity (legal services),</td>
<td>The rules do not appear to prohibit a non-lawyer from working outside the MDP.</td>
<td>Yes. The non-lawyer professional must agree in writing that any work done outside of the MDP must be conducted on a premises not associated with the MDP.</td>
<td>It is anticipated that the non-lawyer partners of an MDP could operate a separate business outside of the MDP; however, issues of confidentiality and conflict will have to be clearly identified and managed by the MDP.</td>
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## MDP Policy Chart

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<td>their work will be supervised by lawyers and subject to the rules on conflict of interest in the Code. If they are not involved in regulated activities, they will be subject to their own organization and/or home regulator’s rules on conflicts. The SRA may take action where a non-lawyer has been convicted of a criminal offence outside the workplace.</td>
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<td>Impact on MDP and non-lawyers of discipline against lawyer</td>
<td>The MDP’s regulated activity will be conducted by solicitors, barristers, etc., with the support of non-lawyers and action can be taken against lawyers and non-lawyers alike for breaches of the high standards expected of lawyers and firms. Where a non-lawyer is working on a regulated activity they are unlikely to be impacted by disciplinary action against those involved in regulated activity. However, they are under an obligation to provide information to the SRA to assist them, and the Policy Statement provides “Information from across the MDP will be disclosable to the SRA in accordance with the provisions of s. 93 LSA”.</td>
<td>The non-lawyer members of an MDP may only offer services that support or supplement the practice of law to the public under the supervision of a lawyer. If the sole lawyer associated with the MDP is no longer authorized to practice law, then the MDP permit would be cancelled (see rule 2-43).</td>
<td>The MDP is only able to operate as a law firm if there is a licensee providing legal services. If a lawyer facing disciplinary proceedings is still entitled to practise law, the MDP normally can continue to provide services to clients. However, if there is only one lawyer and that lawyer is not entitled to practise law, the MDP would no longer be able to operate as a law firm.</td>
<td>The draft regulations contemplate the MDP operating only with a lawyer as a partner; if the lawyer-partner is removed from practice for any reason, the MDP would not be permitted to operate.</td>
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The MDP is only able to operate as a law firm if there is a licensee providing legal services. If a lawyer facing disciplinary proceedings is still entitled to practise law, the MDP normally can continue to provide services to clients. However, if there is only one lawyer and that lawyer is not entitled to practise law, the MDP would no longer be able to operate as a law firm.

The draft regulations contemplate the MDP operating only with a lawyer as a partner; if the lawyer-partner is removed from practice for any reason, the MDP would not be permitted to operate.
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<td>Impact on MDP and lawyer of discipline against non-lawyer</td>
<td>Same range of powers as with any law firm. SRA can seek responses, obtain information and documents, impose disciplinary sanctions if they are employees of the MDP, or disqualify them from working in a licensed body. Focus will be on whether conduct has or is likely to have impact on MDP activities. If working under lawyer supervision, lawyer may also be held responsible as supervisor.</td>
<td>The Society does not have jurisdiction over the non-lawyer members of an MDP. However, a lawyer practising law in an MDP must take all reasonable steps to ensure that the non-lawyer members of the MDP practise their profession, trade or occupation with appropriate skill, judgement and competence; comply with the Act, rules and the Code of Professional Conduct. Failure to do so could result in a revocation of the authorization to practice in an MDP and/or a charge of professional misconduct.</td>
<td>The Society cannot bring professional misconduct proceedings against a non-licensee partner of an MDP, as they are not a licensee and not subject to the Society's jurisdiction. However, regulatory proceedings could be brought against any or all licensee partners of the MDP. The Rules of Professional Conduct for lawyers define “professional misconduct” to include “knowingly assisting or inducing a non-licensee partner or associate of a multi-discipline practice to violate or attempt to violate the rules in rules or a requirement of the Law Society Act or its regulations or by-laws”.</td>
<td>The Society would not have jurisdiction over the non-lawyer partner but could initiate disciplinary proceedings against the lawyer partners if the conduct of the non-lawyer should have been prevented/managed by the lawyers in the MDP.</td>
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Note: SRA MDP application process – assessment of risk areas before approval:

- Whether firm’s manager and interest holders are suitable, as a group (or the sole principal is suitable) to operate or control a business providing regulated legal services
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<td>• Whether the firm’s management or governance arrangements are adequate to safeguard the SRA’s Regulatory Objectives</td>
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<td>• Whether the firm will comply with the SRA’s regulatory arrangements</td>
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<td>• Whether the firm has provided accurate information in its application, and</td>
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<td>• It is not against the public interest or otherwise inconsistent with the Regulatory Objectives to grant authorization.</td>
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INTRODUCTION
The Activity Plan for 2019 outlines those activities that Council has mandated to address the initiatives approved in the Strategic Framework. Council will also monitor certain activities assigned to the Executive Director. Council Committees will carry on with their work under their Terms of Reference and work plans approved by Council.

STRATEGIC DIRECTION 1 – REGULATION AND GOVERNANCE

<table>
<thead>
<tr>
<th>PRIORITY 1. Implementation of Legal Services Regulation and Legal Services Support</th>
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<td><strong>Outcomes:</strong></td>
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<td>• MSELP Rollout is complete and all firms are on a three-year cycle;</td>
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<td>• Legal Services Support team is established and has processes and protocols to address membership needs;</td>
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<td>• Amendments to Legal Profession Act are passed and Regulations to support these amendments are adopted by Council;</td>
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<td>• Succession Planning – resources, templates and education in place to assist lawyers in creating and implementing succession plans, as well as a checklist and guidelines for file retention and destruction.</td>
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<td><strong>TIMELINE</strong></td>
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<tr>
<td>January –</td>
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<td>February - LSS Status Update to Council</td>
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<td>March –</td>
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<td>April -</td>
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<tr>
<td>May – LSS Status Update to Council</td>
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<td>June–</td>
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<td>July/August –</td>
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<td>September –</td>
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<td>December –</td>
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### PRIORITY 2. Restorative Processes and Approaches

**Outcome:**
- An understanding of restorative approaches and when and how to use them in the Organization, at Council and later with committees.

**TIMELINE**
- January –
- February –
- March –
- April
- May – Update to Council on Restorative Approaches
- June –
- July/August –
- September –
- October –
- November –
- December –

### PRIORITY 3. Regulatory Risk

**Outcomes:**
- Participate in additional education session(s) around Regulatory Risk;
- Use preliminary risk information to inform Council’s strategic planning and decision making on priorities;
- Consider Regulatory Risks when working with Committees to ensure risks are addressed in work plans and projects.

**TIMELINE**
- January –
- February –
- March – Education Session on Regulatory Risk and Outcomes Measurement
- April –
- May –
- June –
- July/August –
- September –
- October –
- November –
- December –
## PRIORITY 4. Outcomes Measurement

**Outcomes:**
- Participate in additional education session(s) on Outcomes Measurement;
- Use an outcomes measurement lens when performing strategic planning with a goal of building goals and objectives that can be measured;
- Consider outcomes measurement when working with Committees to help ensure work plans and projects have clearly defined outcomes and goals.

**TIMELINE**
- January – Committee Chairs to attend Council Meeting
- February – Education Session on Regulatory Risk and Outcomes Measurement
- March – Part of Strategic Planning process
- April –
- May –
- June –
- July/August –
- September –
- October –
- November –
- December –

## PRIORITY 5. Modernize Trust Account Requirements

**Outcome:**
- A Trust Assurance Program and Regulations are in place that reflect the Society’s Triple-P approach.

**TIMELINE**
- January – Trust Account Regulation Working Group (TARGW) report to Council with initial set of recommended amendments to the Regulations
- February –
- March –
- April –
- May – Trust Account Assurance Monitoring Report to Council and TARWG – Status Update to Council (1)
- June –
- July –
- August – TARWG – Status Update to Council (2)
- September –
- October –
- November – TARWG – Status Update to Council (3)
- December –
## STRATEGIC DIRECTION 2 – ADMINISTRATION OF JUSTICE

### PRIORITY 1. Promote Access to Legal Services

**Outcomes:**
- Consider recommendations from the Code of Professional Conduct Committee respecting making regulatory and Code of Conduct provisions for permitting MDPs in Nova Scotia;
- Amend Regulations and processes to create possibilities for innovative legal practices.

**TIMELINE**
- January – February - Recommendations to Council on MDPs from CPCC

### PRIORITY 2. Promote Substantive Equality and Freedom from Discrimination in Delivery of Legal Services and the Justice System

**Outcome:**
- Develop relevant tools and resources to increase staff, Council, committees and membership capacity to apply an equity (culturally competent, trauma informed) lens to all Society work.

**TIMELINE**
- January - Education Session on Applying an Equity Lens
- February – March – E&A Monitoring Report to Council
- April – May – E&A Status Update to Council
- June – July/August – September – October – November – December --
<table>
<thead>
<tr>
<th>PRIORITY 3. Engage with Justice Sector Players and Equity-Seeking Communities to Enhance Access to Legal Services and the Justice System</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Outcomes:</strong></td>
</tr>
<tr>
<td>• #TalkJustice project; identify ways for Council to use #TalkJustice data in its work;</td>
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<tr>
<td>• Enhance and build meaningful engagement with communities whose legal needs and concerns fall outside the mandates of the Gender Equity Committee and Racial Equity Committee.</td>
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<tr>
<td><strong>TIMELINE</strong></td>
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<tr>
<td>January – Update on status of #TalkJustice; Council meeting at Schulich School of Law</td>
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<td>February --</td>
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<td>March –</td>
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<tr>
<td>April –</td>
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<tr>
<td>May – Council meeting in the community</td>
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<td>June –</td>
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<td>July/August –</td>
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<td>September –</td>
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<tr>
<td>October –</td>
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<td>November –</td>
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<td>December -</td>
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<th>PRIORITY 4. TRC</th>
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<tr>
<td><strong>Outcomes:</strong></td>
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<tr>
<td>• Education and materials developed reflect a response to Call to Action #27;</td>
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<td>• Provide prompt, substantive support to the TRC Working Group and the Racial Equity Committees as each of these bodies completes their own TRC work.</td>
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<tr>
<td><strong>TIMELINE</strong></td>
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<tr>
<td>January – TRC WG update</td>
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<tr>
<td>February</td>
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<td>March –</td>
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**PRIORITY 5. Promote Equity, Diversity and Inclusion in the Legal Profession**

<table>
<thead>
<tr>
<th>Outcome:</th>
<th>TIMELINE</th>
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</thead>
</table>
| • Council will leverage its education, experience and networks to promote equity, diversity and inclusion in the legal profession. | January – Engage with diverse communities and members to encourage applications for council elections  
February  
March – Dara Gordon event  
April –  
May – Review of questions for Annual Lawyer Report  
June –  
July/August –  
September –  
October –  
November –  
December – |
MEMORANDUM TO COUNCIL

To: Council

From: Lawrence Rubin

Date: February 7, 2019

Subject: Professional Standards (Criminal) Committee

Standard No. 2: Lawyers' Competence

<table>
<thead>
<tr>
<th>DATE</th>
<th>Council</th>
<th>Introduction</th>
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<td>January 19, 2018</td>
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<tr>
<td>February 15, 2019</td>
<td>Council</td>
<td>Approval</td>
</tr>
</tbody>
</table>

Recommendation/Motion:

This is a new Standard No. 2 - Lawyers’ Competence presented by the Professional Standards (Criminal) Committee for final approval. Following introduction of the Standard to Council, the Committee circulated it to the Membership for review and consultation. The Committee has reviewed the responses received and the final version of the proposed Standard for Council’s final approval follows.

Prior to providing this final version of the Standard to you, the Committee referred it to the Racial Equity and Gender Equity Committees for their consideration. Neither Committee proposed any changes to the Standard.

Executive Summary:

The Committee’s Work Plan included a project related to lawyer competence. The Committee’s goal was to articulate the standard with respect to issues of competence for lawyers in the context of criminal proceedings. The Committee notes that the entitlement to effective counsel is enshrined in Sections 7 and 11(d) of the Charter and is supported by the case law.
The attached draft is in the usual three column format, but as a new standard, the first column is blank.

**Exhibit**: Standard No. 2: Lawyers’ Competence with rationale.
### EXISTING STANDARD

<table>
<thead>
<tr>
<th>LAWYERS’ COMPETENCE STANDARD</th>
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<tbody>
<tr>
<td>A lawyer must be competent to perform all legal services undertaken on behalf of a client. In the criminal law context, competence requires:</td>
</tr>
<tr>
<td>- an objective assessment of whether the lawyer can competently represent the client on the specific matter, having regard to the seriousness of the charge(s) and the complexity of the matter, given the lawyer’s experience, pre-existing caseload and available resources.</td>
</tr>
<tr>
<td>- an ability to recognize potential legal, ethical and evidentiary issues.</td>
</tr>
</tbody>
</table>

### COMMENTARY

1. The Rule concerning Competency in section 3.1 of the Nova Scotia Barristers Society Code of Professional Conduct and the more specific definitions of that term contained within section 3.1-1 of the Code are a useful starting point to understanding Competency in the context of criminal practice. Experience of counsel is a significant factor in a lawyer’s competence to undertake a matter. A lawyer must not undertake a matter without the requisite skill gained by training and experience. See Code Ch. 3 - Commentary [6];

2. “The effectiveness of counsel is to be evaluated on an objective standard through the eyes of a reasonable person such that all an accused can expect of his or her defence counsel is a level of competence based on a standard of reasonableness. In other words, the lawyer is ‘required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken.’ Central Trust Co. v. Rafuse, [1986] 2 S.C.R. 147 at para. 57.” (R. v. Fraser, 2011 NSCA 70, at para. 80); also see: R. v. West, 2010 NSCA 16 at para 268; R. v. G.D.B., [2000] 1 S.C.R. 520, 2000 SCC 22 at para. 27; Law Society of Upper Canada, “Entry Level Barrister Competencies”, http://www.lsuc.on.ca/BarristerCompetencies; |

2. A lawyer must recognize a task for which the lawyer lacks competence and the disservice that would be done to the client by undertaking that task. If consulted about such a task, the lawyer should: (a) decline to act; (b) obtain the client’s instructions to retain, consult or collaborate with a lawyer who is competent for that task; or (c) obtain the client’s consent for the lawyer to become competent without undue delay, risk or expense to the client.

3. Experience guidelines are a useful starting point to determining whether counsel has sufficient experience.

4. Counsel can take on cases where they will require some training, as long as the client is advised about the time and expense that may be required.

5. Complexity of the matter includes the form and manner of presentation of the evidence. In some cases this will require the lawyer to have a basic ability to understand specialized information such as financial, scientific (such as DNA), or industry-specific data, and computer literacy and equipment sufficient to allow the lawyer to work with electronic disclosure and evidence presentation. See, specifically, the PPS/police MOU on electronic disclosure.

6. In R. v. Therrien, 2005 BCSC 592, the Court observed:

   37 With those qualifications in mind, I will refer to three cases: Rose, Jonsson, and Hallstone Products. First, in both Rose and Jonsson, the court foreshadowed the eventual response to the claim, as advanced here, of lack of necessary computer skills by counsel. In Rose, Martin J. noted that electronic disclosure is a fact of life, and in relation to acquiring the skills necessary to deal with that development, he said at para. 14 that "it is probably now incumbent ... to get with the program". In Jonsson, the Crown made disclosure of its case on 12 CD-ROMs on which there were summaries of electronic interceptions. The defendant objected on the basis that his lawyer lacked the necessary skills to use a computer and thus could not access the information. As to the lack of computer skills on the part of counsel, Klebuc J. said at para. 14:

   ... the day will soon come when the ability to operate a personal computer and retrieve data stored on computer disks and related media by means of software who has the same skills as the prosecutor and who can use those skills to ensure that the accused receives the full benefit of the panoply of procedural protections available to an accused."


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4 Code of Professional Conduct, Rule 3.1-2, commentary [1]-[6].
programs designed for general public use will be a core competency requirement for counsel who wish to act in cases involving voluminous amounts of data.

7. Competence can involve cultural aspects. Sometimes a client’s cultural background can have a substantive effect on their rights to liberty and to a fair trial. For example, Indigenous people are disproportionately denied bail, and still serve longer sentences than non-Indigenous offenders. As a result, when counsel have an Indigenous client they have a positive duty “to bring that individualized information before the court in every case, unless the offender expressly waives his right to have it considered”. Similar consideration should be given to cultural elements that may affect moral culpability for the purpose of sentencing.

8. Cultural background also has a substantive effect on the right to be tried by a jury of one’s peers.

9. Examining competency is a component in determining “ineffective assistance of counsel” in the appeal context, but the standards are not the same. Cases addressing ineffective assistance of counsel arguments in the criminal context can be a useful reference in understanding competence, but the standard for “competence” in the professional discipline context is different than the standard for a successful argument of ineffective assistance of counsel.


26 The approach to an ineffectiveness claim is explained in Strickland v. Washington, 466 U.S. 668 (1984), per O’Connor J. The reasons contain a performance component and a prejudice component. For an appeal to succeed, it must be established, first, that counsel’s acts or omissions constituted incompetence and second, that a miscarriage of justice resulted.

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5 This is not a defined term. In the Society’s Equity Portal there is good material – see Cultural competence: An essential skill in an increasingly diverse world – practicePRO


7 Ipeelee, para. 60.

8 R. v. X., 2013 NSPC 127.

27 Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.

28 Miscarriages of justice may take many forms in this context. In some instances, counsel's performance may have resulted in procedural unfairness. In others, the reliability of the trial's result may have been compromised.

29 In those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade counsel's performance or professional conduct. The latter is left to the profession's self-governing body. If it is appropriate to dispose of an ineffectiveness claim on the ground of no prejudice having occurred, that is the course to follow (Strickland, *supra*, at p. 697).

34 Where, in the course of a trial, counsel makes a decision in good faith and in the best interests of his client, a court should not look behind it save only to prevent a miscarriage of justice.

*R. v. West, 2010 NSCA 16 – Standard of review for ineffective assistance*

[269] One takes a two-step approach when assessing trial counsel's competence: first, the appellant must demonstrate that the conduct or omissions amount to incompetence, and second, that the incompetence resulted in a miscarriage of justice. As Major J., observed in *B.(G.D.)*, *supra*, at para. 26-29, in most cases it is best to begin with an inquiry into the prejudice component. If the appellant cannot demonstrate prejudice resulting from the alleged ineffective assistance of counsel, it will be unnecessary to address the issue of the competence.

10. Cases addressing ineffective assistance of counsel in the criminal context have commented on specific behavior that may fall below the standard expected of criminal counsel. The impugned

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10 See *R. v. Furtado*, 2006 CanLII 32992, 43 CR (6th) 305 (ONSC), at para. 74, for a comprehensive review of ineffective assistance of counsel first principles.
conduct will be directed to either particular failings that affect the verdict, or pervasive incompetence that undermine the trial process, or both. Examples include:

(ii) Conducting trial while a true conflict of interest exists – trial fairness [*Joanisse*, at para. 79];
(iii) Failing to advise client on challenge for cause in jury selection – trial fairness [*Fraser*, at paras. 57-78];
(iv) Failing to adhere to the rule in *Browne v. Dunn* – reliability of verdict [*R. v. Gardiner*, 2010 NBCA 46];
(v) Failing to competently conduct a motion to adduce certain evidence – both [*Fraser*, at paras. 109-114];
(vi) Failing to advise fully of the benefits/dangers associated with testifying/not testifying, particularly when relying on a defence that has a subjective component – both [*Ross*, at paras. 37-61];
(vii) Failing to cross-examine any witness – both [*Ross*, at paras. 58-61];
(viii) Fundamental lack of understanding of the law – trial fairness [*Ross*, at paras. 58-61];
(ix) Failing to investigate (including a failure to effectively pursue areas at Preliminary Inquiry) and prepare case – reliability of verdict [*Fraser*, at paras. 94-95];
(x) Failing to prepare witness for testimony – both [*Ross*, at paras. 45, 58-61; *Fraser*, at paras. 105-107];
(xi) Failing to review new disclosure and advise client of particulars and options – both [*Fraser*, at paras. 93, 116-119];
(xii) Failing review all evidence of witness, and then failing to call them – reliability of verdict [*Fraser*, at paras. 84-93, 97-104];
(xiii) The cumulation of failures may affect the verdict [*R. v. J.B.*, 2011 ONCA 404];
(xiv) Failure to advise of possible defences or consequences of a guilty plea – both (though it is unsettled about whether the failure to advise of collateral or administrative consequences

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11 *Ross*, (see note 2) at para. 33.

11. It is critical for counsel to recognize that competence will not be measured by a microscopic examination, or “forensic autopsy”\(^\text{12}\) of counsel’s performance. To do so would discourage the duty of counsel to fearlessly and vigorously defend their clients.\(^\text{13}\)

12. Likewise, counsel are entrusted to act independently when they take carriage of a file. They are not the mouthpiece of their client. Their independent judgment includes making strategic decisions, the extent of cross-examination, etc. Advancing any and all objections, making any and all applications that come to mind, regardless of consideration of chances of success, or effect on other arguments or defences advanced, are the hallmark of incompetence.\(^\text{14}\) See also American Bar Association *Criminal Justice Standards for the Defense Function*

**Standard 4-5.2 Control and Direction of the Case**

(a) Certain decisions relating to the conduct of the case are for the accused; others are for defense counsel. Determining whether a decision is ultimately to be made by the client or by counsel is highly contextual, and counsel should give great weight to strongly held views of a competent client regarding decisions of all kinds.

(b) The decisions ultimately to be made by a competent client, after full consultation with defense counsel, include:

1. whether to proceed without counsel;
2. what pleas to enter;
3. whether to accept a plea offer;
4. whether to cooperate with or provide substantial assistance to the government;
5. whether to waive jury trial;

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\(^{12}\) *Joanisse*, at para. 68.

\(^{13}\) *Ibid.*, at para. 69.

\(^{14}\) *Furtado* (see note 3), at para. 74(19),(25).
(vi) whether to testify in his or her own behalf;
(vii) whether to speak at sentencing;
(viii) whether to appeal; and
(ix) any other decision that has been determined in the jurisdiction to belong to the client.

(c) If defense counsel has a good faith doubt regarding the client’s competence to make important decisions, counsel should consider seeking an expert evaluation from a mental health professional, within the protection of confidentiality and privilege rules if applicable.

(d) Strategic and tactical decisions should be made by defense counsel, after consultation with the client where feasible and appropriate. Such decisions include how to pursue plea negotiations, how to craft and respond to motions and, at hearing or trial, what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what motions and objections should be made, what stipulations if any to agree to, and what and how evidence should be introduced.

(e) If a disagreement on a significant matter arises between defense counsel and the client, and counsel resolves it differently than the client prefers, defense counsel should consider memorializing the disagreement and its resolution, showing that record to the client, and preserving it in the file.

References

American Bar Association Criminal Justice Standards
Criminal Justice Standards

Provincial Court Rules
http://www.courts.ns.ca/Provincial_Court/NSPC_criminal_rules_forms.htm

Supreme Court Rules
http://www.courts.ns.ca/Rules/toc.htm

Supreme Court Criminal Forms
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<td>PPSC - Public Prosecution Service of Canada Deskbook</td>
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<tr>
<td>Nova Scotia Legal Aid</td>
<td><a href="http://www.nslegalaid.ca/lawyers.php">http://www.nslegalaid.ca/lawyers.php</a></td>
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</table>
MEMORANDUM TO COUNCIL

To: Council

From: Lawrence Rubin

Date: February 7, 2019

Subject: Professional Standards (Criminal) Committee

Standard No. 3: Defence Obligations Regarding Disclosure

<table>
<thead>
<tr>
<th>DATE</th>
<th>FOR</th>
<th>APPROVAL</th>
<th>INTRODUCTION</th>
<th>INFORMATION</th>
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<tr>
<td>March 23, 2018</td>
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<td>February 15, 2019</td>
<td>Council</td>
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<td>Approval</td>
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Recommendation/Motion:

This is a new Standard No. 3 – Defence Obligations Regarding Disclosure presented by the Professional Standards (Criminal) Committee for final approval. Following introduction of the Standard to Council, the Committee circulated it to the Membership for review and consultation. The Committee has reviewed the responses received and the final version of the proposed Standard for Council’s final approval follows.

Prior to providing this final version of the Standard to you, the Committee referred it to the Racial Equity and Gender Equity Committees for their consideration. Neither Committee proposed any changes to the Standard.

Executive Summary:

The Committee’s Work Plan included a project related to defence obligations regarding disclosure. The Committee’s goal was to articulate the standard with respect to issues of disclosure for lawyers defending criminal proceedings. The Committee is of the opinion that a standard is required so that criminal practitioners (i) have a clear understanding of their obligations to obtain and review disclosure; and (ii) uniformly observe minimum requirements respecting this obligation.
The Committee considers such a standard to be important to enable criminal practitioners to provide effective services to their clients.

The attached draft is in the usual three-column format, but as a new standard, the first column is blank.

**Exhibit:** Standard 3 - Defence Obligations Regarding Disclosure with rationale.
<table>
<thead>
<tr>
<th>EXISTING STANDARD</th>
<th>PROPOSED STANDARD</th>
<th>RATIONALE</th>
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<tr>
<td><strong>NEW</strong></td>
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| STANDARD 3: Defence Obligations Regarding Disclosure | **STANDARD:** (including commentary and resources)  
Once retained, Defence Counsel must obtain and review adequate Crown disclosure and review it with the client to permit them to obtain instructions from the client and to effectively represent the client.¹ | The Professional Standards (Criminal) Committee is of the opinion that a standard is required so that criminal practitioners (i) have a clear understanding of their obligations to obtain and review disclosure; and (ii) uniformly observe minimum requirements respecting this obligation. |

**COMMENTARY**

**GENERAL**

[1] The Crown has an obligation to disclose all relevant non-privileged information in its control or possession to the Accused which permits an evaluation of the strength or weaknesses in the Crown’s case and to allow an Accused to evaluate whether further investigation is warranted.²


**RETAINER³**

[3] Retainers can be in writing or a retainer may be established through a request for limited or summary representation.⁴ The service requested may be limited or general in scope.⁵ The service may be *pro bono* or for an agreed upon fee. In any case, once the solicitor-client relationship has been established, the retainer is complete.⁶

[4] As part of the service provided, Defence Counsel provide their legal opinions.⁷ They do so by way of advice to their clients. It is then for the client to provide instructions based upon that advice. It is not unusual for Defence Counsel to differ in their interpretations of disclosure and it is not uncommon for clients to disagree with that interpretation. This should not dissuade Defence Counsel from providing their opinions respectfully and comprehensively.⁸
Where a client’s instructions conflict with the Defence Counsel’s advice, they must not compromise the client’s position even though the conflict will result in the termination of the retainer, and a request to be removed as counsel of record. Defence Counsel should consider how the advice provided and how the instructions may be affected by any equity-seeking community (e.g. Mi'kmaq, African Nova Scotian, Francophone, Immigrant, Persons with Disabilities, LGBTQ, or clients from any other racialized or Indigenous communities) to which they may belong.

Adequate Disclosure

What is adequate disclosure may not always be apparent. Depending upon circumstances and client’s instructions, the review might be a cursory review only. Similarly, a client is always at liberty to expressly instruct Defence Counsel to proceed without reviewing full Crown disclosure, although in such cases, wherever possible Defence counsel should strongly consider obtaining those instructions in writing. If a client wishes to enter a guilty plea, Defence Counsel’s review obligation might not be as rigorous as when the client wishes advice on possible defences, shortcomings in the Crown’s case or possible Charter arguments.

Obtaining Crown disclosure is a process and may often involve multiple requests for further disclosure. It may include refusal by the Crown to provide requested information. It might also include applications to the Court to require the Crown to provide information. Defence Counsel should provide legal advice about the information sought and, if appropriate to do so, obtain instructions to seek the disclosure.

Defence Counsel must try to be alert to inadequate disclosure and the need to advise a client when and if further disclosure is required to provide effective representation.

Effective Representation Guilty Plea

Even where a client acknowledges guilt and provides instructions to plead guilty to some, all or included offences, Defence Counsel must review adequate disclosure with their client to permit advice that there is admissible evidence of all essential elements of the offence(s) and that no defence is apparent.
Sometimes the client wishes to instruct Defence Counsel that they wish to plead guilty before full disclosure has been made. So long as the client is reasonably well-informed, properly instructs them, confirms those instructions on the record, and the s. 606(1.1) of the Criminal Code inquiry is confirmed by the client on the record, Defence Counsel may accept instructions that the client wishes to plead guilty and to represent the client accordingly. Written instructions are strongly recommended in such cases.

ADVICE OF POSSIBLE DEFENCES
Where the client is seeking a more in-depth opinion, Defence Counsel should make a detailed investigation of the evidence outlines in the disclosure and, if required request the additional disclosure or a closer review of the evidence outlined in the disclosure. In that case, Defence Counsel must advise of the limitations and constraints of such an inquiry, the time and expense of that inquiry and then to seek instructions accordingly.

Once Defence Counsel believes adequate disclosure has been reviewed, the opinion should be, wherever possible, in writing and any caveats or limitations should be included in that opinion. This is especially true if the client is providing instructions containing waivers, direction concerning procedure or guilty plea.

DUTY TO THE CLIENT
Defence Counsel owes a duty to the client to be honest, ethical and candid. It will not always be possible to give definitive answers to client enquiries with available disclosure or due to the nature of the case. If further disclosure might be of assistance, Defence Counsel must identify that and advise the client accordingly.

It is always open to the client at any time, expressly to waive the requirement for full disclosure or to limit the requirement for full review of further disclosure. In those circumstances Defence Counsel ought to take those instructions in writing and with the confirmation acknowledged by the client that Defence Counsel has advised of the benefits in obtaining further and better disclosure.
Similarly, it is open to the client to expressly waive any inquiry into possible Charter arguments; but Defence Counsel ought to take those instructions in writing and with the confirmation acknowledged by the client that Defence Counsel has advised them of the possible Charter issues.24

Within the disclosure requirement is the requirement that Defence Counsel seek instructions from their client so they understand the client’s expectations. Defence Counsel should ensure that the client understands how the obtaining full disclosure and reviewing it with the client is integral to the service being provided and any limitations therewith.25

DUTY TO COURT
[17] Defence Counsel owes a duty of candour to the Court. It is always proper for Defence Counsel to respectfully advocate their client’s instructions. It is never proper to intentionally misrepresent their client’s position to the Court. Unless disclosure has been adequately made by the Crown to the Accused, Defence Counsel should seek judicial intervention as forcefully as is possible in the circumstances, whether by way of a Stinchcombe application or by other legal means to require the provision of the information necessary to permit an informed election or plea to be made by the client.26

DUTY TO OTHER COUNSEL
[18] Defence Counsel owes a duty to colleagues to be respectful. Lawyers often disagree but there is no need to be disagreeable. This is especially true between Crown and Defence Counsel. Crown disclosure may be provided to Defence Counsel with limitations concerning its use or dissemination. Unless those limitations interfere with representation of the client, they should be followed. Otherwise Defence Counsel should not agree to them. Defence Counsel should only agree to limit their ability to provide the disclosure received to their client if it does not interfere with their client’s right to make full answer and defence.27

Duty to the Public
[19] Defence Counsel is not restrained from spirited advocacy. This is especially true concerning the need for adequate disclosure. It is the cornerstone of effective representation and it is needed to make full answer and defence.28
| 20 | All lawyers have a duty to act honourably and ethically. Defence Counsel should refuse to accept instructions they regard as inappropriate. Disclosure often contains names, addresses and contact information of members of the police and other citizens, including witnesses. Defence Counsel must be on guard that these judicial participants do not become vulnerable to personal attacks or unwarranted interference. |
| 21 | Crown disclosure is confidential information and Defence Counsel must not permit it to be improperly distributed, disseminated or made public. Crown disclosure is made to enable an Accused to make full answer and defence only but remains confidential and also remains the property of the Crown. Defence Counsel receipt of disclosure is always subject to an implied undertaking respecting its use in the absence of an express undertaking. |

**THIRD PARTY APPLICATIONS**

22. This standard is not meant to apply to Applications for Third Party Records. These records are not usually in the possession of the Crown and are not subject to the general rules governing disclosure.

**DEFENCE DISCLOSURE OBLIGATIONS**

23. This standard is not intended to address the defence disclosure obligations. For a guide to these obligations, the reader should refer to the decision of *R. v. Murray* and the paper of D. Murray Brown.

24. Clearly, when Defence Counsel come into possession of physical evidence, some consideration should be made to whether Defence Counsel must provide the evidence to Crown. Defence Counsel should refer to Chapter 5.1-2A and the Commentary references [1]-[6] of the Code of Professional Conduct in such instances.

25. Also, Defence Counsel should keep in mind that certain kinds of information must or should be disclosed to the Crown. If a client instructs Defence Counsel that he has an “alibi” defence, failure to give notice of this defence will prejudice the accused. In addition, expert evidence is governed by the disclosure obligations under s. 657.3(3) of the Criminal Code. For this reason, clear instructions must be sought from the Accused and those instructions ought to be properly documented.
[26] R. v. Sandeson [2017]NSJ 335 (Arnold J) concerns the situation where information obtained by a private investigator hired by Defence and disclosed by the investigator to Police may be used by the Crown.

INADVERTENT DISCLOSURE

[27] In the instance where Defence Counsel receives disclosure determined to be inadvertent, Defence Counsel must not reveal that information to their client, must immediately advise Crown Counsel of the error and deal with the information as requested by Crown Counsel. 37 Examples of inadvertent disclosure are names of Confidential Informants38 or personal information of vulnerable witnesses.

[28] Receipt by Defence Counsel of inadvertent disclosure is not an automatic disqualification from representing the client and does not amount to a waiver of privilege (e.g Confidential Informant privilege39. As well, Defence Counsel should refer to paragraph [21] above.

NOTES

*Crown’s duty to disclose to the Accused involves different considerations and is dealt with by way of standards internal to PPS (Can) & PPS (NS). See also R. v. Hennessey [2013] NJ No 165 (NL Sup Ct)

1. See generally Chapter 3.1 of Code of Professional Conduct. See also Competence of Counsel Standard (Criminal law Standards)
3. See Commentary in Chapter 1 of Code of Professional Conduct
4. Ibid
5. See Limited Scope Retainers, Chapter 3.1-1A in the Code of Professional Conduct
7. Paragraph 30(iv) of decision of Saunders JA in R. v. Fraser [2011] NSJ No. 400 (NSCA); contrast this decision with the decision of Saunders JA in R. v. Hobbs [1022] NSJ No 335 (NSCA) dismissing a complaint of ineffective representation; See also the decision of Oland JA in R. Dugas [2012] NSJ No 507 (NSCA)
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<tr>
<td>10.</td>
<td>See general guidance in the decision of Derrick PCJ in R. v. X [2014] NSJ No. 609</td>
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<td>13.</td>
<td>Ibid</td>
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<td>15.</td>
<td>R. v. Fraser Note 7</td>
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<td>16.</td>
<td>Supra Footnote 9</td>
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<td>17.</td>
<td>Supra Footnote 9</td>
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<tr>
<td>20.</td>
<td>See Chapter 3.2-2 &amp; 3.6 of the code of professional Conduct</td>
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<td>21.</td>
<td>Supra Footnote 9</td>
</tr>
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<td>22.</td>
<td>See generally Chapter 3.1 and 3.2 Code of Professional Conduct</td>
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<tr>
<td>23.</td>
<td>Ibid</td>
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<td>24.</td>
<td>See R. v. Allison [2016] NSJ No 291 (NSSC) especially that the waiver must be “informed”</td>
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<tr>
<td>25.</td>
<td>Supra Footnote 9</td>
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<tr>
<td>26.</td>
<td>See Chapter 5.1 of the Code of Professional Conduct</td>
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<tr>
<td>27.</td>
<td>Ibid</td>
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<tr>
<td>28.</td>
<td>Ibid</td>
</tr>
<tr>
<td>29.</td>
<td>Chapter 5.1-2 of the Code of Professional Conduct</td>
</tr>
<tr>
<td>30.</td>
<td>Ibid</td>
</tr>
<tr>
<td>32.</td>
<td>See ss. 276-276.4 and ss. 278.1-278.9 of the Criminal Code. These sections govern the limitations upon adducing evidence of prior sexual conduct and the requirements, in order for an accused to access third party records.</td>
</tr>
<tr>
<td>33.</td>
<td>2000 CanLII 22631 (Ont SC)</td>
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<td>34. See Recent Developments in Disclosure: A Turn for the Defence, D. Murray Brown QC, December 2000; See also 35. Ibid 36. See R. Young [1990] NSJ No, 224 (NSCA), MacDonald JA:</td>
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<td></td>
<td>“In the present case and, as I have already mentioned, neither Mr. Young nor Mr. Cullen gave advance notice that alibi evidence was going to be led. Their failure to do so went to the weight to be given such evidence and nothing more.”</td>
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<td>38. Ibid 39. Ibid.</td>
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### Council Year: July 2018 – June 2019

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<thead>
<tr>
<th>JULY</th>
<th>AUGUST</th>
<th>SEPTEMBER</th>
<th>OCTOBER</th>
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<tbody>
<tr>
<td>Council Meeting – July 20</td>
<td>No Council meeting</td>
<td>Council Meeting – September 21 in Millbrook First Nation</td>
<td>No Council Meeting</td>
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<tr>
<td><strong>Big Issue: Equity &amp; Access – Introduction to Year Ahead</strong></td>
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<td><strong>Big Issue: EDI &amp; TRC</strong></td>
<td>Other Activities</td>
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<tr>
<td>• Credentials Monitoring Report</td>
<td></td>
<td>• LIANS Report to Council</td>
<td>• Notice x2 re 2nd VP out to membership</td>
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<tr>
<td>• DSA Recipient Announced</td>
<td></td>
<td>• Report on 2018 Annual Lawyer Report</td>
<td>• FLSC Conference – Charlottetown, PEI, October 17-20</td>
</tr>
<tr>
<td>• Introduction to Regulatory Risk</td>
<td></td>
<td>• Process and timing for Committee Reports</td>
<td>• Call to the Bar – October 19</td>
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<tr>
<td>• Council composition discussion</td>
<td></td>
<td>• Introduction to Restorative Approaches</td>
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<tr>
<td>Other Activities</td>
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<td><strong>Other Activities</strong></td>
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<tr>
<td>• Combined CIC and Credentials Committee Professional Development Workshop – July 19</td>
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<td>• Wickwire Memorial Lecture @ Schulich School of Law – September 21</td>
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<td>• Rhyno Hearing – July 3-23</td>
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<td>• Pride Workshop – July 26</td>
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<td>• Pride Reception – July 26</td>
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<td>• Meeting between REC, GEC and Executive – July 27</td>
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<tr>
<td>NOVEMBER</td>
<td>DECEMBER</td>
<td>JANUARY</td>
<td>FEBRUARY</td>
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<tr>
<td>Council Meeting – November 23</td>
<td>No Council Meeting</td>
<td>Council Meeting – January 18</td>
<td>Council Meeting – February 15</td>
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<tr>
<td><strong>Big Issue: Next Steps for LSS</strong></td>
<td></td>
<td><strong>Big Issue: E&amp;A Status Update</strong></td>
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<tr>
<td>• Approval of Committee appointments</td>
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<td>• Approval of 2019 Activity Plan</td>
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<tr>
<td>• Introduction of 2019 Activity Plan</td>
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<td>• Report from GNC re 2nd VP nominee</td>
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<tr>
<td>• Introduction to Outcomes Measurement/Update on Regulatory Risk</td>
<td></td>
<td>• Trust Account Regulation WG (TARGW) report with initial set of recommended amendments to the Regulations</td>
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<tr>
<td>Other Activities</td>
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<td><strong>Other Activities</strong></td>
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<tr>
<td>• Recognition Reception – November 23</td>
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<td>• Committee terms for 2019-2021 begin</td>
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<tr>
<td>• Hearing Committee Training – November 19-20</td>
<td></td>
<td>• GNC interviews for 2nd VP (early January)</td>
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<td>DECEMBER</td>
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<tr>
<td>Council Meeting – November 19</td>
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<tr>
<td><strong>Big Issue: LSS Status Update</strong></td>
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<td>FEbruary</td>
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## Council Year: July 2018 – June 2019

<table>
<thead>
<tr>
<th>MARCH</th>
<th>APRIL</th>
<th>MAY</th>
<th>JUNE</th>
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<tbody>
<tr>
<td><strong>Council Meeting</strong> – March 15</td>
<td><strong>Council Meeting</strong> – April 26</td>
<td><strong>Council Meeting</strong> – May 17 – Black Cultural Centre, Cherry Brook</td>
<td><strong>Council Orientation for New Council Members</strong> – June 14 (all day)</td>
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<tr>
<td><strong>Big Issue:</strong> Budget introduction/debate/preliminary approval</td>
<td><strong>Big Issue:</strong> Fee/Budget approval/LIANS Levy</td>
<td><strong>Big Issue:</strong> LSS and E&amp;A Status Updates; Next Strategic Plan</td>
<td><strong>Other Activities</strong></td>
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<tr>
<td>• LIANS Report to Council</td>
<td>Other Activities</td>
<td>• PR Monitoring Report</td>
<td>• Main Call to the Bar – June 7 @ Pier 21</td>
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<tr>
<td>• Equity &amp; Access Monitoring Report</td>
<td>• Nominations for At-Large candidates close</td>
<td>• Update on Restorative Approaches</td>
<td>• REC Event Honouring Articled Clerks from Racialized &amp; Indigenous Communities – June (Date TBD)</td>
</tr>
<tr>
<td>• LFCC claims</td>
<td>• Election for At-Large Positions – if required</td>
<td>• TA Monitoring Report and TARWG Status Update</td>
<td>• Council Dinner – June 14</td>
</tr>
<tr>
<td>• Committee work plans</td>
<td></td>
<td>• Draft Annual Lawyer Report presented</td>
<td>• Annual Meeting – June 15 @ Schulich School of Law</td>
</tr>
<tr>
<td>• Education Session on Regulatory Risk (and/or Outcomes Measurement)</td>
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<td>• LFCC claims</td>
<td>• Annual Lawyer Report filings due – June 30</td>
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<tr>
<td>• Memo re Restorative Approaches</td>
<td></td>
<td>• MDP Update</td>
<td>• All Fees due – June 30</td>
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<tr>
<td><strong>Other Activities</strong></td>
<td></td>
<td>• PRPPC Policy Recommendation re retroactive application of Remuneration Policy</td>
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<td>• 2nd VP Election – if required</td>
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<tr>
<td>• District Elections</td>
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<td><strong>Other Activities</strong></td>
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<tr>
<td>• Call for At-Large Nominizations</td>
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<td>• Exit interviews for departing Council members</td>
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<tr>
<td>• Dara Gordon Event – Date TBD</td>
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<td>• Strategic Planning for Council</td>
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<td>• Call to the Bar – May 3</td>
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**Other Activities**
- Nominations for district elections close – February 15

**Notes:**
- **MARCH:** Other Activities include:
  - 2nd VP Election – if required
  - District Elections
  - Call for At-Large Nominations
  - Dara Gordon Event – Date TBD

- **APRIL:** Other Activities include:
  - Exit interviews for departing Council members
  - Strategic Planning for Council
  - Call to the Bar – May 3
MEMORANDUM TO COUNCIL

From: Tilly Pillay, QC
Date: February 15, 2019
Subject: Executive Director’s Report

Here are some of the initiatives that we have been moving forward since my last report to Council.

**Regulatory Risk**

We continue to hold internal meetings to identify the risks associated with our various areas of work. More recently, we identified the risks associated with our equity and access work. One unique factor identified with this work is that we do not promote diversity, inclusion and access to legal services in a vacuum. We rely on partners and stakeholders, which means we cannot always control the risks associated with undertaking such initiatives. We will be holding a workshop at the March Council meeting on this topic as well as introducing the topic of outcomes measurement. Andrew Norton, Director of Business Technology with the Law Society of Alberta, will be joining us at the March meeting and contributing to the discussions. This will give Council a chance to get to know him before we engage in our strategic planning session in May.

**Budget**

The planning for the 2019/2020 budget is well underway and Council will receive a high level introduction at the February meeting. We have tried to anticipate the training/education and resources that will be needed as we continue our important TRC work, contemplate the next phase of Legal Services Support and seek to improve the administration of justice. There will, no doubt, be some new initiatives that Council will want to undertake as a result of the new strategic plan, so we will try to build some flexibility into the budget to support these moving forward. We are still on track to have a balanced budget.
**Human Resources**

The Director of Finance competition has closed. We received some excellent applicants. Interviews will be scheduled in the near future. The interview panel will consist of myself, Peggy Gates-Hammond and an external Director of Finance who has the technical expertise the panel requires. I will provide updates as the competition progresses.

**Legal Services Support**

You will be receiving a much more detailed update at the February meeting from the LSS group about the results of the first “soft launch,” what we have learnt, and what are the next steps.

**IT Update**

We have invested energy and resources into upgrading our IT infrastructure. In our world, that means the IMIS database. This upgrade allows us to go to the next step, which is creating electronic forms for use in all our processes. This will make us more efficient in fulfilling our regulatory functions. We have just installed a new phone system (which is cheaper than our last one but better). This should improve our teleconferencing abilities. In addition, we are looking at ways to enable attending committee meetings by videoconferencing etc., as we recognize how much valuable time some committee members take from their busy days to travel back and forth for meetings.
MEMORANDUM TO COUNCIL

From: Elaine Cumming, Professional Responsibility Counsel
Date: January 10, 2019
Subject: Crossing the Border with Electronic Devices

Date – February 8, 2019  Executive Committee  N/A

Date – February 15, 2019  Council  For Information

Recommendation/Motion:

It is recommended that the memorandum Crossing the Border with Electronic Devices: What Canadian Legal Professionals Should Know as prepared by the Policy Counsel Counterpart Group of the Federation of Law Societies of Canada be adopted for use in Nova Scotia.

Executive Summary:

The attached document has been developed to provide lawyers with practical advice about traveling outside of Canada with electronic devices. Lawyers have an ethical obligation to ensure that privileged and/or confidential client information is protected from disclosure. It is therefore extremely important for lawyers to understand how they may be impacted by legislation and policies that are being enforced in the name of public safety in airports and other border crossings.

This document provides an overview of the risks of travelling with electronic devices outside of Canada, identifies relevant professional responsibilities and makes suggestions for lawyers to minimize the risks of breaching client privilege.

While Canadian law provides a great deal of protection for solicitor-client privilege, the Canadian Border Services Act permits border services officers wide latitude for searches of electronic devices. As well, lawyers must be aware that when travelling in the US or other foreign jurisdictions, the law may provide little, if any, protections. This document notes that while US customs officers working on Canadian soil must respect Canadian law, Canadians have little recourse in the event of a failure to do so.
The practical advice to lawyers to consider before travelling is likely to be a great resource for lawyers who may be unfamiliar with the law in this area, and will assist them in taking appropriate steps to ensure that they are meeting their ethical obligations.

**Analysis:**

Appendix A - *Crossing the Border with Electronic Devices: What Canadian Legal Professionals Should Know* – prepared by the Policy Counsel Counterpart Group
Crossing the Border with Electronic Devices: What Canadian Legal Professionals Should Know

Prepared by the Policy Counsel Counterpart Group

December 14, 2018
Crossing the Border with Electronic Devices: What Canadian Legal Professionals Should Know

With travellers at Canadian airports and border crossings subject to increasing scrutiny,¹ it is important for lawyers and Quebec notaries to have an understanding of how the privacy interests of their clients may be impacted by legislation and policies developed to address public safety issues. Legal counsel should also understand that their profession does not make them immune to policies and processes that could impact information otherwise subject to solicitor-client privilege.

Canadian lawyers and Quebec notaries travelling internationally with electronic devices face increasing uncertainty about how those electronic devices will be treated by border agents on apprehension by Canadian Border Security Agency (“CBSA”) officers on return to Canada, by border agents in the U.S., or by border agents in other international destinations. Searching the electronic device (including smart phones, laptops, and USB sticks) of a legal professional may infringe solicitor-client privilege when that legal professional crosses borders.

This draft advisory, developed by the Policy Counterpart Group of the Federation of Law Societies of Canada (the “Federation”) with the assistance of law society practice advice counsel, describes the risks of travelling with an electronic device when returning to Canada, going through pre-clearance with U.S. border officials on Canadian soil, and when travelling to the U.S. and beyond. This advisory also identifies relevant professional responsibilities, and concludes with suggestions and advice for Canadian lawyers and Quebec notaries on minimizing those risks.

Returning to Canada

When returning to Canada, a lawyer or Quebec notary may be unable to rely on a claim of privilege to adequately protect clients’ confidential information due to the CBSA’s broad interpretation of “goods.”²

Section 99(1)(a) of the Customs Act provides border service officers with the authority to examine “any goods that have been imported and open or cause to be opened any package or container of imported goods and take samples from imported goods in reasonable amounts” without a warrant. Goods are defined within the legislation as including “conveyances, animals and any document in any form.”³ The CBSA further interprets section 99(1)(a) to extend to electronic devices and the documents contained on them.⁴ The courts are amenable to this

² Customs Act, RSC 1985, c 1 (2nd Supp), s 99(1)(a) [CCA].
³ Ibid, s 2(1).
⁴ The Honourable Ralph Goodale PC, MP, Response to the Tenth Report of the Standing Committee on Access to Information, Privacy and Ethics entitled: Protecting Canadians’ Privacy at the US Border, (Letter to The Honourable Bob Zimmer, MP, Chair of
interpretation; recent BC and Saskatchewan decisions have affirmed that section 99(1)(a) authorizes a CBSA officer to examine the data stored on any electronic device in the actual possession of, or in the accompanying baggage of, a traveller. The CBSA further asserts that officers can request passwords for the devices. The BC Civil Liberties Association estimates that CBSA examines a daily average of 40 electronic devices at borders crossings across the country; from those 40 electronic devices, an average of 13 are searched each day.

While CBSA policy currently is not publicly available on the CBSA’s website, a copy of an operational bulletin for digital devices and media may be found appended to a recent House of Commons Committee report on privacy at the border. A review of information available through other sources and correspondence from Minister Goodale suggests that solicitor-client privileged information is subject to special rules. However, the policy does not completely exempt a legal professional’s electronic device from a border search and there are concerns that adequate protections are not in place.

Both the Federation and the Law Society of British Columbia have expressed concerns about the Canadian government’s interpretation of “goods” under the Act, as well as the CBSA policy guiding examination of electronic device by its officers. To date, Minister Goodale has responded affirming the CBSA’s interpretation of “goods,” and asserting that there are procedures in place for documents subject to solicitor-client privilege.

The Supreme Court of Canada has held that section 8 Charter protections against unreasonable search and seizure include a heightened expectation of privacy in electronic devices. Further, the Supreme Court has stated that solicitor-client privilege is near absolute, and can only be set aside with legislative language that is clear, explicit, and unequivocal. In a non-border context, search provisions found in legislation must provide the constitutionally required protection for solicitor-client privilege, or they will be found to infringe the s. 8 Charter
right to be free of unreasonable search and seizure.\textsuperscript{15} The \textit{Customs Act} does not contain the required language for CBSA officers to access privileged information. The Supreme Court of Canada has continuously reaffirmed solicitor-client privilege as a civil right and a fundamental principle of justice of supreme importance in Canadian law that must be as close to absolute as possible.\textsuperscript{16} Therefore any incursions to privilege must be absolutely necessary and minimally impairing.\textsuperscript{17}

In \textit{Lavallee}, the Supreme Court of Canada set out guidelines for law office searches to protect solicitor-client privilege.\textsuperscript{18} These guidelines were extended in \textit{Festing}, where the BC Court of Appeal stated “the legal protection afforded solicitor-client privilege does not begin and end at the door of a law office.”\textsuperscript{19} In this case, the Court of Appeal broadly defined “law office” as extending to “any place where privileged documents may reasonably be expected to be located.”\textsuperscript{20} Accordingly, an electronic device used to practice law, such as a laptop or smartphone, should be considered a “law office” subject to the \textit{Lavallee} guidelines. Further, the Supreme Court has held that the expectation of privacy in communications subject to solicitor-client privilege is invariably high. The Court has specifically rejected the argument that there is a reduced expectation of privacy for privileged communication during a search of a law office by a FINTRAC official rather than a police officer investigating a criminal complaint.\textsuperscript{21} There has been no case law to suggest there is a reduced expectation of privacy for solicitor-client privileged information at the border.

Respecting body searches at the border, courts have concluded that the State’s sovereignty and security interests grant a lower expectation of privacy at the border than in other situations.\textsuperscript{22} In \textit{Simmons}, warrantless border searches were “justified by the national interests of sovereign states in preventing the entry of undesirable persons and prohibited goods, and in protecting tariff revenue.”\textsuperscript{23} While solicitor-client privilege is nearly absolute, there are limited exemptions. One exemption is the narrowly defined “protection of public safety.” This is not a broad public safety exemption; it requires that (1) the client poses a clear risk to an identifiable person or group of persons; (2) the risk is of serious bodily harm or death; and (3) the risk is imminent.\textsuperscript{24} There is nothing to indicate the CBSA could rely on the public safety exemption in a broader context.

Because the legality of a potential CBSA search of a lawyer or notary’s electronic device containing privileged information has not been tested in court, legal professionals should be wary when crossing the border into Canada.

\textsuperscript{15} \textit{Canada (Attorney General) v Federation of Law Societies of Canada}, 2015 SCC 7, [2015] 1 SCR at 6 [AG v FLSC].
\textsuperscript{16} \textit{Alberta (Information and Privacy Commissioner) v University of Calgary}, 2016 SCC 53, [2016] 2 SCR 555.
\textsuperscript{17} \textit{Ibid}.
\textsuperscript{18} \textit{Lavallee, Rackel & Heintz v Canada (Attorney General); White, Ottenheimer & Baker v Canada (Attorney General); R v Fink}, [2002] 3 SCR 209, 2002 SCC 61 (CanLII).
\textsuperscript{19} \textit{Festing v Attorney General (Canada)}, 2003 BCCA 112 at para 27, 223 DLR (4th) 448.
\textsuperscript{20} \textit{Ibid} at para 24.
\textsuperscript{21} AG v FLSC, supra note 15 at para 38.
\textsuperscript{22} \textit{R v Simmons}, [1988] 2 SCR 495 at para 49, 55 DLR (4th) 673.
\textsuperscript{23} \textit{Ibid}, at para 48.
Lawyers and notaries should also consider whether, in certain situations, they ought to take steps to protect solicitor-client privilege as between themselves and their clients with respect to communications that may be in the possession of their clients on their own laptops or cellphones. Legal professionals could include information in their retainer letter about protecting privileged information during travel, and should discuss this issue with their clients, providing guidance as appropriate to the circumstances.

**U.S. Border Officials on Canadian Soil: Pre-Clearance**

Lawyers and notaries should also know that travellers to the U.S. could encounter U.S. border officials while still on Canadian soil. At a growing number of preclearance points across Canada, U.S. border officials have the authority to examine passengers and their goods, including electronic devices, ahead of travel. As set out on the Privacy Commissioner of Canada’s website

> “While preclearance legislation states U.S. officers must, while in Canada, also comply with Canadian law, including the Charter, a Canadian who believes a U.S. customs official has broken Canadian law has little recourse in the courts due to the principle of state immunity.”

Of course, Canadian travellers may also choose to walk away from a proposed search and forego their wish to enter the U.S., although that decision may be noted and affect future travel. If you are concerned that a U.S. border official operating in a preclearance facility has violated Canadian law, you could contact Public Safety Canada’s Preclearance Unit (Public Safety Canada International Affairs Division – Preclearance, 269 Laurier Avenue West, Ottawa, Ontario K1A 0P8).

**Travelling to the United States and Beyond**

On January 4, 2018, U.S. Customs and Border Protection (“CBP”) issued a new Directive on the border search of electronic devices. It sets out procedures for CBP officers to follow when they encounter information on an electronic device over which solicitor-client privilege is asserted: they need to seek clarification from the owner as to specific files, attorney or client names, or other particulars that may assist CBP officers in identifying privileged information; any privileged material must be segregated following a mandatory consultation with CBP counsel; and unless any of those materials indicate an imminent threat to homeland security, copies of the privileged materials must be destroyed. The American Civil Liberties Association has criticized the Directive for failing to require a search warrant in advance of a CBP’s search and

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25 See, i.e., *R. v Simpore*, 2017 NBQB 162 (CanLII), which revolved around the propriety of a search undertaken by CBSA agents on an individual’s laptop and cell phone, resulting in the discovery of communications between the client and an articling student.

26 “Your privacy at airports and borders,” *supra* note 1.

copy of a traveler’s electronic device.\textsuperscript{28} It is notable as well that the Directive exempts actions taken to determine if physical contraband is concealed within the device itself, and does not limit CBP’s authority to conduct lawful searches of electronic devices in response to exigent circumstances.\textsuperscript{29}

Other jurisdictions may or may not have laws and policies addressing border searches of electronic devices. While it is outside of the scope of this advisory to canvas legislative authorities in other countries, we advise lawyers and Quebec notaries to undertake due diligence about applicable laws and policies when travelling internationally with electronic devices.

**Model Code of Professional Conduct obligations and other responsibilities**

“Lawyers must keep their clients’ confidences and act with commitment to serving and protecting their clients’ legitimate interests.”\textsuperscript{30} Solicitor-client privilege is a principle of fundamental justice, and one of the obligations that lawyers have a professional duty to uphold. The *Model Code of Professional Conduct* Rule 3.3-1 sets out the following requirements:

“A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless:

(a) expressly or impliedly authorized by the client;
(b) required by law or a court to do so;
(c) required to deliver the information to the Law Society; or,
(d) otherwise permitted by this rule.”\textsuperscript{31}

Rule 3.4-23 extends obligations to protect the confidential information of clients to law firm staff. Subrule (b) requires that a lawyer or law firm must exercise due diligence in ensuring that each member and employee of the law firm, and each other person whose services the lawyer or the firm has retained, does not disclose confidential information of clients of the firm, or any other law firm in which the person has worked.\textsuperscript{32} A potential electronic device search at the border also engages Rule 3.3-2, which requires that a lawyer not “disclose a client’s or former client’s confidential information to the disadvantage of the client or former client, or for the benefit of the lawyer or a third person without the consent of the client or former client.”\textsuperscript{33}

\textsuperscript{28} ACLU Comment on Trump Administration Directive on Border Searches, January 5, 2018, available online: https://www.aclu.org/news/aclu-comment-trump-administration-directive-border-searches.
\textsuperscript{29} Ibid at para. 2.3.
\textsuperscript{30} AG v FLSC, supra note 15 at para 1.
\textsuperscript{31} Federation of Law Societies of Canada, *Model Code of Professional Conduct* (14 March 2017), r 3.3-1, online: FLSC <https://flsc.ca>. As of the date of writing every province and territory, with the exceptions of Quebec and the Yukon, has either adopted or agreed to adopt the Code.
\textsuperscript{32} Ibid, r 3.4-23.
\textsuperscript{33} Ibid, r 3.3-2.
In addition to Code obligations regarding confidential client information, legal counsel may also have obligations under rules of their respective law societies and applicable privacy legislation. These obligations may require legal professionals to report to their law society or to the privacy commissioner or both in circumstances where the their electronic device containing confidential client information has been examined by a border official. Legal counsel may contact a law society practice advisor or the equivalent at their law society for guidance as to their reporting obligations.

Suggestions for Canadian Lawyers and Notaries Travelling with Electronic Devices

Lawyers and Quebec notaries should assess the risks of carrying confidential client information across borders and take steps to ameliorate the risk of a client’s information being exposed.

Below are some suggestions to consider for travelling with electronic devices.

1. Establish a policy about cross-border travel by legal counsel and staff carrying smartphones, laptops and other electronic devices that may contain confidential information of their clients. Lawyers and notaries have an obligation to maintain the confidentiality of their clients’ information and this obligation extends to ensuring that non-lawyer staff and each other person whose services the lawyer, notary, or law firm has retained also maintain clients’ confidentiality.

2. Get help from information technology professionals regarding the security of your devices and alternatives to carrying potentially privileged information across the border. The safest way to travel is without any confidential client information. Some firms have separate clean laptops and phones available for cross-border travel. It may be advisable to forensically clean confidential information from your device before travelling (including cookies, cache and browsing history).

3. If you do not maintain separate devices for work and personal matters, separate your work and personal accounts on your laptop or smartphone, if possible, so that privileged information in one user account can be easily identified during any prospective searches. Characterize sensitive information, clearly marking privileged documents as solicitor-client privileged. If documents are not clearly marked, the information may be at heightened risk of being examined by the CBSA or other border agencies. Whether or not privileged documents are clearly marked, it is important to speak up early during the examination process and claim privilege when appropriate.

34 Paralegals, accountants, bookkeepers, information technology professionals, etc., may have privileged information on their devices.

35 Barbara Buchanan QC, Client Confidentiality-Think Twice Before Taking Your Laptop or Smart Phone Across Border (Benchers’ Bulletin, Spring 2017) online: Law Society of British Columbia <https://www.lawsociety.bc.ca/> at 11.

36 BC Civil Liberties Association, supra note 5 at 49.
4. Carry identification that shows that you are a legal professional, such as your law society member identification card and a business card.

5. Understand that certain characteristics of your travel and your behavior make you more susceptible to closer examination by border agents. Based on research done by the B.C. Civil Liberties Association, you are more likely to be chosen to have your devices searched by the CBSA if, amongst other indicators, you have travelled to and from “high risk” destinations, are a single man traveling alone, exhibit nervousness or agitation, have multiple electronic devices (including hard drives), purchase a ticket to travel at the last minute, or have “unusual” travel routes.  

6. Put your device on airplane mode to stop information from transmitting and turn it off before approaching the border. When you turn your device on again, it will still be in airplane mode and no new information will have been transmitted. CBSA and CBP officers are supposed to look at only information that is on your device, not use the device to access information that is in the cloud.

7. If asked by a border officer to hand over your electronic device, explain that you are a lawyer or Quebec notary and claim privilege (if the device may contain privileged information). If the officer is a CBSA officer, tell him or her about Minister Goodale’s letter assuring that there are CBSA policies in place for solicitor-client privileged information (or even carry a copy with you and provide it to the officer).

8. If the CBSA demands your electronic device containing privileged information, request to see the senior customs officer at the place in which the search is to be conducted. If the senior officer sees no reasonable grounds for a search, you may be discharged.

9. Do not be intentionally vague to border officers. Legal counsel should be prepared to explain the purpose of their travel, and if appropriate, their connection to a Canadian law practice, without divulging confidential client information. Do not rely on your electronic device to answer travel questions. Instead, have a printed itinerary to show to border officers.

10. Communicate with your clients about what information, if any, they are comfortable having you travelling with across borders. Also consider that some clients may not

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37 Ibid at 24-25.
38 This will prevent any new incoming texts, emails, calls, and other incoming communications from your applications.
40 Goodale, supra note 7.
41 CCA, supra note 2 s 99.2(3).
42 Ibid, s 99.2(4).
permit their confidential information to be accessed on an electronic device outside of Canada or the disclosure of any information without their consent or a court order.  

11. Bring less data with you. If you use a cloud-based storage provider, you may wish to delete cloud-based applications before crossing the border and reinstall afterwards. Similarly, client contact and calendar information can be deleted from smartphones and subsequently restored through internet services. Contact your IT professionals about how to securely re-install deleted applications.

12. Use encryption and secure passwords. Use two-factor authentication to control access to your accounts. It will not deter initial access to your electronic device during a border search, but in the event that your electronic device is seized for further examination, protected accounts may not be accessible.

13. If a CBSA officer retains or accesses your device, get a receipt and make sure that you have a detailed description of the device including make, model and serial number.

14. If you refuse to provide your device’s password to allow examination or if there are technical difficulties preventing a CBSA officer from examining the device, the CBSA officer may detain the device for examination by an expert trained in forensic examinations. Under the 2015 operational bulletin, until further instructions are issued, CBSA officers have been advised not to arrest a traveler for hindering solely for refusing to provide a password; a restrained approach is to be adopted until the matter is settled in ongoing court proceedings. It may be advisable to seek legal advice if you anticipate refusing to provide the password to your device to a CBSA officer.

15. Consider applying for a Nexus pass. Nexus is run jointly by the CBSA and U.S. Customs and Border Protection. While having a pass does not mean that you will not be searched, low-risk, pre-approved travelers into Canada and the U.S. enjoy expedited clearance and participating U.S. and Canadian airports, land and marine border crossings.

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43 A client’s needs and expectations are ideally explored at the beginning of the solicitor-client relationship and dealt with in the retainer agreement. Consider asking simple questions such as whether it is acceptable to share the name of the client and to disclose the purpose of the retainer.

44 BC Civil Liberties Association, supra note 6 at 42-44.

45 The Law Society of BC has a Cloud Computing Checklist (May 2017) and Law Society Rules 10-3 and 10-4 regarding cloud storage providers, standards and security.

46 Supra note 6 at 46.

47 Customs Act, RSC 1985, c 1 (2nd Supp), s 101.

48 Supra note 7 and Customs Act, s. 153.1.
Traverser la frontière avec des appareils électroniques : Ce que les juristes canadiens doivent savoir

Élaboré par le
Groupe d’homologues des Conseillers et Conseillères en matière de politiques

14 décembre 2018
Traverser la frontière avec des appareils électroniques : Ce que les juristes canadiens doivent savoir

Aujourd'hui, les voyageurs sont de plus en plus surveillés dans les aéroports canadiens et aux postes frontaliers et c’est pourquoi il est important que les avocats et les notaires du Québec comprennent comment le droit à la vie privée de leurs clients peut être influencé par les lois et les politiques en place pour régler les questions de sécurité publique. Les juristes doivent également comprendre que leur profession ne les met pas à l’abri des politiques et des processus pouvant avoir des répercussions sur l’information autrement protégée par le privilège du secret professionnel.

De plus en plus, les avocats canadiens et les notaires du Québec qui voyagent à l’étranger avec des appareils électroniques ne savent pas comment ces appareils seront traités lorsqu’ils sont saisis par un agent de l’Agence des services frontaliers du Canada (ASFC) au moment de leur retour au Canada, par un agent des services frontaliers aux États-Unis ou par les agents des services frontaliers d’autres pays. Fouiller l’appareil électronique d’un juriste (incluant téléphone intelligent, ordinateur portable et clé USB) peut porter atteinte au privilège du secret professionnel lorsque le juriste traverse la frontière.

Le présent avis, préparé par le groupe d’homologues en matière de politiques de la Fédération des ordres professionnels de juristes du Canada (la « Fédération ») avec l’aide des conseillers en matière de pratiques des ordres professionnels de juristes, décrit les risques de voyager avec un appareil électronique au moment de rentrer au Canada, de passer un poste de prédéouanement américain en sol canadien et de voyager aux États-Unis ou ailleurs. Le présent avis définit également les responsabilités professionnelles pertinentes et se termine par des suggestions et des conseils aux avocats canadiens et notaires du Québec pour réduire ces risques au minimum.

Retour au Canada

Au moment de son retour au Canada, un avocat ou un notaire du Québec ne pourra peut-être pas invoquer le privilège pour protéger adéquatement les renseignements confidentiels de son client en raison de la façon dont l’ASFC interprète les « marchandises ».  

L’article 99(1)(a) de la Loi sur les douanes donne aux agents des services frontaliers le pouvoir d’examiner « toutes marchandises importées et en ouvrir ou faire ouvrir tous colis ou contenants, ainsi qu’en prélever des échantillons en quantités raisonnables » sans mandat. Au sens de la loi, les marchandises incluent « les moyens de transport et les animaux, ainsi que tout document, quel que soit son support ».  

2 Loi sur les douanes, LRC 1985, c 1 (2e suppl), art. 99(1)(a).
3 Ibid., art. 2(1).
façon à le rendre applicable aux appareils électroniques et aux documents que ces appareils contiennent. Les tribunaux semblent disposés à appuyer cette interprétation. Des décisions rendues récemment en Colombie-Britannique et en Saskatchewan ont soutenu que l'article 99(1)(a) autorise un agent de l’ASFC à examiner les données stockées dans tout appareil électronique qu’un voyageur a en sa possession ou dans ses bagages. L’ASFC souligne aussi que les agents peuvent demander le mot de passe de chacun de ces appareils. Selon l’Association des libertés civiles de la Colombie-Britannique, l’ASFC examine en moyenne 40 appareils électroniques chaque jour aux postes frontaliers à travers le pays ; de ces 40 appareils, 13 en moyenne sont fouillés chaque jour.

Bien que la politique de l’ASFC ne soit pas actuellement publiée sur son site Web, la copie d’un bulletin opérationnel pour les appareils et les supports numériques est jointe à un rapport récent du Comité de la Chambre des communes sur la protection des renseignements personnels à la frontière. Un examen de l’information provenant d’autres sources et une lettre du ministre Goodale laissent entendre que les renseignements protégés par le privilège du secret professionnel sont assujettis à des règles spéciales. Toutefois, la politique n’exempte pas complètement l’appareil électronique du juriste d’une fouille à la frontière et on craint que des protections adéquates ne soient pas en place.

La Fédération et la Law Society of British Columbia ont toutes les deux exprimé certaines préoccupations au sujet de la façon dont le gouvernement canadien interprète les « marchandises » en vertu de la Loi et au sujet de la politique de l’ASFC qui régit l’examen des appareils électroniques par ses agents. Jusqu’à maintenant, le ministre Goodale a répondu en appuyant l’interprétation de « marchandises » par l’ASFC et affirmant que des procédures sont en place pour les documents protégés par le privilège du secret professionnel.


10 FOPJC, supra note 8.


La Cour suprême du Canada a statué que les protections contre les fouilles, les perquisitions et les saisies abusives, telles que prévues par l’article 8 de la Charte, incluent des attentes élevées en matière de protection de la vie privée dans le cas d’un appareil électronique. De plus, la Cour suprême a déclaré que le privilège du secret professionnel est aussi absolu que possible et ne peut être annulé que dans des termes législatifs qui sont clairs, précis et non équivoques. Dans un contexte sans frontière, les dispositions de la législation relatives aux fouilles doivent assurer la protection exigée par la Constitution en ce qui concerne le secret professionnel; sinon, on conclura que ces dispositions portent atteinte au droit à la protection contre les fouilles et les perquisitions garanti par l’article 8 de la Charte. La Loi sur les douanes ne contient pas les termes requis pouvant permettre aux agents de l’ASFC d’avoir accès à des renseignements protégés par le secret professionnel. La Cour suprême du Canada ne cesse d’affirmer que le privilège du secret professionnel est un droit civil et un principe de justice fondamentale d’une importance primordiale en droit canadien qui doit être aussi absolu que possible. C’est pourquoi toute atteinte au privilège doit être absolument nécessaire et doit nuire de façon très minime.

Dans Lavallee, la Cour suprême du Canada a établi des lignes directrices applicables aux perquisitions dans des cabinets juridiques afin de protéger le privilège du secret professionnel. Ces lignes directrices ont été citées dans Festing, alors que la Cour d’appel de la Colombie-Britannique a affirmé que la protection accordée par la loi au privilège du secret professionnel ne commence et ne s’arrête pas à la porte d’un cabinet juridique. Dans cette affaire, la Cour d’appel a défini le « cabinet juridique » au sens large comme étant tout endroit où on peut raisonnablement s’attendre à trouver des documents confidentiels. Par conséquent, un appareil électronique utilisé pour exercer le droit, tel qu’un portable ou un téléphone intelligent, devrait être considéré comme un « cabinet juridique » assujetti aux lignes directrices de l’arrêt Lavallee. De plus, la Cour suprême a statué que l’attente à l’égard de la confidentialité des communications protégées par le privilège du secret professionnel est invariablement élevée. La Cour a expressément rejeté l’argument voulant que l’attente soit moins élevée dans le cas des communications protégées par le secret professionnel lorsqu’un fonctionnaire du CANAFE perquisitionne dans un cabinet juridique qu’elle ne l’est lorsqu’un policier perquisitionne au cours d’une enquête sur une éventuelle infraction criminelle. Il n’y a aucune jurisprudence qui laisse entendre que l’attente à l’égard de la protection de renseignements protégés par le secret professionnel est moins grande à la frontière.

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15 Canada (Procureur général) c. Fédération des ordres professionnels de juristes du Canada, 2015 CSC 7, [2015] 1 RCS à 6 [PG c. FOPJC].  
17 Ibid.  
18 Lavallee, Rackel & Heintz c. Canada (Procureur général); White, Ottenheimer & Baker c. Canada (Procureur général); R c. Fink, [2002] 3 RCS 209, 2002 CSC 61 (CanLII).  
19 Festing v Attorney General (Canada); 2003 BCCA 112 au par. 27, 223 DLR (4e) 448.  
20 Ibid. au par. 24.  
21 PG c. FOPJC, supra note 15 au par. 38.
En ce qui concerne les fouilles corporelles à la frontière, les tribunaux ont conclu que la souveraineté de l’État et ses intérêts en matière de sécurité permettent une attente moins élevée à l’égard de la protection de la vie privée à la frontière que dans d’autres situations.22 Dans l’arrêt Simmons, les fouilles sans mandat à la frontière étaient « justifiées par l’intérêt qu’ont les États souverains à empêcher l’entrée dans leur territoire de personnes indésirables et de marchandises prohibées, et à protéger leurs revenus tarifaires ».23 Bien que le privilège du secret professionnel soit quasi absolu, il existe des exemptions limitées. Une de ces exemptions est « la protection de la sécurité publique » définie au sens étroit. Il ne s’agit pas d’une exemption relative à la sécurité publique au sens large; elle exige (1) que le client pose clairement un risque à une personne ou un groupe de personnes identifiables; (2) qu’il y ait un risque de blessure grave ou de mort; et (3) que le danger soit imminent.24 Rien ne porte à croire que l’ASFC pourrait invoquer l’exemption relative à la sécurité publique dans un contexte plus large.

Puisque la légalité d’une fouille possible, par l’ASFC, de l’appareil électronique d’un avocat ou d’un notaire qui contient des renseignements protégés par le secret professionnel n’a pas été mise en question devant les tribunaux, les juristes doivent être prudents lorsqu’ils traversent la frontière pour revenir au Canada. Les juristes devraient également examiner la possibilité de prendre des mesures, dans certaines circonstances, pour protéger le privilège du secret professionnel entre eux et leurs clients à l’égard des communications que leurs clients pourraient avoir dans leur propre portable ou téléphone cellulaire.25 Ils pourraient expliquer dans la description de leur mandat comment les renseignements confidentiels sont protégés lorsqu’ils voyagent et en discuter avec leurs clients en leur donnant des conseils selon les circonstances.

**Agents des services frontaliers des États-Unis en sol canadien : prédédouanement**

Les avocats et les notaires doivent également savoir que les voyageurs qui se rendent aux États-Unis pourraient se trouver devant un agent des services frontaliers des États-Unis alors qu’ils sont encore en sol canadien. À un nombre croissant de postes de prédédouanement à travers le Canada, des agents des services frontaliers des États-Unis ont le pouvoir d’examiner les passagers et leurs biens, y compris les appareils électroniques, avant le départ. Tel qu’indiqué sur le site Web du commissaire à la protection de la vie privée :

« Bien que la législation sur le prédédouanement prévoie que les agents américains doivent se conformer au droit canadien, y compris à la Charte, lorsqu’ils se trouvent au Canada, un Canadien qui croit qu’un agent des services...  

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22 R. c. Simmons, [1988] 2 RCS 495 au par. 52, 55 DLR (4e) 673.
23 Ibid., au par. 51.
25 Voir, R. c. Sompère, 2017 NBBR 162 (CanLII), qui concernait le bien-fondé d’une fouille, effectuée par des agents de l’ASFC, du portable et du téléphone cellulaire d’une personne et ayant mené à la découverte de communications entre le client et un stagiaire.
frontaliers des États-Unis a enfreint une loi canadienne a peu de recours devant les tribunaux en raison du principe de l’immunité des États. »

Évidemment, les voyageurs canadiens peuvent également décider de ne pas subir une fouille et peuvent renoncer à leur projet de voyage aux États-Unis. Une telle décision pourrait toutefois être notée et avoir une incidence sur tout voyage futur. Si vous croyez qu’un agent des services frontaliers des États-Unis à un poste de prédéouanement a enfreint la loi canadienne, vous pouvez communiquer avec l’unité de prédéouanement de Sécurité publique Canada (Division des affaires internationales, Sécurité publique Canada – Prédéouanement, 269, avenue Laurier Ouest, Ottawa (Ontario) K1A 0P8).

Voyager aux États-Unis et ailleurs

Le 4 janvier 2018, la U.S. Customs and Border Protection (l’agence de protection aux douanes et aux frontières ou la CBP) a communiqué une nouvelle directive sur la fouille d’appareils électroniques à la frontière.27 La directive énonce la procédure que doivent suivre les agents de la CBP lorsqu’ils trouvent dans un appareil électronique de l’information pour laquelle le privilège du secret professionnel est invoqué : ils doivent demander au propriétaire des précisions concernant les dossiers en question, le nom du juriste ou du client ou d’autres renseignements particuliers qui pourraient les aider à déterminer quelle information est confidentielle; toute documentation confidentielle doit être isolée suite à une consultation obligatoire avec l’avocat de la CBP; et, à moins que cette documentation présente une menace imminente pour la sécurité du pays, les copies de la documentation confidentielle doivent être détruites. L’American Civil Liberties Union a critiqué la directive parce qu’elle n’exige pas de mandat de perquisition avant la fouille par la CBP et une copie de l’appareil électronique du voyageur.28 Il est également remarquable que la directive exempte les mesures prises pour déterminer si des objets interdits sont cachés dans l’appareil lui-même et ne limite pas le pouvoir de la CBP de fouiller légalement des appareils électroniques en réponse à l’urgence de la situation.29

D’autres pays pourraient avoir ou ne pas avoir des lois et des politiques régissant les fouilles d’appareils électroniques à la frontière. Bien qu’une consultation auprès des autorités législatives d’autres pays dépasse le cadre de cet avis, nous conseillons aux avocats et aux notaires du Québec de faire preuve de diligence raisonnable quant aux lois et aux politiques qui s’appliquent lorsqu’ils voyagent à l’étranger avec des appareils électroniques.

26 « Votre droit à la vie privée dans les aéroports et aux postes frontaliers » supra note 1.
29 Ibid. au par. 2.3.
Obligations et autres responsabilités en vertu du Code type de déontologie professionnelle

« Les avocats doivent garder secrètes les confidences de leurs clients et se dévouer au service et à la défense de leurs intérêts légitimes. »\(^{30}\) Le privilège du secret professionnel du juriste est un principe de justice fondamentale, et une des obligations que les juristes sont tenus de respecter en vertu de leur code de déontologie. La règle 3.3-1 du *Code type de déontologie professionnelle* énonce les exigences suivantes :

« Un juriste est tenu en tout temps de garder dans le plus grand secret tous les renseignements qu'il apprend au sujet des affaires et des activités d'un client au cours de la relation professionnelle et ne doit divulguer aucun de ces renseignements à moins que :

(a) le client l’ait expressément ou implicitement autorisé;
(b) la loi ou un tribunal l’exige;
(c) le juriste soit tenu de donner les renseignements à l’ordre professionnel de juristes; ou
(d) la présente règle le permette. »\(^{31}\)

La règle 3.4-23 rend les obligations de protection des renseignements confidentiels des clients applicables au personnel des cabinets juridiques. En vertu du paragraphe (b), un juriste ou un cabinet juridique doit faire preuve de diligence raisonnable en s’assurant que chaque membre et chaque employé du cabinet, et chaque autre personne à qui le juriste ou le cabinet juridique a fait appel pour ses services, ne divulguent pas les renseignements confidentiels des clients du cabinet ou de tout autre cabinet où cette personne a travaillé.\(^{32}\) La fouille éventuelle d’un appareil électronique à la frontière concerne également la règle 3.3-2, laquelle stipule qu’un juriste ne doit pas « divulguer des renseignements confidentiels relatifs à un client actuel ou un ancien client au détriment du client actuel ou de l’ancien client ou dans l’intérêt du juriste ou d’un tiers sans le consentement du client actuel ou de l’ancien client ».\(^{33}\)

En plus des obligations relatives aux renseignements confidentiels des clients en vertu du Code, les juristes ont peut-être aussi d’autres obligations imposées par les règles de leur ordre professionnel respectif et les lois applicables en matière de protection de la vie privée. Ces obligations pourraient imposer à un juriste le devoir de faire une déclaration à son ordre professionnel ou au commissaire à la protection de la vie privée, ou aux deux, si son appareil électronique contenant des renseignements confidentiels sur des clients a été examiné par un agent des services frontaliers. Les juristes peuvent communiquer avec le conseiller professionnel de leur ordre professionnel pour obtenir plus de renseignements sur leurs obligations de déclaration.

\(^{30}\) PG c. FOPJC, supra note 15 au par. 1.
\(^{32}\) Ibid., règle 3.4-23.
\(^{33}\) Ibid., règle 3.3-2.
Suggestions pour les avocats et les notaires canadiens qui voyagent avec un appareil électronique

Les avocats et les notaires du Québec devraient évaluer les risques qu’ils courent en passant la frontière avec des renseignements confidentiels concernant des clients et prendre des mesures pour réduire le risque de divulgation des renseignements des clients.

Voici quelques suggestions à prendre en considération lorsque vous voyagez avec des appareils électroniques.

1. Instaurez une politique sur les voyages transfrontaliers des juristes et du personnel qui se déplacent avec un téléphone intelligent, un ordinateur portable et autre appareil électronique pouvant contenir des renseignements confidentiels concernant des clients. Les avocats et les notaires ont l’obligation de préserver la confidentialité des renseignements de leurs clients, ainsi que de s’assurer que les membres du personnel non juriste et toute personne engagée par l’avocat, le notaire ou le cabinet juridique préservent aussi la confidentialité des renseignements des clients.

2. Obtenez les conseils d’un spécialiste des technologies de l’information concernant la sécurité de vos appareils et des solutions de rechange pour ne pas avoir à traverser la frontière avec des renseignements potentiellement confidentiels. La façon la plus sûre de voyager est de le faire sans avoir en sa possession des renseignements confidentiels concernant un client. Certains cabinets ont des portables et des téléphones « propres » dont leurs employés peuvent se servir pour voyager et traverser la frontière. Il pourrait être souhaitable de nettoyer votre appareil en le vidant de tout renseignement confidentiel (incluant les témoins, la mémoire cache et l’historique de navigation) avant de voyager.

3. Si vous n’avez pas deux appareils distincts, un pour le travail et l’autre pour votre propre utilisation, séparez vos comptes clients et vos comptes personnels dans votre portable ou votre téléphone intelligent, si possible, afin que les renseignements protégés par le secret professionnel dans un compte utilisateur puissent être identifiés facilement en faisant une recherche. Précisez la nature des renseignements confidentiels en indiquant clairement qu’il s’agit de documents protégés par le privilège du secret professionnel du juriste. Si les documents ne sont pas identifiés clairement, ils sont davantage susceptibles d’être examinés par l’ASFC ou d’autres agences de services frontaliers. Que vos documents soient ou ne soient pas identifiés comme étant protégés par le secret professionnel, il est important de vous exprimer dès le début du processus d’examen et d’invoquer le privilège s’il y a lieu.

34 Les parajuristes, comptables, commis comptables, spécialistes des technologies de l’information, etc. pourraient avoir des renseignements confidentiels sauvegardés dans leurs appareils.
35 Barbara Buchanan, c.r., Client Confidentiality—Think Twice Before Taking Your Laptop or Smart Phone Across Border (Benchers’ Bulletin, printemps 2017) en ligne : Law Society of British Columbia <https://www.lawsociety.bc.ca/> à la p. 11.
36 Association des libertés civiles de la C.-B., supra note 5 à 49.
4. Ayez en votre possession une pièce d’identité qui montre que vous êtes juriste, telle que votre carte de membre de l’ordre professionnel de juristes ou une carte professionnelle.

5. Sachez que certaines caractéristiques de vos déplacements et de votre comportement vous exposent davantage à un examen plus minutieux par les agents des services frontaliers. Selon une recherche menée par l’Association des libertés civiles de la C.-B., vous risquez davantage de voir vos appareils fouillés par l’ASFC si, entre autres, vous revenez d’un voyage à un endroit « à risque élevé », vous êtes un homme célibataire qui voyage seul, vous semblez nerveux et agité, vous avez plusieurs appareils électroniques (incluant des lecteurs de disque dur), vous achetez un billet pour un voyage de dernière minute ou vous avez un itinéraire « inhabituel ».

6. Règlez votre appareil en mode Avion afin d’interrompre la transmission de données et éteignez-le avant d’arriver près de la frontière. Lorsque vous rallumez votre appareil, il sera encore en mode Avion et aucune nouvelle donnée n’aura été transmise. Les agents de l’ASFC et la CBP sont censés examiner uniquement l’information qui est dans votre appareil, et non pas utiliser votre appareil pour avoir accès à de l’information stockée en nuage.

7. Si un agent des services frontaliers vous demande de lui remettre votre appareil électrique, expliquez-lui que vous êtes un avocat ou un notaire du Québec et invoquez le privilège (si l’appareil contient des renseignements protégés par le secret professionnel). S’il s’agit d’un agent de l’ASFC, dites-lui que le ministre Goodale affirme dans une lettre que des politiques sont en place à l’ASFC en ce qui a trait aux renseignements protégés par le secret professionnel (ou même apportez un copie de la lettre et présentez-la à l’agent).

8. Si l’agent de l’ASFC exige que vous lui remettiez votre appareil électrique qui contient des renseignements protégés par le secret professionnel, demandez de voir l’agent principal des douanes à l’en droit où la fouille doit être effectuée. Si l’agent principal juge qu’il n’y a aucun motif valable de procéder à la fouille, vous pourrez être relâché.

9. Ne vous adressez pas à un agent des services frontaliers en tenant des propos qui sont vagues. Les juristes doivent être prêts à expliquer le but de leur voyage et, s’il y a lieu, leur lien avec un cabinet juridique canadien sans divulguer des renseignements confidentiels concernant leurs clients. Ne consultez pas vos appareils électroniques pour

---

37 Ibid. à 24-25.
38 Ce mode empêche la réception de nouveaux messages textes, courriels, appels et autres communications provenant de vos applications.
40 Goodale, supra note 7.
41 Loi sur les douanes, supra note 2 art. 99.2(3).
42 Ibid., art. 99.2(4).
répondre à des questions concernant votre voyage. Gardez plutôt un itinéraire imprimé que vous pourrez montrer à l’agent des services frontaliers.

10. Consultez vos clients pour savoir quels types de renseignements, le cas échéant, ils acceptent que vous apportiez lorsque vous traversez la frontière. De plus, n’oubliez pas que certains clients ne vous permettent peut-être pas d’avoir accès à leurs renseignements confidentiels à l’aide d’un appareil électronique à l’extérieur du Canada ou de divulguer des renseignements sans leur consentement ou sans une ordonnance de la cour.43

11. Apportez moins de données avec vous.44 Si vous faites appel à un fournisseur de stockage en nuage45, vous voudrez peut-être supprimer les applications stockées en nuage avant de traverser la frontière et les réinstaller plus tard. De même, les coordonnées des clients et l’agenda peuvent être supprimés d’un téléphone intelligent, puis récupérés par service Internet. Communiquez avec votre spécialiste des technologies de l’information pour savoir comment réinstaller des applications supprimées de façon sécuritaire.

12. Servez-vous de chiffrement et de mots de passe sécurisés. Utilisez l’authentification à deux facteurs pour contrôler l’accès à vos comptes. Ces fonctions n’empêcheront pas l’accès à votre appareil électronique lors d’une fouille à la frontière, mais si votre appareil est saisi pour être examiné de plus près, l’accès aux comptes protégés ne sera pas possible.46

13. Si un agent de l’ASFC garde ou examine votre appareil, obtenez un reçu et assurez-vous d’avoir une description détaillée de l’appareil, incluant la marque, le modèle et le numéro de série.

14. Si vous refusez de donner le mot de passe de votre appareil afin que l’agent puisse l’examiner ou si des problèmes techniques empêchent un agent de l’ASFC d’examiner l’appareil, l’agent de l’ASFC peut conserver l’appareil pour le faire examiner par un expert en criminalistique informatique.47 En vertu du bulletin opérationnel 2015, jusqu’à ce que d’autres directives soient données, les agents de l’ASFC ont été avisés de ne pas arrêter un voyageur pour cause d’entrave simplement parce qu’il refuse de donner un mot de passe; une approche mesurée doit être adoptée jusqu’à ce que l’affaire soit réglée dans le cadre des procédures judiciaires en cours.48 Il pourrait être souhaitable

43 L’idéal est d’établir les besoins et les attentes d’un client dès le début de la relation juriste-client et de les consigner dans le mandat de représentation. Vous pourriez demander des questions simples, telles que s’il est acceptable de donner le nom du client et de divulguer l’objet du mandat.
44 Association des libertés civiles de la C.-B., supra note 6 à 42-44.
45 La Law Society of BC a une liste de contrôle d’infonuagerie (mai 2017), ainsi que les règlements 10-3 et 10-4 concernant les fournisseurs, les normes et la sécurité du stockage en nuage.
46 Supra note 6 à 46.
47 Loi sur les douanes, LRC 1985, c 1 (2e suppl), art. 101.
48 Supra note 7 et Loi sur les douanes, art. 153.1.
d’obtenir un avis juridique si vous prévoyez refuser de donner à un agent de l’ASFC le mot de passe donnant accès à votre appareil.

### Summary

The Society has a "Balanced Operating Budget" for the fiscal year 2018/2019 meaning that Revenues equal Expenses for the year and a total Operating Surplus (Deficit) calculated as Revenues less Expenses:

<table>
<thead>
<tr>
<th>Year to Date</th>
<th>Year-End</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dec-18</td>
<td>Apr-19</td>
</tr>
<tr>
<td>$646,901</td>
<td>$348,716</td>
</tr>
<tr>
<td>$791,158</td>
<td>$348,716</td>
</tr>
</tbody>
</table>

### Revenues

#### Membership Fee Revenue

<table>
<thead>
<tr>
<th></th>
<th>Year to Date</th>
<th>Forecasted Year-End</th>
</tr>
</thead>
<tbody>
<tr>
<td>Practising fees</td>
<td>28,379</td>
<td>52,379</td>
</tr>
<tr>
<td>Non-Practising fees</td>
<td>(915)</td>
<td>(1,515)</td>
</tr>
<tr>
<td>Retired members</td>
<td>1,343</td>
<td>2,226</td>
</tr>
<tr>
<td>Incorporation</td>
<td>(850)</td>
<td>(12,250)</td>
</tr>
<tr>
<td>Surcharges/Assessments</td>
<td>1,800</td>
<td>1,800</td>
</tr>
</tbody>
</table>

- The number of Practising lawyers is currently projected to be approximately 30 above the number budgeted.
- The number of Non-Practising lawyers has decreased from what was budgeted (approximately 5)
- The number of Retired lawyers is approximately 45 more than budgeted.

### Education & Credentialing Revenue

<table>
<thead>
<tr>
<th></th>
<th>Year to Date</th>
<th>Forecasted Year-End</th>
</tr>
</thead>
<tbody>
<tr>
<td>Admission Fees</td>
<td>(798)</td>
<td>250</td>
</tr>
<tr>
<td>Articling</td>
<td>(8,700)</td>
<td>3,125</td>
</tr>
<tr>
<td>Application Fees</td>
<td>625</td>
<td>1,000</td>
</tr>
<tr>
<td>Exam Fees</td>
<td>32,925</td>
<td>22,000</td>
</tr>
<tr>
<td>Tuition</td>
<td>15,000</td>
<td>15,000</td>
</tr>
<tr>
<td>CPD/LRA Revenue</td>
<td>(3,050)</td>
<td>(1,371)</td>
</tr>
</tbody>
</table>

- The Society's investment balance is down slightly over the year resulting in a small overall loss in value. There has been a loss in value over the past month.

### Costs

#### Professional Responsibility Department Expenses

<table>
<thead>
<tr>
<th></th>
<th>Year to Date</th>
<th>Forecasted Year-End</th>
</tr>
</thead>
<tbody>
<tr>
<td>Salaries and Benefits</td>
<td>1,674</td>
<td>7,475</td>
</tr>
<tr>
<td>Recruiting Fees</td>
<td>(5,000)</td>
<td>(7,500)</td>
</tr>
<tr>
<td>Lawyer's Services/Legal Fees</td>
<td>4,386</td>
<td>6,581</td>
</tr>
</tbody>
</table>

- Short term vacancy and difference in compensation
- Year to date recruiting fees to hire new Executive Assistant
- Based on recent increase in support required by PR group for investigations

#### Investigation Expenses

<table>
<thead>
<tr>
<th></th>
<th>Year to Date</th>
<th>Forecasted Year-End</th>
</tr>
</thead>
<tbody>
<tr>
<td>Committee Expenses</td>
<td>4,037</td>
<td>6,053</td>
</tr>
<tr>
<td>Professional Services</td>
<td>2,609</td>
<td>(10,000)</td>
</tr>
<tr>
<td>Practise Investigations</td>
<td>9,125</td>
<td>(7,000)</td>
</tr>
<tr>
<td>Forensic Financial Audits</td>
<td>78,221</td>
<td>(140,000)</td>
</tr>
</tbody>
</table>

- Small savings based on number of meetings projected
- Costs in support of investigations estimated
- Based on estimate from Forensic firm on the work required on current matter

#### Prosecution & Hearing Expenses

<table>
<thead>
<tr>
<th></th>
<th>Year to Date</th>
<th>Forecasted Year-End</th>
</tr>
</thead>
<tbody>
<tr>
<td>Committee Expenses</td>
<td>(1,331)</td>
<td>(4,000)</td>
</tr>
<tr>
<td>Lawyers' Services/Legal Fees</td>
<td>(33,515)</td>
<td>(10,000)</td>
</tr>
<tr>
<td>Professional Services</td>
<td>10,053</td>
<td>11,000</td>
</tr>
</tbody>
</table>

- Estimate based on Hearing and meeting Days
- Large increase in the number and complexity of matters before PR, new matters will be heard in 2019/20.

#### Practice Administration

<table>
<thead>
<tr>
<th></th>
<th>Year to Date</th>
<th>Forecasted Year-End</th>
</tr>
</thead>
<tbody>
<tr>
<td>Advertising</td>
<td>-</td>
<td>(15,000)</td>
</tr>
<tr>
<td>Professional Services</td>
<td>-</td>
<td>(7,500)</td>
</tr>
<tr>
<td>Wind-up Assistance</td>
<td>13,698</td>
<td>20,000</td>
</tr>
<tr>
<td>Administration/Practice Support</td>
<td>12,357</td>
<td>18,500</td>
</tr>
<tr>
<td>Receiver Fees</td>
<td>(18,261)</td>
<td>(45,000)</td>
</tr>
<tr>
<td>Custodian Fees</td>
<td>(16,605)</td>
<td>(142,000)</td>
</tr>
</tbody>
</table>

- Previous year-end forecasted estimate
- Previous year-end forecasted estimate, small assistance expected this fiscal year
- Based on current Receiverships ongoing - larger than expected
- Based on one large custodianship of a Law Firm, prior to December was a Receivership matter
<table>
<thead>
<tr>
<th>Education &amp; Credentialing Department Expenses</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Expenses</td>
<td>Year to Date</td>
<td>Forecasted Year End Variances</td>
</tr>
<tr>
<td>Skills Course Expenses</td>
<td>(6,276)</td>
<td>(25,464)</td>
</tr>
<tr>
<td>Additional support/teaching required due to staff vacancy</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bar Exam Expenses</td>
<td>(8,664)</td>
<td>(337)</td>
</tr>
<tr>
<td>Bar Exam expenses are currently projected to be close to budget based on the enrollment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>CPDLRA Expenses</td>
<td>8,560</td>
<td>1,000</td>
</tr>
<tr>
<td>Currently CPDLRA expenses are expected to trend to budget for the year.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Salaries and benefits</td>
<td>50,987</td>
<td>78,945</td>
</tr>
<tr>
<td>Vacancy of E&amp;C Officer and Exec Assistant partially offset by Skills Course expenses above</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Staff Professional Development</td>
<td>6,103</td>
<td>5,800</td>
</tr>
<tr>
<td>Timing of professional development will result in savings this year, due to vacancies and type of training used.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Admissions Event</td>
<td>1,441</td>
<td>1,441</td>
</tr>
<tr>
<td>Savings from admissions event in June 2018.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Legal Services Regulation Expenses</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Expenses</td>
<td>Year to Date</td>
<td>Forecasted Year End Variances</td>
</tr>
<tr>
<td>Salaries and compensation</td>
<td>3,103</td>
<td>10,000</td>
</tr>
<tr>
<td>Timing/delay in hiring new LSS Officer</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Professional Services</td>
<td>6,668</td>
<td>5,000</td>
</tr>
<tr>
<td>Forecast based on 50% of Budget</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Consulting Fees</td>
<td>28,334</td>
<td>37,500</td>
</tr>
<tr>
<td>Forecast based on 50% of Budget</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Executive Director’s Office Expenses</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Expenses</td>
<td>Year to Date</td>
<td>Forecasted Year End Variances</td>
</tr>
<tr>
<td>Salaries and compensation</td>
<td>96,316</td>
<td>60,000</td>
</tr>
<tr>
<td>Timing of GC and Paralegal hiring</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Staff Benefits</td>
<td>16,216</td>
<td>10,000</td>
</tr>
<tr>
<td>Timing of GC and Paralegal hiring</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Equity and Access Expenses Expenses</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Expenses</td>
<td>Year to Date</td>
<td>Forecasted Year End Variances</td>
</tr>
<tr>
<td>Salaries and Benefits</td>
<td>59,851</td>
<td>73,275</td>
</tr>
<tr>
<td>Temporary vacancy, Recruitment and compensation savings based on positions)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Food &amp; Entertainment</td>
<td>(1,906)</td>
<td>(2,000)</td>
</tr>
<tr>
<td>Timing of E&amp;A events and contract costs</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Liaison and Outreach Expenses</td>
<td>33,334</td>
<td>-</td>
</tr>
<tr>
<td>Costs for Truth and Reconciliation Commission work, projected to be on budget by year-end.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Professional Services</td>
<td>5,966</td>
<td>7,500</td>
</tr>
<tr>
<td>Potential savings due to part time staff handling some of these functions.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Governance &amp; Committees Expenses</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Expenses</td>
<td>Year to Date</td>
<td>Forecasted Year End Variances</td>
</tr>
<tr>
<td>Council Volunteer Travel/Meetings</td>
<td>15,638</td>
<td>1,683</td>
</tr>
<tr>
<td>Forecast based on Budget at this time, plus extra meeting and travel for Millbrook Council meeting</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Council Committees - Meeting exp</td>
<td>10,366</td>
<td>12,900</td>
</tr>
<tr>
<td>Forecast based on Budget at this time</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Library and Information Services Expenses</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Expenses</td>
<td>Year to Date</td>
<td>Forecasted Year End Variances</td>
</tr>
<tr>
<td>Salary &amp; Benefits</td>
<td>250</td>
<td>(7,500)</td>
</tr>
<tr>
<td>Potential back-fill required for staff member</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Subscriptions &amp; Books</td>
<td>16,602</td>
<td>-</td>
</tr>
<tr>
<td>Costs are estimated on a two year average and are based on contract pricing and purchases based on budget</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Professional Services</td>
<td>4,000</td>
<td>3,000</td>
</tr>
<tr>
<td>Savings in project costs due to number of projects/work</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
# NOVA SCOTIA BARRISTERS SOCIETY
Forecasted results for the fiscal year 2018/19 based on December 31, 2018 Financial Results

## General Operating Expenses

<table>
<thead>
<tr>
<th>Expenses</th>
<th>Year to Date</th>
<th>Forecasted Year End Variances</th>
</tr>
</thead>
<tbody>
<tr>
<td>Staff Travel</td>
<td>5,068</td>
<td>5,000</td>
</tr>
<tr>
<td>Less staff travel than budgeted</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank &amp; Credit Charges</td>
<td>4,215</td>
<td>1,000</td>
</tr>
<tr>
<td>Timing of credit card expenses and forecasted to be on budget</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Investment Management Fees</td>
<td>(2,171)</td>
<td>(3,232)</td>
</tr>
<tr>
<td>Fees based on value of investments</td>
<td></td>
<td></td>
</tr>
<tr>
<td>External Computer Support</td>
<td>38,990</td>
<td>45,000</td>
</tr>
<tr>
<td>Finalization of implementing the Society's new IT Infrastructure and back-up project. Also, the Society may be utilizing a consultant to continue developing the Database (iMIS) system and forms project</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rent</td>
<td>631</td>
<td>(9,252)</td>
</tr>
<tr>
<td>Rent Operating costs and additional repairs and maintenance to office spaces and services</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Professional Services</td>
<td>23,920</td>
<td>2,600</td>
</tr>
<tr>
<td>Human Resources Support and consultant to assist with process/procedure documentation - estimated based on budget at this time.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Salaries</td>
<td>1,862</td>
<td>10,000</td>
</tr>
<tr>
<td>Mat Top up, training of replacement staff, 2-3 month vacancy in Director position</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Contingency</td>
<td>66,666</td>
<td>100,000</td>
</tr>
<tr>
<td>The Contingency line is currently not projected to be used</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Depreciation &amp; Amortization</td>
<td>21,640</td>
<td>15,000</td>
</tr>
<tr>
<td>Year end calculations and adjustments, along with less capital items purchased during the year</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

## Human Resources & Communications

<table>
<thead>
<tr>
<th>Expenses</th>
<th>Year to Date</th>
<th>Forecasted Year End Variances</th>
</tr>
</thead>
<tbody>
<tr>
<td>Salary &amp; Benefits</td>
<td>16,912</td>
<td>(22,500)</td>
</tr>
<tr>
<td>Additional costs due to organizational structure redesign.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Website</td>
<td>17,198</td>
<td>20,000</td>
</tr>
<tr>
<td>Estimate based on contracts and timing</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

## Member/Lawyer Services

<table>
<thead>
<tr>
<th>Expenses</th>
<th>Year to Date</th>
<th>Forecasted Year End Variances</th>
</tr>
</thead>
<tbody>
<tr>
<td>LRA Audit</td>
<td>32,069</td>
<td>30,000</td>
</tr>
<tr>
<td>Timing of expenses for LRA audits and based on previous year results</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

## NON-OPERATING COST ANALYSIS - Lawyers Fund for Client Compensation

<table>
<thead>
<tr>
<th>Revenues and Expenses</th>
<th>Year to Date</th>
<th>Forecasted Year End Variances</th>
</tr>
</thead>
<tbody>
<tr>
<td>Investment Income (Gain/Loss)</td>
<td>(47,927)</td>
<td>(54,548)</td>
</tr>
<tr>
<td>Based on Year to Date results, the investments are not projected to achieve budgeted results.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>LFCC Claims</td>
<td>5,334</td>
<td>(492,000)</td>
</tr>
<tr>
<td>Estimate of $500K annual maximum self retention under the CLIA Part C policy</td>
<td></td>
<td></td>
</tr>
<tr>
<td>CLIA Premium</td>
<td>2,800</td>
<td>6,533</td>
</tr>
<tr>
<td>Annual fee lower than budgeted, credit received as part of fee per lawyer received from CLIA.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### NOVA SCOTIA BARRISTERS' SOCIETY - GENERAL FUND
#### BUDGET COMPARISON STATEMENT
FOR THE PERIOD ENDING 12/31/2018

<table>
<thead>
<tr>
<th>Revenue</th>
<th>YTD Budget</th>
<th>Actual</th>
<th>YTD Actual vs Full Year</th>
<th>YTD Last Year</th>
<th>YTD Actual vs Full Year</th>
<th>Forecast vs Full Year</th>
<th>OV/UN</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fees Revenue</td>
<td>$3,464,710</td>
<td>3,497,697</td>
<td>32,987 1.0%</td>
<td>3,733,986 (236,289)</td>
<td>5,128,450</td>
<td>5,174,766</td>
<td>46,316 0.9%</td>
</tr>
<tr>
<td>Education &amp; Credentials</td>
<td>403,750</td>
<td>438,852</td>
<td>35,052 8.7%</td>
<td>510,016 (71,214)</td>
<td>456,125</td>
<td>497,729</td>
<td>41,604 9.1%</td>
</tr>
<tr>
<td>Law Stamps</td>
<td>90,666</td>
<td>96,200</td>
<td>5,534 6.1%</td>
<td>102,350 (1,150)</td>
<td>138,000</td>
<td>134,786</td>
<td>(2,124) 0.9%</td>
</tr>
<tr>
<td>Library Revenue</td>
<td>2,265</td>
<td>2,542 (277) 13.7%</td>
<td>3,016 (1,474)</td>
<td>3,400</td>
<td>2,494 (906) 26.6%</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>Interest/Investment</td>
<td>33,200</td>
<td>28,645 (4,555) 13.7%</td>
<td>34,505 (5,860)</td>
<td>50,000</td>
<td>45,768 (4,232) 8.5%</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>Management Fees</td>
<td>99,999</td>
<td>95,815 (4,184) 4.4%</td>
<td>33,333</td>
<td>62,281</td>
<td>150,000</td>
<td>142,475 (7,525) 5.0%</td>
<td>6</td>
</tr>
<tr>
<td>Other</td>
<td></td>
<td></td>
<td>4,419</td>
<td>6,000</td>
<td>11,794 (5,794) 96.6%</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td>Total Revenue</td>
<td>4,098,591</td>
<td>4,162,920</td>
<td>64,329 1.6%</td>
<td>4,428,031 (265,111)</td>
<td>5,929,975</td>
<td>6,009,813</td>
<td>79,838 1.3%</td>
</tr>
</tbody>
</table>

### Expenses

| Professional Responsibility | 804,086 | 896,065 (91,979) 11.4% | 837,000 (93,925) | 1,210,903 | 1,487,168 (276,265) 22.8% | 9 |
| Education & Credentials | 519,484 | 458,323 61,161 11.8% | 468,595 | 10,273 | 770,877 | 709,650 | 61,227 8.5% | 10 |
| Legal Services Regulation | 204,456 | 170,245 34,211 16.7% | 89,348 | (90,897) | 305,205 | 264,414 | 40,791 13.4% | 11 |
| Executive Director's Office | 400,571 | 277,360 123,211 30.8% | 369,257 | 91,896 | 631,125 | 545,757 | 75,368 12.4% | 12 |
| Equity and Access to Justice | 239,307 | 140,252 99,055 41.4% | 155,894 | 15,464 | 342,747 | 260,370 | 82,377 24.0% | 13 |
| Governance & Committees | 217,070 | 185,185 31,885 16.9% | 195,865 | 29,707 | 325,600 | 292,232 | 33,368 10.2% | 14 |
| Finance & Administration | 920,840 | 730,931 189,909 20.6% | 702,899 | (28,033) | 1,370,325 | 1,178,069 | 192,256 14.0% | 15 |
| Library | 300,152 | 269,193 30,959 10.3% | 371,633 | 102,440 | 449,764 | 446,436 | 4,328 1.0% | 16 |
| HR & Communications | 268,368 | 214,799 53,569 20.0% | 140,378 | (74,421) | 403,229 | 387,949 | 15,280 3.9% | 17 |
| Member/Lawyer Services | 80,000 | 48,400 31,600 39.5% | 132,641 | 84,241 | 120,000 | 90,351 | 29,649 24.7% | 18 |
| Total Expenses | 3,954,334 | 3,371,763 582,571 14.7% | 3,463,508 | 91,746 | 5,929,975 | 5,661,096 | 268,879 4.5% | 19 |

#### Net Contribution to Surplus

<table>
<thead>
<tr>
<th>YTD Budget</th>
<th>Actual</th>
<th>YTD Actual vs Full Year</th>
<th>YTD Last Year</th>
<th>YTD Actual vs Full Year</th>
<th>Forecast vs Full Year</th>
<th>OV/UN</th>
</tr>
</thead>
<tbody>
<tr>
<td>$144,257</td>
<td>791,158</td>
<td>646,901</td>
<td>448.4%</td>
<td>964,523</td>
<td>(173,365)</td>
<td>-138,716</td>
</tr>
</tbody>
</table>

### NOVA SCOTIA BARRISTERS' SOCIETY - LAWYERS' FUND FOR CLIENT COMPENSATION (LFCC)
#### BUDGET COMPARISON STATEMENT
FOR THE PERIOD ENDING 12/31/2018

<table>
<thead>
<tr>
<th>LFCC Revenue</th>
<th>YTD Budget</th>
<th>Actual</th>
<th>YTD Actual vs Full Year</th>
<th>YTD Last Year</th>
<th>YTD Actual vs Full Year</th>
<th>Forecast vs Full Year</th>
<th>OV/UN</th>
</tr>
</thead>
<tbody>
<tr>
<td>$50,000</td>
<td>45,585 (4,415) 9.9%</td>
<td>36,268</td>
<td>9,293</td>
<td>75,000</td>
<td>500,000</td>
<td>425,000</td>
<td>566.7%</td>
</tr>
<tr>
<td>LFCC Expenses</td>
<td>113,020</td>
<td>103,064 (9,956) 8.8%</td>
<td>101,410</td>
<td>(1,655)</td>
<td>169,530</td>
<td>652,265</td>
<td>(482,735)</td>
</tr>
<tr>
<td>Net Contribution to Surplus</td>
<td>(63,020) (97,504) 5,416 (8.8%)</td>
<td>(65,142)</td>
<td>7,838</td>
<td>(94,530)</td>
<td>(152,265)</td>
<td>(57,735)</td>
<td>61.1%</td>
</tr>
</tbody>
</table>

#### Consolidated Net Contribution to Surplus (Deficit)

<table>
<thead>
<tr>
<th>YTD Budget</th>
<th>Actual</th>
<th>YTD Actual vs Full Year</th>
<th>YTD Last Year</th>
<th>YTD Actual vs Full Year</th>
<th>Forecast vs Full Year</th>
<th>OV/UN</th>
</tr>
</thead>
<tbody>
<tr>
<td>$81,327</td>
<td>733,654</td>
<td>652,417</td>
<td>863.1%</td>
<td>899,381</td>
<td>(165,727)</td>
<td>(84,530)</td>
</tr>
</tbody>
</table>

**Notes:**
1. At the end of December there have been on average 24 more Practising members per month that budgeted (45+ more Retired, (5) less Non-Practising) . This results in additional fee revenue overall.
2. There are approximately 4-5 more students registered for the Skills Course than originally budgeted, and again this year we are seeing an increase in the requests for credentialing rulings.
3. The year to date market value of the investment portfolio has decreased slightly resulting in earned and unearned investment income.
4. Large increase in the forensic financial audit, receiver and custodian costs due to recent investigations.
5. Staff member vacancy for a large portion of the fiscal year projected.
6. Potential savings in professional fees based on timing of projects and short term vacancy of new staff member.
7. Timing savings due to delays in hiring General Counsel and Paraegal positions.
8. Short term vacancy and potential savings on professional fees.
9. Potential savings from Council and Committee meeting and travel costs.
10. Contingency ($100k) has not been anticipated to be needed at this time and savings on Technology projects due to delayed start times and efficiencies.
11. Part-time vacation resulting in supplies savings partially offset by back fill position in library.
12. Savings on website and professional fees project timing.
13. Savings from a reduction in the number of LRA audits performed.
14. Investment Revenue is projected to be significantly under budget based on recent results.
15. Very early estimate of current potential claims on LFCC - estimate of 90% of $500 maximum.
## Expense Breakdown

<table>
<thead>
<tr>
<th>Expense Breakdown</th>
<th>Budget</th>
<th>YTD Actual</th>
<th>Budget vs Actual</th>
<th>OV/UN %</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Salaries and benefits</strong></td>
<td>2,154,891</td>
<td>1,903,470</td>
<td>251,421</td>
<td>11.7%</td>
<td></td>
</tr>
<tr>
<td><strong>Legal fees</strong></td>
<td>235,334</td>
<td>258,619</td>
<td>(23,285)</td>
<td>(9.9%)</td>
<td></td>
</tr>
<tr>
<td><strong>Professional fees</strong></td>
<td>251,134</td>
<td>187,571</td>
<td>63,563</td>
<td>25.3%</td>
<td></td>
</tr>
<tr>
<td><strong>Receiver &amp; Custodians</strong></td>
<td>40,000</td>
<td>74,867</td>
<td>(34,867)</td>
<td>(87.2%)</td>
<td></td>
</tr>
<tr>
<td><strong>Rent</strong></td>
<td>251,480</td>
<td>253,857</td>
<td>(2,377)</td>
<td>(0.9%)</td>
<td></td>
</tr>
<tr>
<td><strong>Governance and committees</strong></td>
<td>202,353</td>
<td>154,804</td>
<td>47,549</td>
<td>23.5%</td>
<td></td>
</tr>
<tr>
<td><strong>Subscriptions and books</strong></td>
<td>135,734</td>
<td>121,848</td>
<td>13,886</td>
<td>10.2%</td>
<td></td>
</tr>
<tr>
<td><strong>Member/lawyers services</strong></td>
<td>80,000</td>
<td>47,695</td>
<td>32,305</td>
<td>40.4%</td>
<td></td>
</tr>
<tr>
<td><strong>Office related expenses</strong></td>
<td>108,655</td>
<td>77,686</td>
<td>30,969</td>
<td>28.5%</td>
<td></td>
</tr>
<tr>
<td><strong>National Initiatives</strong></td>
<td>96,666</td>
<td>97,317</td>
<td>(651)</td>
<td>(0.7%)</td>
<td></td>
</tr>
<tr>
<td><strong>Administrative expenses</strong></td>
<td>78,620</td>
<td>64,934</td>
<td>13,686</td>
<td>17.4%</td>
<td></td>
</tr>
<tr>
<td><strong>Contingency</strong></td>
<td>66,666</td>
<td>-</td>
<td>66,666</td>
<td>100.0%</td>
<td></td>
</tr>
<tr>
<td><strong>Depreciation &amp; amortization</strong></td>
<td>60,000</td>
<td>38,360</td>
<td>21,640</td>
<td>36.1%</td>
<td></td>
</tr>
<tr>
<td><strong>Technology</strong></td>
<td>99,933</td>
<td>43,935</td>
<td>55,998</td>
<td>56.0%</td>
<td></td>
</tr>
<tr>
<td><strong>Professional memberships &amp; travel</strong></td>
<td>81,868</td>
<td>44,359</td>
<td>37,509</td>
<td>45.8%</td>
<td></td>
</tr>
<tr>
<td><strong>LRA education expenses</strong></td>
<td>11,000</td>
<td>2,440</td>
<td>8,560</td>
<td>77.8%</td>
<td></td>
</tr>
<tr>
<td><strong>Total Expenses</strong></td>
<td>3,954,334</td>
<td>3,371,763</td>
<td>582,571</td>
<td>14.7%</td>
<td></td>
</tr>
</tbody>
</table>

### 2018/19 Year to Date

<table>
<thead>
<tr>
<th>FY Budget</th>
<th>FY Forecast</th>
<th>Budget vs Actual</th>
<th>OV/UN %</th>
</tr>
</thead>
<tbody>
<tr>
<td>3,251,128</td>
<td>3,028,433</td>
<td>222,695</td>
<td>6.8%</td>
</tr>
<tr>
<td>353,000</td>
<td>332,669</td>
<td>20,331</td>
<td>5.8%</td>
</tr>
<tr>
<td>376,700</td>
<td>448,346</td>
<td>(71,646)</td>
<td>(19.0%)</td>
</tr>
<tr>
<td>60,000</td>
<td>247,000</td>
<td>(187,000)</td>
<td>(311.7%)</td>
</tr>
<tr>
<td>376,318</td>
<td>390,366</td>
<td>(14,048)</td>
<td>(3.7%)</td>
</tr>
<tr>
<td>203,600</td>
<td>207,071</td>
<td>(3,471)</td>
<td>(1.7%)</td>
</tr>
<tr>
<td>120,000</td>
<td>89,846</td>
<td>30,354</td>
<td>25.3%</td>
</tr>
<tr>
<td>158,848</td>
<td>137,644</td>
<td>21,204</td>
<td>13.3%</td>
</tr>
<tr>
<td>145,000</td>
<td>147,750</td>
<td>(2,750)</td>
<td>(1.9%)</td>
</tr>
<tr>
<td>104,031</td>
<td>97,122</td>
<td>6,909</td>
<td>6.6%</td>
</tr>
<tr>
<td>100,000</td>
<td>-</td>
<td>100,000</td>
<td>100.0%</td>
</tr>
<tr>
<td>90,000</td>
<td>75,000</td>
<td>15,000</td>
<td>16.7%</td>
</tr>
<tr>
<td>150,000</td>
<td>85,326</td>
<td>64,674</td>
<td>43.1%</td>
</tr>
<tr>
<td>121,300</td>
<td>85,329</td>
<td>35,971</td>
<td>29.7%</td>
</tr>
<tr>
<td>16,500</td>
<td>15,500</td>
<td>1,000</td>
<td>6.1%</td>
</tr>
</tbody>
</table>

### 2018/19 Fiscal Year-End

<table>
<thead>
<tr>
<th>FY Budget</th>
<th>FY Forecast</th>
<th>Budget vs Actual</th>
<th>OV/UN %</th>
</tr>
</thead>
<tbody>
<tr>
<td>5,929,975</td>
<td>5,661,096</td>
<td>268,879</td>
<td>4.5%</td>
</tr>
</tbody>
</table>

### Notes:

1. Employee vacancies and delays in hiring General Counsel and Paralegal positions.
2. Savings projected based on timing of hearings and appeals for Professional Responsibility area.
3. Costs for forensic financial audit have exceeded budget due to recent investigation.
4. Large increase in receiver and custodian costs due to recent investigation and items related to one law firm.
6. Anticipated savings in the LRA Audit program reduced number of audits expected.
7. Potential savings on office supplies, printing and sundry items.
8. Savings on insurance contracts and other small areas.
9. At this time the Contingency funds have not been allocated/anticipated.
10. Potential delays in Technology projects may result in savings for the current fiscal year.
11. Staff travel and professional membership/development are expected to be less than budget and what was previously expected.
The Coming End of Lawyer Control Over Legal Regulation
by Jordan Furlong

At the end of last year, as John-Paul Boyd ably chronicled on this website, members of the Law Society of BC voted on three resolutions regarding access to justice. The second of these resolutions — directing the law society to bar paralegals from providing family law services under new provincial legislation and to postpone any other enlargement of paralegals’ scope of practice — received overwhelming approval.

While this was a disappointing outcome from an access standpoint, as John-Paul explains, it was hardly a surprising one, given lawyers’ entrenched opposition to expanding the scope of “law practice” beyond the legal profession. What was surprising, to me at least, was the response from the law society’s leadership, as reported in Canadian Lawyer:

> LSBC president Miriam Kresivo, who chaired the AGM and headed the LSBC’s Alternate Legal Service Provider Working Group, which advocated for the use of non-lawyers, says benchers would have to give the membership decision “serious consideration.” “It will have to be considered as part of the consultation process,” she says...

Now, I’m old enough to remember when the overwhelmingly expressed will of a province’s lawyers was complete and sufficient cause to dictate the next steps of a law society. Here, however, a law society president says it will take the opinions of lawyers into account, along with the opinions of other parties — including, presumably, a government that passed a newly revised statute now called the “Legal Professions Act” (note the plural).

It seems to me that the duly elected members of the BC legislature and the duly elected leaders of the province’s lawyers are trying to send a message to the profession’s rank and file: You’re not in control of legal market regulation anymore. John-Paul puts the point bluntly:

> The amending statute clearly signals government’s intention to allow non-lawyers to practice law, and my fundamental concern on this point is that if we fail to embrace the inevitable and regulate the extent to which non-lawyers practice law, government will do it for us.

Now, let’s move several hundreds kilometres down the coast — past Washington State, which pioneered the groundbreaking limited-license legal technician (LLLT) program back in 2015 — all the way to California. The State Bar of California was recently sundered, with its lawyer advocacy function hived off into the new California Lawyers Association and the regulatory side finally set free to focus solely on regulating legal services.

One of the new Bar’s first acts was to commission a report on the state of the legal market landscape by Professor William Henderson of the University of Indiana School of Law. You need only be glancingly familiar with Bill Henderson’s accomplishments and convictions to know that this report delivered a thorough and unflinching view of the current legal market’s failure to provide accessible justice to Californians. From the executive summary:

> The legal profession is at an inflection point. Solving the problem of lagging legal productivity requires lawyers to work closely with professionals from other disciplines. Unfortunately, the ethics rules hinder this type of collaboration. To the extent these rules promote consumer protection, they do so only for the minority of citizens who can afford legal services.
Modifying the ethics rules to facilitate greater collaboration across law and other disciplines will (1) drive down costs; (2) improve access; (3) increase predictability and transparency of legal services; (4) aid the growth of new businesses; and (5) elevate the reputation of the legal profession.

This report accompanied the Bar’s decision to create the Task Force on Access Through Innovation of Legal Services. (Much as in BC, the title is revealing of the framers’ purpose.) Read the charter of the task force, and you’ll see that the following issues are squarely within its mandate to consider and evaluate:

- the consumer protection purposes of UPL prohibitions;
- the impact of the definition of “the practice of law” on AI-driven legal systems, online consumer self-help services, matching services, document production, and dispute resolution;
- lawyer advertising and solicitation;
- partnerships with non-lawyers;
- fee-splitting (including compensation for client referrals);
- entity regulation;
- non-lawyer ownership or investment in businesses engaged in the practice of law;
- multidisciplinary practice models; and
- alternative business structures.

That is to say: The task force’s remit is everything related to the traditional regulation of legal services.

Combine this with the membership of the task force (split fairly equally between people who are lawyers and people who are not), the bold nature of its founding document, and the fact that the newly focused State Bar has chosen this subject as its first order of business … well, I don’t have much doubt that when the task force reports at the end of this year, it could very well recommend a sea change in legal market regulation in California.

California is home to more than 250,000 lawyers. It has long been a harbinger of regulatory shifts in the United States. The likelihood that legal market liberalization in the US will stop at its borders seems remote.

What’s especially noteworthy for me, though, is the fact that a task force of this type was never convened — in fact, I believe could never have been convened — when California’s State Bar had conflicting mandates to serve both the interests of lawyers and the interests of the public. Take lawyers out of the regulatory equation — as California has done, and as BC evidently is doing right now — and everything changes.

Regulatory revolution is not confined to the west coast of North America, by any means. Nova Scotia, Illinois, Utah, Tennessee, and of course, England & Wales and Australia, are either talking openly about radical regulatory change or already far down the road towards making it a reality. But the two Pacific coast jurisdictions described above could very well represent the true tipping point in this process — the point at which our understanding of legal services regulation changes, fundamentally and permanently.

You’re free to decide, of course, whether you think this development is good or bad. But I’m here to say two things. One, legal market regulation is now moving beyond the control of the legal profession, and I don’t think we’re going to get it back.

Two, it matters very much what the legal profession, individually and collectively, decides to do in response. How hard we fight the battle to retain legal market control will determine how much good will or opposition we’ll engender when the fight turns, as it likely soon will, to lawyer self-regulation. The last word here goes to Matthew Peters of McCarthy Tétrault, quoted by John-Paul Boyd:

“If we are preventing innovation, we are going to lose our social licence, because, quite frankly, if I was an elected official, I would actually pass legislation soon if the profession didn’t wake up and say: ‘We need to solve this in a different way, because you’re too self-interested.’”

Comments
MEMORANDUM TO COUNCIL

From: Tilly Pillay, QC
Date: February 15, 2019
Subject: New Appointment to Lawyers’ Fund for Client Compensation Committee

The LFCC is currently dealing with various claims that require expertise in real estate, wills and estates. There is a gap in this expertise on the committee. The committee is seeking approval to add Matthew Moir to their membership as he has the requisite expertise and is ready to serve. The committee will be more balanced by this addition. Council’s approval is sought to appoint Matthew Moir to the LFCC.
MEMORANDUM TO COUNCIL

From: Tilly Pillay QC, Executive Director

Date: February 6, 2019

Subject: Technology for the Council Election

<table>
<thead>
<tr>
<th>Date –</th>
<th>Executive Committee</th>
<th>N/A</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date – February 15, 2019</td>
<td>Council</td>
<td>For approval</td>
</tr>
</tbody>
</table>

Recommendation/Motion:
Be it resolved that Council approves the use of VoteNet Solutions’ eBallot technology for the 2019 Council elections.

Executive Summary:
Pierre Benoit, our Database Administrator, outlines below the process and technology for the upcoming Council election.

Analysis:
The software we have used in the past, and what I am requesting to use again, is called eBallot by VoteNet Solutions Inc.

The website is [http://www.eballot.com](http://www.eballot.com)

As in the past, the election is run online. VoteNet Solutions Inc. provides the product, including security and backup. We (NSBS staff) are responsible for administering the election (everything from setting up the ballot to ensuring all users receive the means to vote).

As in the past, each eligible voter receives a unique username and password that will allow them to vote in those elections for which they are permitted to vote in. They can only vote once. All ballots are confidential – even I as the administrator cannot tell who voted for whom. All we can tell is if an individual voted or not.

Part of our internal procedure indicates that if a voter does not have a unique email address, then their access information to vote in these elections will not be emailed, but rather snail mailed to them. Over the last few elections, this number has been extremely low (less than 20 overall).
MEMORANDUM TO COUNCIL

From:    Jacqueline Mullenger
Date:    January 30, 2019
Subject: Uniform Certificate of Standing

For:    Approval
        Introduction
        Information  X

Executive Summary:

In 2017 The Federation of Law Societies’ of Canada Council formed a working group to
develop a uniform certificate of standing that would be used by all provinces in Canada. The
working group was formed to ensure that all law societies were meeting their obligations under
the mobility agreements and the Canadian Free Trade Act. Having a common certificate and
understanding will provide law societies with confidence that they are interpreting the
legislation consistently and using a shared lexicon of terms.

The working group has completed its work and has forwarded a template for the Uniform
Certificate as well as an interpretation Guide and An Authorization. Staff have brought it
forward so that Council is aware of the new template and the changes that have been made.

Analysis:

The Society routinely issues certificates of standing for lawyers applying to transfer to other
jurisdictions as well as to those applying for a variety of positions which require confirmation
that they are in good standing with the Society. The current form of certificate has been in use for decades. The Legal Profession Act makes no reference to certificates of standing. The regulations to the LPA provide when the Society can or should accept certificates of standing from those applying to be members but is silent on when and how the Society will issue certificates of standing. Until recently Certificates of standing were issued out of the Executive Director’s office. Two years ago that process was transferred to Education and Credentials. The Society has a process for issuing these certificates but there is nothing in our legislation or regulation that indicates who has the authority to issue the certificate or what should be included. Council may determine that it wants to create a regulation setting these things out but at the moment a regulation does not exist.

All law Societies do issue certificates of standing and for the most part they were similar. The major difference was that the terms were interpreted differently. In particular, the phrase “entitled to practice” meant different things in different provinces. In addition, not everyone reported restrictions to practice and there were differences to what was provided with respect to disciplinary matters.

The working group has created a guide to assist law societies in interpreting the terms consistently and some changes have been made to the actual certificate template. The changes have been highlighted on the actual document that is provided in the appendices.

The changes to the template are not significant for Nova Scotia. The new certificate of standing will still report on the same matters that the current certificate reports on. The new certificate will explicitly tell other law societies if there are restrictions on a members practice and will also tell if they have been readmitted. In addition, it asks a member to sign an acknowledgment and authorization which gives the member an opportunity to see the certificate before it is sent out on their behalf and it continues to give the Society authorization to share information with the new law society. Nova Scotia’s process has always required the member to sign an authorization so this is not new.

Staff are providing these documents to Council for information purposes. It is not necessary for Council to pass a resolution in this regard as there is no requirement for Council approval.

I would be happy to answer any questions.

Exhibits/Appendices:

Appendix “A” Uniform Certificate of Standing Interpretive Guide, Template And Authorization
Staff Mobility Implementation Working Group

Uniform Certificate of Standing Interpretive Guide

This guide is intended to be a tool for law societies when completing Certificates of Standing. It may be updated from time to time as needed.

A sub-group of the Staff Mobility Implementation Working Group developed a Uniform Certificate of Standing in the fall, 2018. The sub-group created this accompanying Interpretive Guide to assist law societies when filling out the new Certificate of Standing. The Guide also provides the policy rationale behind the sub-group’s approach to the content of the Certificate.

September 2018
I CERTIFY THAT our records* indicate the following about:

Name: _______________________________ (“the applicant”)

Address: _______________________________

*Our records date back to the applicant’s original date of admission as a member unless otherwise noted here:

__________________________________________________________________

Commentary: The mobility agreements require law societies to report on a member’s disciplinary history from their original date of admission/licensing as a member, since a member who has been the subject of disciplinary proceedings is required to obtain a permit for mobility purposes. In the event that a law society is not in possession of complete records for an applicant (i.e. if paper files have been stored off-site or destroyed), the Certificate of Standing should reflect the shorter time frame by noting the date of the oldest record reviewed by the law society. A shorter period of time can be specified here for all or part of the Certificate of Standing (e.g. the shorter time frame might apply only to bankruptcy, criminal or discipline records, etc.)

We use “member” in lieu of “lawyer” to include Ontario paralegals. Reference to “admission” means admission or licensing as a member of the legal profession (e.g. as a lawyer or Ontario paralegal), and not admission as a student.

1. Admission:
   a) The applicant was:
      ☐ admitted/licensed as a member in this jurisdiction on __________.
      ☐ admitted/licensed as a member in this jurisdiction on __________ by way of special or restrictive permit: __________.
      ☐ re-admitted/relicensed on __________ after having ceased to be a member in this jurisdiction on __________.

      If re-admitted, please explain circumstances: ________________________________

   b) To the best of our knowledge, the applicant is or has been a member of the Law Society in the following Canadian jurisdictions:

      | Province/Territory | Dates |
      |-------------------|-------|
      |                   |       |

2. Present Status:
   a) The applicant:
      (i) ☐ is a member of this Law Society today; or
(ii) ☐ is not a member of this Law Society today, and has not been a member since __________

The applicant ceased to be a member for the following reason(s): __________

________________________________________________________________________

b) To the best of our knowledge, the applicant:

☐ is not in arrears of any fees, costs, charges or other amounts owing to the Society.

☐ is in arrears as follows:

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<th>Nature of arrears</th>
<th>Owed since</th>
<th>Amount owing</th>
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c) The applicant:

(i) ☐ is entitled/authorized to practice law in this jurisdiction, or

(ii) ☐ is not entitled/authorized to practice law in this jurisdiction for the following reason(s):

________________________________________________________________________

d) The applicant is indemnified under the Society’s liability insurance plan for errors and omissions, subject to the terms and conditions of the policy:

Yes ☐ No ☐ (If available: Exempt ☐)

Commentary: (b) The types of arrears owing may include premiums, insurance deductibles, Transaction Levy payments, assessments, discipline costs, etc. For instance, the member resigned with fees owing, or costs that were awarded against the member as a result of a discipline hearing have not been paid. Monies owing for reimbursement to a compensation fund or similar fund should not be reported.

(c) Law societies’ approach to interpreting “entitled to practice law” should facilitate mobility where it is in keeping with the spirit of the requirements of the NMA and the Canadian Free Trade Agreement. Moving towards a principled approach to “entitled to practice law” would allow law societies to make uniform decisions. We recommend that an applicant who is entitled to practice but for the requirement to obtain insurance in their home jurisdiction is, for the purpose of this Certificate of Standing treated pragmatically as an applicant who is “entitled to practice law”.

When a member is deemed entitled to practice, past administrative suspensions are not reflected.

(d) Information about their insurance status is requested separate from, and should be treated as unrelated to their status as either entitled to practice or not entitled to practice. If the person or department completing the Certificate of Standing knows the reason why the applicant does not have insurance (i.e. they are exempt), it should be specified here.
3. Professional Conduct Record

a) Complaints: the following number of complaint files are open: None ☐ or ___

b) Formal Disciplinary Proceedings: the applicant is or has been the subject of the following formal disciplinary proceedings (ongoing or concluded when there is a finding against the applicant): None ☐ or

<table>
<thead>
<tr>
<th>Date</th>
<th>Nature of case and finding</th>
<th>Disposition</th>
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Commentary: (a) Complaints: All complaint files that are open and active within the law society's regulatory system, whether at the pre-investigative or investigative stage, should be included in the number reported. The substance of the complaint(s) should not be provided. Law societies wishing further information about the nature of the complaint(s) would be expected to contact the law society.

Complaint files that are being addressed through an early resolution process should not be reported unless and until they have been referred on to the law society's regular complaints and investigation process.

(b) Formal disciplinary proceedings: Formal disciplinary proceedings refer to matters that are in the discipline process following the conclusion of the investigation. These should be reported if they have resulted in findings against, or citations on, an applicant's file. Formal disciplinary proceedings that are in progress, i.e. at the charging stage, should also be reported here. Do not include dismissed charges, discharges, cautions or pardons.

Law societies use different terms for various aspects of their discipline process. Parts a and b of this section should be read broadly, so that the information provided aligns with the intent of what is to be captured despite differences in terminology.

4. Custodianship or Trusteeship:

(i) ☐ the applicant has not been the subject of a custodianship or trusteeship, or

(ii) ☐ the applicant has been the subject of a custodianship or trusteeship as follows:

Commentary: This section is meant to capture law societies' activities as custodian/trustee of a lawyer's trust account and/or practice, regardless of the term used by the law society (e.g. custodianship, trusteeship, prise de possession). This section is not intended to cover informal, proactive supports for members relating to trust accounting or retirement planning.

5. Practice Conditions and Restrictions

The applicant has the following practice conditions or restrictions: None ☐ or
Commentary: Law societies should report here on any conditions or restrictions related to the practice of law, including those that may arise from voluntary practice reviews.

Law societies should not include issues related to trust accounting, or undertakings to the law society which are compliance-based rather than conditional on the applicant’s practice. However, an undertaking that relates to competency to practice, for example, a lawyer undertakes not to practice real estate until certain pre-requisites have been met, should be reported here.

Restrictions relating to membership, such as being restricted to providing pro bono services, should not be reported here. Membership restrictions should be reported under Other Relevant Information, below.

6. Personal History

a) Criminal offences: To the best of our knowledge, the following are the criminal proceedings outstanding or criminal convictions affecting the applicant:

None ☐ or

<table>
<thead>
<tr>
<th>Date</th>
<th>Place/Jurisdiction</th>
<th>Charge</th>
<th>Disposition</th>
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b) Financial Difficulty: To the best of our knowledge, the applicant has been the subject of the following procedures under The Bankruptcy and Insolvency Act:

None ☐ or

(i) ☐ an assignment under Section 49;
(ii) ☐ a petition for a receiving order under Section 43;
(iii) ☐ a proposal under Section 50; or
(iv) ☐ an application for consolidation order under Section 219 in the following circumstances:

.........................................................................................................................
.........................................................................................................................
.........................................................................................................................

or has reported to the Society the following financial difficulties:

........................................................ ........................................................

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.........................................................................................................................

Commentary: (a) Criminal offences: Law societies should not list pardons (even if arising from a prior conviction), conditional discharges, or absolute discharges. This information is not available to all law societies and it is too onerous for some law societies to canvas exhaustively. If a criminal matter has serious consequences for an applicant’s practice, law societies can expect that the matter will inevitably arise in their disciplinary proceedings.
Charges or convictions issued against an applicant under the *Youth Criminal Justice Act*, or its predecessor, are not to be listed here.

The Certificate of Standing acts as a supplement to the information that is provided directly from the applicant in their good character reference. If, as a result of what is disclosed in the good character reference, there are issues of concern to a law society, they can solicit further information directly from the applicant or the other law society.

(b) Financial difficulty: The information provided about an applicant's financial history is to allow law societies to make an assessment about the applicant's characteristic of financial management. Although it may seem unreasonable to report on past bankruptcies, there may be a pattern of behaviour exhibited by multiple bankruptcies that could be germane to a lawyer's mobility or status generally.

The Certificate of Standing should not report on monetary (civil) judgments against the applicant, but note that in the event of a transfer application, this information can be solicited by the law society from the applicant, e.g., where the law society solicits this information from its own members.

7. Other Relevant Information: None ☐ or

Commentary: Include here restrictions on membership, e.g. pro bono only, and any additional information that is considered relevant by your law society but is not already listed on the Certificate of Standing. If a jurisdiction has additional information relevant to the Certificate of Standing, e.g. money owed to a compensation fund (Quebec) or pro bono membership status (Saskatchewan), that information can be recorded here. Do not include information on capacity.

________________________
Date

(Name and title, Law society of ____________)

Please note that no outside searches have been conducted by the Law Society of ____________ and that the information provided is strictly based on records available at the Law Society of ________________.

Commentary: The signature line is left blank in acknowledgment of the fact that law societies have different authorities for signing off on Certificates of Standing.
CERTIFICATE OF STANDING

ACKNOWLEDGEMENT AND AUTHORIZATION

I, ___________________________, have reviewed the information provided in the attached Certificate of Standing which was prepared at my request by the Law Society of ________________ as a pre-condition to my application for:

(i) ☐ admission on transfer, or
(ii) ☐ a mobility permit in your jurisdiction; or
(iii) ☐ other (state purpose): ________________________________

I acknowledge that the information contained in the Certificate is accurate and complete, and I authorize the release of this information to ________________ . I further authorize ________________ to make enquiries concerning my background, character and fitness for admission as a member of your law society, and I also authorize the disclosure of information about myself to ________________ by any person or body possessing it, provided that such information will be used for the purpose of this application, and will be treated in strict confidence except when disclosure is required by law or your society’s governing regulations.

__________________________ Date __________________________ Signature of Applicant

Commentary: As Certificates of Standing are requested by law societies, other regulators, employers, Courts, etc., this Acknowledgement allows the Applicant to identify the recipient of their information by specific name. The final clause in the Acknowledgement calls the applicant’s attention to the law society’s ability to disclose information to others if required by law or regulation.
MEMORANDUM TO COUNCIL

From: Lawrence Rubin

Date: January 31, 2019

Subject: Professional Standards (Criminal) Committee

Standard No. 4: Withdrawal of Guilty Plea

<table>
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<tr>
<th>FOR:</th>
<th>APPROVAL</th>
<th>INTRODUCTION</th>
<th>INFORMATION</th>
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<tr>
<td>DATE</td>
<td>February 15, 2019</td>
<td>Council</td>
<td>Introduction</td>
</tr>
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<td>Council</td>
<td>Approval</td>
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Recommendation/Motion:

This is a new Standard No. 4 – Withdrawal of Guilty Plea being presented for introduction by the Professional Standards (Criminal) Committee. Following introduction to Council, the proposed Standard will be communicated to the Membership for review and consultation. Comments received will be reviewed by the Committee and then the Standard, amended if necessary, will be brought back to Council for approval.

This draft Standard has been submitted to both the Racial Equity Committee and the Gender Equity Committee for comment and both have responded that they have no issues with the proposed Standard.

Executive Summary:

This new standard addresses the circumstances when a party wishes to withdraw a guilty plea, the steps that counsel, acting for that party, must take in those circumstances and the issues counsel should consider.

The draft (attached) is in the usual three column format, but as a new standard, the first column is blank.

Exhibit: Standard 4 Withdrawal of Guilty Plea.
<table>
<thead>
<tr>
<th>EXISTING STANDARD</th>
<th>PROPOSED STANDARD</th>
<th>RATIONALE</th>
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<tbody>
<tr>
<td>NEW</td>
<td>STANDARD: (including commentary and resources)</td>
<td>This new standard is designed to address the circumstances when a party wishes to withdraw a guilty plea and the steps that counsel, acting for that party, must take and the issues to be considered.</td>
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</tbody>
</table>

A lawyer who accepts instructions to bring a motion to withdraw a guilty plea must be satisfied following independent investigation\(^1\) that there is a sufficient basis to conclude that the plea was either involuntary, equivocal or uninformed, or that the interests of justice are otherwise such\(^2\) that it would be unjust to maintain the plea\(^3\).

**NOTES**

Counsel should be fearless in seeking to undo unjust or wrong guilty pleas. They occur. But, with the procedural safeguards afforded to all accused persons, the standard for withdrawing a guilty plea is intentionally high. Reputations of former counsel may be at stake. Your client's reasons for seeking to withdraw the plea will be viewed with skepticism. There are procedural requirements to consider, such as waiver of solicitor-client privilege, filing proper documents in the proper court, and potentially marshalling expert evidence.

Anecdotally, there is no single, uniform practice at present, and the Civil Procedure Rules and Provincial Court Rules provide no guidelines. Some courts and counsel have incorrectly assumed the matter to be *pro forma*. The required motion, however, carefully balances the proper functioning of the system and maintaining respect for the administration of justice with the overall need to prevent miscarriages of justice. It is, therefore, extremely important to consider the ethical, procedural, legal and practical factors when advising your client on whether to make the motion, advising of chances of success, and litigating.

The importance of your ethical obligations cannot be stressed enough when you are considering a motion to withdraw the guilty plea of a client who was represented by counsel at the time. The admonition in *R. v. Elliott* bears special attention:

\(^1\) *R. v. Elliott* (1975), 28 C.C.C. (2d) 546 (Ont. C.A.), at paras. 6-7.
\(^2\) The "interests of justice" aspect is not part of the strict test to withdraw a guilty plea. But, rare instances have occurred where newly discovered exculpatory evidence, long after the plea was taken, militate in favour of withdrawing the guilty plea. See, for example, *R. v. Hanemaayer*, 2008 ONCA 580; *R. v. Barton*, 2011 NSCA 12; *R. v. Kumar*, 2011 ONCA 120.
“I consider it most unfortunate that any counsel, carried away by his enthusiastic support of his client's cause, should permit himself, by reason of his client's instructions, to make allegations inferring unjust conduct on the part of the Court, or unprofessional conduct on the part of brother solicitors without first satisfying himself by personal investigations or inquiries that some foundation, apart from his client's instructions, existed for making such allegations. His duty to his client does not absolve a solicitor from heeding his duty to the Court and to his fellow solicitors.”

1. The Test

The accused bears the “heavy burden” of demonstrating that the guilty plea should be set aside. It may be misleading or unhelpful to use terms such as “balance of probabilities”, or other traditional standards, in assessing the burden on the client here. Some courts have said that there must be “convincing evidence” that the plea was invalid. There will be a strong presumption of a valid plea when it is taken in open court, particularly where the trial judge undertakes the s.606(1.1) Code inquiry. When your client was represented by counsel when the pleas were accepted, withdrawal of the guilty plea will be “almost insurmountable”.

The decision to allow that the plea be withdrawn is discretionary, and will only follow where a Court concludes that there is “valid reason” to do so such that it would be unjust to maintain the plea. Therefore, generally, the accused must show that the guilty plea was either involuntary, equivocal and/or uninformed. Exceptional circumstances may also merit setting aside the plea, even where the general test cannot be met.

(i) Involuntary

A voluntary plea involves a conscious, volitional choice, for reasons that the accused regards as appropriate at the time. A plea entered in open court will be presumed to be voluntary.

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4 At para. 7.
5 R. v. Miller, 2011 NBCA 52, at paras. 6-8.
8 See subheading (iv), and footnotes 27 and 28 for examples.
9 T. (R.), at paras. 14, 16.
Several factors may affect this: undue pressure (external); abusive plea bargaining; being under the influence of alcohol and/or drug at the time of the plea; mental health issues.\(^{10}\) Rarely will internal pressure or anxiety suffice to invalidate the plea.\(^{11}\)

When alleging alcohol, drugs or mental health issues as invalidating the plea, medical evidence will be required. Either influence must remove the ability to make the volitional choice. In the case of questions regarding cognitive capacity, the test for a valid plea is the same as fitness to stand trial – limited cognitive capacity. There is no need for the accused to have the capacity to make a wise choice.\(^{12}\)

Pressure to plead guilty must be of such a magnitude that it overrode the choice of the accused, and that overridden choice was consistent with assertions of innocence.\(^{13}\)

Pressure to plead guilty from deals made on the Courthouse steps is common and generally insufficient to invalidate the plea.\(^{14}\)

(ii) Equivocal

The accused must plead guilty free from uncertainty, qualification, or confusion. Alcoholic blackout of the facts surrounding the offence will generally not suffice to render the plea equivocal.\(^{15}\) The plea in open court, especially when represented by (experienced) counsel, with an agreement to the facts and chance to speak to the matter, all favour the conclusion that a plea was unequivocal.\(^{16}\)

Experience of both counsel and the accused will factor into this part of the inquiry.\(^{17}\)

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\(^{10}\) Ibid., at para. 17.

\(^{11}\) Ibid., at para. 18.


\(^{15}\) T. (R.), at paras. 21-23.

\(^{16}\) Ibid.

\(^{17}\) Nevin, at para. 20.
A disagreement with facts other than the essential elements will not render the plea involuntary or equivocal.\(^{18}\)

(iii) Uninformed

An accused must have a sufficient understanding of the nature of the charges, the facts alleged, whether those facts give rise to a valid defence, the effect of the plea, and the consequences of the plea.\(^{19}\) Consequences can include the effect of the sentence on immigration status,\(^{20}\) or on one’s driving suspension under provincial legislation.\(^{21}\)

In circumstances where an accused is unaware of “legally relevant collateral consequences”\(^{22}\) of conviction and sentence — one which bears on sufficiently serious legal issues for the accused\(^{23}\) — the plea will be uninformed. If such a claim is accepted as credible, an accused must then establish that they would have either: (1) opted for a trial and pleaded not guilty, or (2) pleaded guilty, but with different conditions.\(^{24}\) A court will assess the veracity of this subjective assertion by looking to objective, contemporaneous evidence.\(^{25}\) There will be no requirement that the accused demonstrate an arguable defence; nor, a requirement to establish ineffective assistance of counsel — it is the misinformation, and not its source, that drives the prejudice inquiry.\(^{26}\)

Language difficulties arise from time to time. An accused person has to be able to follow the proceedings and understand what s/he is pleading guilty to, as well as the legal consequences. Cases which have resulted in successful motions due to language problems include:

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\(^{19}\) *Moser*, at para. 34; *Nevin*, at para. 20.


\(^{21}\) *R. v. Quick*, 2016 ONCA 95.


\(^{23}\) *Ibid*.


\(^{25}\) *Ibid*.

(a) Where it was later discovered that an interpreter provided an incorrect translation of the law of being a party to a crime (by presence at the scene) and the accused would have otherwise pleaded not guilty;  

(b) Where, even with counsel, the accused did not have a sufficient understanding of English to follow the proceedings. The applicant provided the Court with an independent language proficiency test to substantiate his claim. The Court concluded that the accused’s s.14 Charter right to an interpreter was violated and ordered a withdrawal of the guilty plea as a remedy.

Be aware, though, that such claims will generally require credibility assessments, and may involve contradictory evidence from counsel who represented the accused at the guilty plea.

Again, the experience of counsel and the accused with criminal law will factor into this aspect. The greater counsel’s experience, the greater the inference counsel discharged his/her duties thoroughly and professionally; and, that the accused was aware of the charges, facts, effect and consequences of the plea. The accused need not know the exact sentence s/he will receive, or course -- just the risk of various available sentences, due to the nature of the charges and the plea.

The fact that an accused feels s/he has a defence, but pleads guilty with full knowledge of this, will not invalidate the plea. The guilty plea relieves the Crown of its burden and removes certain procedural rights of the accused.

(iv) The Interests of Justice Otherwise Merit Withdrawal of the Guilty Plea

In rare and exceptional circumstances, the requisites for a valid plea are undisturbed, but the interests of justice require that the plea be set aside. This contemplates situations where new disclosure, often years later, reveal that the client could/should not have been found guilty. Such instances include:

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29 See, for example, R. v. L.(F.), 2011 NSPC 8; aff’d, 2011 NSCA 91.
30 Moser, at para. 38.
(a) where unrelated investigations, DNA, etc. lead to the conclusion that another person committed the offence(s); or,
(b) where commissioned inquiries lead to the conclusion of systemic, fatal blunders in forensic investigations.

2. Preliminary considerations

(i) Waiver of solicitor-client privilege

Before discussing the test to which you should direct your evidence and brief, special discussion of waiver is required. Waiver of solicitor-client privilege is often assumed when these motions proceed. This is not the case, and a number of consequences flow from how this issue is handled.

First, waiver allows you to speak with former counsel. This is part of your ethical duty to the Court and to other counsel to not advance any allegations which may negatively affect counsel’s reputation without independent inquiry, apart from the allegations of your client.

Second, the waiver allows you to tender the affidavit of former counsel as part of your motion. A refusal to waive solicitor-client privilege does not insulate your client from former counsel’s evidence being heard. Crown counsel can seek to have the Court deem waiver so as to equip the Court with a full picture of how the guilty plea came about. Former counsel also have the right to defend his/her reputation.

Equally, a refusal to waive solicitor-client privilege, and/or failure to obtain an affidavit from former counsel, gives rise to a permissive (and likely inevitable) adverse inference against the accused -- former counsel’s evidence would contradict, or at least not support the accused, even if former counsel is called by the Crown.

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32 Hanemaayer – the accused pleaded guilty to what the police concluded years later was committed by the Scarborough Rapist, Paul Bernardo; Barton – the young accused pleaded guilty to sexual assault in order to avoid jail, and years later the victim’s recantation and DNA analysis warranted setting aside the guilty plea.
33 Kumar -- one of many convictions which were overturned following the Gudge Inquiry into the practices of forensic pathologist, Dr. Charles Smith.
34 Elliott, at paras. 6-7; see, also R. v. Dunbar, 2003 BCCA 667, at paras. 335-337.
36 Ibid.
Either way, former counsel have a right to be informed of the pending motion, and must be given sufficient time to prepare an affidavit and contact LIANS. Then a decision may be made on whether to seek to intervene.

There is, therefore, no upside to refusal to waive privilege, and counsel taking on the motion should be very clear with their client about this. Some comfort can be taken from the fact that the Court and counsel have a duty to only pierce privilege to the extent as is necessary to have the issues before the Court fully developed. There is no right to a free roam through former counsel’s file, or to stray into irrelevant areas.

   (ii) Look at the involvement of counsel

It will be important, based on the preceding point, to look at the involvement of counsel leading up to and including the entry of the guilty plea and sentencing. If counsel acted, and had fulfilled the requirements as set out in the standard for a “Guilty Plea”, it will be very difficult to have the plea set aside. There would have to be a critical factor, unknown to counsel at the time, that would materially affect an aspect of the test to warrant bringing the motion.

Take, for example, receipt of late disclosure. The plea may be set aside where there is a reasonable possibility that the information would have influenced the decision to plead guilty had the information been available prior to the plea.37

   (iii) Consult Senior Counsel

This area can be very tricky. It involves a difficult test that may also confront the competence of previous counsel. A lawyer’s obligations to the client must be balanced against the lawyer’s obligations to the profession and the interests of justice. Since credibility will generally be very much alive, a thorough examination of the circumstances and a healthy measure of sound judgement will be required. It is advised that less experienced counsel consult senior members of the bar for guidance.

3. Jurisdiction

This is a relatively simple aspect. The trial court where the plea was entered is where the motion should be held, unless sentence has already been ordered. If the latter is so, you must appeal to

the appropriate appellate court. In the trial court, if the judge who recorded the guilty plea heard
the facts in support of the guilty plea, s/he is seized and must hear the motion to withdraw38. If the
same judge hears the motion to withdraw, this does not relieve the moving party from providing a
transcript of the appearance at which the plea was taken, or any other relevant appearances.

4. Procedure

(i) Before Sentencing

The accused bears the burden to satisfy the Court to exercise its discretion in favour of permitting
withdrawal of a guilty plea. S/he must, therefore give proper notice to the Court and the Crown.
The Civil Procedure Rules govern for Supreme Court (Rule 29). The Provincial Court Rules do
not really deal with it. Ultimately, the Crown (and, where applicable, counsel who represented the
accused for the plea) will need sufficient notice and time to respond.

Counsel who represented the accused when the plea was taken must consider whether they can
represent the accused at the motion to withdraw. This is generally prohibited where:

(i) the reasons for seeking to withdraw the plea require counsel to withdraw, or are
such that counsel should seek to withdraw, per the Standard on Withdrawal as
Counsel; or,

(ii) the Crown has indicated that it will not consent to the motion.

At a motion to invalidate the guilty plea, counsel’s competence and/or reputation will be at least
indirectly in the cross-hairs of the inquiry. They will become a witness, whether providing evidence
in support of, or contrary to, the accused.39

Notice documents should include:

(i) Notice of Motion;

(ii) Affidavit of Accused;

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38 Criminal Code, s.669; Saskatchewan (Attorney General) v. Saskatchewan (Provincial Court Judge) (1994) 93 C.C.C. (3d) 483 (Sask.C.A.); R. v. Savoie

39 Code of Professional Conduct, Rule 5.2-1
(iii) Transcript(s) of relevant proceedings;
(iv) Brief of law;
(v) Where necessary, an affidavit from a medical or other expert;
(vi) A waiver of solicitor-client privilege;
(vii) An affidavit of former counsel who represented the accused when the plea was taken.

The Crown will have the right to cross-examine your client and former counsel, as well as any other affiants.

(ii) After Sentencing

Where the motion to withdraw is brought for the first time on appeal, the Civil Procedure Rules and s. 683 of the Criminal Code apply regarding the need to make a motion to adduce fresh evidence. That is, all of the requirements regarding the of launching criminal appeals apply\(^40\), as well as the requirement to make a motion to adduce fresh evidence.

Where the appellant was represented by counsel at the time the plea was entered, you should obtain a waiver of solicitor-client privilege and follow your ethical obligations to independently satisfy yourself that there is substance to the allegations (below).\(^41\)

The fresh evidence materials must include the Notice of Motion and necessary affidavits from all witnesses upon whom you rely to substantiate the allegations. A modified version of the “Palmer” test\(^42\) must be satisfied for the fresh evidence to be admitted.\(^43\) To add, the evidence must be filed in a manner that is admissible in substance and form, as if it were being tendered at trial. Hearsay, for example, is inadmissible.\(^44\)

Practical considerations

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\(^{40}\) See Rule 91 of the Civil Procedure Rules.

\(^{41}\) Elliott, per note 1, applies here. As well, the NSCA “Protocol for Appeal Proceedings Involving Allegations of Ineffective Trial Counsel” will likely also apply.


\(^{43}\) Nevin, at para. 4; R. v. Pivonka, 2007 ONCA 572.

\(^{44}\) R. v. Laffin, 2009 NSCA 19, at paras. 27-34.
| Practical factors will include whether the plea was made with full/adequate disclosure; the number of appearances, the time between appearances, comments made by counsel and/or the accused on record, whether counsel have represented the accused before, etc. |
| Special emphasis should be made regarding the timing of the motion. Once sentence has already been ordered, the Court and procedure may become more stringent for following rules. The required documents will increase in volume, at a greater cost to your client. As a logical consideration, the Court of Appeal will be more skeptical of the effort to set aside the plea, particularly where a fair bit of time has passed between the plea and sentence. |
| Finally, the judge(s) hearing the motion will not countenance any efforts to manipulate or frustrate the system by bringing the motion. To allow the motion in such circumstances would severely undermine the principle of finality and the repute of the administration of justice. |

45 A panel of at least three judges will hear the motion as part of the appeal in the Nova Scotia Court of Appeal. A single judge will hear the motion at the trial and Summary Conviction Appeal levels.  
46 Moser, at para. 42; Raynor; Marriott.