



AGENDA

Benchers

Date: Thursday, December 15, 2022

Time: 12:30 p.m.

Location: Law Society Offices, 200 - 260 St. Mary Avenue, Winnipeg, Manitoba
and Via Videoconference

ITEM	TOPIC	TIME (min)	SPEAKER	MATERIALS	ACTION
1.0 PRESIDENT'S WELCOME AND TREATY ACKNOWLEDGEMENT					
	The President will welcome benchers, guests and staff to the meeting.				
2.0 IN MEMORIAM					
	<p>Robert Bruce Lindey, who passed away on October 13, 2022 at the age of 71. Mr. Lindey received his call to the Bar on June 26, 1996. He practised in association with the firm Doyle Riley Lindey for one year and then joined the Department of Justice (Canada) where he practised for 12 years. Mr. Lindey continued to practice as a sole practitioner from 2009 until his retirement in 2015. He resided in Ontario at the time of his death.</p> <p>Charles Edward Curtis, who passed away on November 15, 2022 at the of 91. Mr. Curtis served as a lay bencher from 1998 to 2013, following which he was appointed an Honourary Life Bencher of the Law Society.</p>				

John Jesse Van Massenhoven, who passed away on November 18, 2022 at the age of 51. Mr. Massenhoven received his call to the Bar on July 13, 1998. He practised as an associate with Thompson Dorfman Sweatman for one year and from 2003 to 2011 he served as counsel to the Winnipeg Regional Health Authority.

Brian Francis Squair, K.C., who passed away on November 18, 2022 at the age 86. Mr. Squair received his call to the Bar on June 26, 1968. He served as counsel to the Attorney General's Department for 25 years, leaving practice in 1993. Mr. Squair was appointed King's Counsel in 1984.

ITEM	TOPIC	TIME (min)	SPEAKER	MATERIALS	ACTION
------	-------	------------	---------	-----------	--------

3.0 CONSENT AGENDA

The Consent Agenda matters are proposed to be dealt with by unanimous consent and without debate. Benchers may seek clarification or ask questions without removing a matter from the consent agenda. Any bencher may request that a consent agenda item be moved to the regular agenda by notifying the President or Chief Executive Officer prior to the meeting.

3.1	Minutes of November 10, 2022 Meeting	5		Attached	Approval
-----	--------------------------------------	---	--	----------	----------

4.0 EXECUTIVE REPORTS

4.1	President's Report	10	Sacha Paul		Briefing
4.2	CEO Report	10	Leah Kosokowsky	Attached	Briefing
4.3	Strategic Plan Progress Report - December 2022	10	Leah Kosokowsky	Attached	Briefing

5.0 DISCUSSION/DECISION

5.1	Rule 5-27 and the Obligation to Comply with Domestic Trade Agreements	15	Rennie Stonyk Richard Porcher	Attached	Discussion/ Decision
-----	---	----	----------------------------------	----------	-------------------------

ITEM	TOPIC	TIME (min)	SPEAKER	MATERIALS	ACTION
5.2	Proposed <i>Code of Professional Conduct</i> Amendments re: Discrimination, Harassment and <i>Ex Parte</i> Communications	15	Darcia Senft	Attached	Discussion/ Decision
6.0 MONITORING REPORTS					
6.1	Operations and Administration	10	Leah Kosokowsky Rennie Stonyk	Attached	Briefing
7.0 COMMITTEE REPORTS					
7.1	Access to Justice Stakeholders Committee	10	Ken Mandzuik Brian McLeod		Briefing
7.2	President's Special Committee on Regulating Legal Entities	10	Mason Broadfoot		Briefing
8.0 MISCELLANEOUS BUSINESS					
8.1	FLSC Council Report	5	Lynda Troup	Attached	Briefing
8.2	Competency Profile Project - Articling Students	5	Leah Kosokowsky	Attached	Briefing
9.0 FOR INFORMATION					
9.1	Agenda for the Joint Meeting of the Benchers and the MBA Council			Attached	Information
9.2	Invitation to Holiday Reception			Attached	Information
9.3	Media Reports			Attached	Information

Strategic Plan 2022 – 2025

Progress Report

December 2022



STRATEGIC OBJECTIVE 1: COMPETENCE

Regulate proactively to protect the public interest by ensuring that legal services are delivered by competent and ethical lawyers.

- Proactively support lawyers and law firms to mitigate risk
- Proactively ensure that lawyers are fit to practice by addressing capacity and well-being
- Proactively support, assess and address the competence of lawyers at stages of practice when it is most needed
- Proactively engage with articling students to provide support and resources as appropriate

Progress:

Spring 2022	Practice management resources completed and posted on website related to file closing, withdrawal of legal services, absences and contingency planning; billing disbursements, retainers, retirement trust accounting
Spring 2022	Practice area fundamentals revised, updated and posted on website related to criminal law, civil procedure (partial), corporate commercial, real estate wills and estates
March 2022	Health Recovery Program framework, and consent form and agreement templates completed
May 2022	Health Recovery Program rule amendments presented to benchers for approval
June 2022	Health Recovery Program Coordinator position established
2021-2022	Peer Support Program - Law(yer) Strong - established with ongoing awareness initiatives
June 2022	Northern Bar CPD program - LSM resources and supports

August 2022	Central Bar CPD program - LSM resources and supports
September 2022	Translated Rule Amendments (Final) approved - Health Recovery Program
September 2022	New and updated practice fundamentals posted for real estate
September 2022	Draft e-learning modules completed - file closing, retention & storage; planning for absences and contingencies; retainers; retirement: winding up a practice; and withdrawal of legal services
October 2022	Second annual wellness edition of <i>Communiqué</i> published
November 2022	Practice Management Workbook complete and posted
November 2022	Health Recovery Program launched
December 2022	New and updated practice fundamentals posted for wills and estates

STRATEGIC OBJECTIVE 2: ACCESS TO JUSTICE

Advance, promote and facilitate increased access to justice for all Manitobans.

- Engage with Manitobans in northern and rural communities, members of Indigenous communities and others who are members of vulnerable and historically disadvantaged groups about unmet legal needs and opportunities to address those needs
- Explore opportunities to remove regulatory barriers to the delivery of legal services in new ways
- Promote and facilitate collaboration about access issues with the courts and other justice system stakeholders to increase access to justice
- Explore opportunities for the Law Society to increase the number of lawyers who practice law in remote/rural communities and improve retention

Progress:

February 2022	Conduct engagement sessions with community organizations
April 2022	Review, analyze and summarize consultations
May 2022	Follow-up communications and surveys delivered to organizations

April 2022	Amendments to the Legal Profession Act allowing for the regulation of limited practitioners proclaimed
April 2022	Benchers approve of proposed structure for “regulatory sandbox”
May 2022	Benchers review Forgivable Loan Program
Summer 2022	Collaboration with Manitoba Law Foundation on survey of Manitobans
August 2022	Collaboration with University of Manitoba Faculty of Law - distribute Access to Justice Survey
October 2022	Presentation at National Access to Justice Week - people-centred data collection
November 2022	Results of survey and consultation received by Entity Regulation Committee
November 2022	Regulatory Sandbox launched
November 2022	Request to extend and expand Hub services to Manitoba Law Foundation

STRATEGIC OBJECTIVE 3: EQUITY, DIVERSITY AND INCLUSION

Promote and improve equity, diversity and inclusion within the legal profession in the regulation of the legal profession and in the delivery of legal services.

- Engage and inspire Indigenous youth in Manitoba to become lawyers
- Remove inequitable barriers to admission into the legal profession for Indigenous people and other equity-seeking individuals
- Consider imposing mandatory continuing legal education relating to cultural competency as a regulatory requirement for lawyers
- Promote, support and facilitate equity, diversity and inclusion within law firms

Progress:

January 2022	Post inclusivity statement on website regarding the admissions process and the good character requirements
March 2022	Benchers resolve to require all Manitoba practising lawyers to complete one-time Indigenous intercultural awareness and competency training
June 2022	Benchers consider proposed amendments to Code of Professional Conduct re: French speaking clients and legal services

June 2022	Host SOGIC reception with MBA
December 2022	Collaboration proposed with University of Manitoba, Public Prosecutions and Legal Aid to attract and retain lawyers to northern communities
December 2022	Collaboration underway with University of Manitoba to attract Indigenous youth to law

STRATEGIC OBJECTIVE 4: STAKEHOLDER CONFIDENCE

Build public and shareholder confidence in the Law Society as the regulator of the legal profession.

- Engage with members of the public who are from vulnerable and historically disadvantaged groups
- Increase and improve engagement of the Law Society with members of the Northern Bar and members practising in other rural communities
- Build members' confidence and competence by connecting them to Law Society resources and supports

Progress:

Spring 2022	Engage with access to justice coordinator to identify organizations and leaders
June 2022	Northern Bar communication - implementation of survey and mentorship supports
December 2022	Outreach to profession regarding website resources to support competence



MEMORANDUM

To: Benchers

From: Rennie Stonyk and Richard Porcher

Date: December 6, 2022

Re: **Law Society Rule 5-27 and the Obligation to Comply with Domestic Trade Agreements**

BACKGROUND

Law Society Rule 5-27 allows the Society to impose a requirement for further articling for some Canadian lawyers transferring to the Manitoba Bar. The Rule is set out below:

5-27 Where the total of the pre-call training period for an applicant's home jurisdiction and the length of his or her post-call practice experience in that jurisdiction is less than 52 weeks, the applicant, before being called to the bar in Manitoba, must article to an approved member in Manitoba for a period of time equal to the difference, unless that time is abridged by the chief executive officer.

The Law Society is subject to *The Fair Registration in Regulated Professions Act* of Manitoba (the "Act"), which has the purpose of helping to ensure that regulated professions and individuals applying for registration by regulated professions are governed by registration practices that are transparent, objective, impartial and fair. Section 4.1 of the Act requires all regulated professions to comply with domestic trade agreements. It reads as follows:

4.1 A regulated profession must ensure that its registration practices comply with the obligations of a domestic trade agreement.

DOMESTIC TRADE AGREEMENTS

Rule 5-27 appears to be offside the Society's obligation to comply with domestic trade agreements. In particular, the principle upon which these agreements are based is that a certified worker in one

Canadian jurisdiction should be admitted in another Canadian jurisdiction without further qualification. In November 2021 the Fair Registration Practices Office released its policy statement regarding the obligation of Manitoba's regulated professions to comply with the Domestic Trade Agreements and, in particular, Chapter 7 of the Canadian Free Trade Agreement (CFTA) and Article 13 of the New West Partnership Trade Agreement (NWTPA). Attached at **Appendix 1** is a copy of the policy for reference.

We draw your attention to the following from the policy:

A fundamental principle of labour mobility is license-to-license recognition. Any worker certified for an occupation by a regulatory authority in one jurisdiction shall, upon application, be certified for that occupation by all other jurisdictions that regulate the occupation. No material requirements for additional training, experience, examinations or assessment are permitted for labour mobility applicants, except in limited circumstances when a government has approved exceptions to labour mobility.

The policy goes on to outline permissible and non-permissible requirements as well as acceptable restrictions or conditions. You will note that it indicates that a requirement may be imposed if there is a substantial break in practice; however, it indicates that this is not permissible for newly certified workers.

Articles 6 and 13 of the NWPTA provide as follows:

Article 13: Labour Mobility

1. Any worker certified for an occupation by a regulatory authority of a Party shall be recognized as qualified to practice that occupation by the other Parties.
2. Requirements imposed on workers to obtain a license, certification, or to register with a Party or one of its regulatory authorities prior to commencing work within the territory of that Party shall be deemed to be consistent with paragraph 1 provided that no material additional training, education, experience or examinations are required as part of that registration procedure and registrations are processed on a timely basis.
3. For greater certainty, and without limiting the general application of Part II (B) to such measures, a regulatory authority of a Party may refuse to certify or recognize a worker, or may impose conditions or restrictions on a worker, provided the refusal or imposition of conditions or restrictions complies with Article 6.

4. Any worker certified to practice a trade under the Red Seal Program shall be recognized as qualified to practice that trade by the Parties.

Article 6: Legitimate Objectives

1. A Party may adopt or maintain a measure that is inconsistent with articles 3, 4 or 5, or Part II (C) provided the Party can demonstrate:
 - (a) the purpose of the measure is to achieve a legitimate objective;
 - (b) the measure is not more restrictive to trade, investment or labour mobility than necessary to achieve that legitimate objective; and
 - (c) the measure is not a disguised restriction to trade, investment or labour mobility.
2. Subject to paragraph 1, Parties may establish the level of protection necessary to achieve the legitimate objective.
3. No Party shall prohibit or restrict an investment or the import of any good or service from any other Party for the export of any good or service to any other Party for legitimate objective unless the prohibition or restriction on investment for the import of the like good or service from all Parties and non-Parties for the export of the like good or services to all Parties and non-Parties is similarly prohibited or restricted.

Attached at **Appendix 2** is a copy of Chapter 7 of the CFTA for reference.

NATIONAL MOBILITY AGREEMENT

All provincial law societies in Canada, including the Law Society of Manitoba, are parties to the National Mobility Agreement. The National Mobility Agreement (NMA) allows lawyers to transfer with ease between all common law provinces in Canada, and lawyers in common law provinces also enjoy temporary mobility rights and are permitted to practise for up to 100 days a year in other common law provinces. Essentially, the purpose of the NMA aligns with that of the domestic trade agreements. That is, there should be no substantive requirements, such as examinations or re-training, required of practising lawyers who are transferring to another provincial Bar. In most cases, a practising lawyer can transfer to another Bar and the only significant requirement is meeting a reading requirement or certifying knowledge of local law and procedure.

Rule 5-27 [formerly Rule 99(4)] was passed in 1999 by the benchers pursuant to the then-current Inter-Jurisdictional Practice Protocol, which was the predecessor to the NMA. The language from the

Protocol was adopted into our Rules (currently Rule 5-27), and notwithstanding the amendments made to the Rules when the provisions of the NMA were adopted, this particular Rule remained in place. In other words, the language in Rule 5-27 is a legacy from the old Inter-Jurisdictional Practice Protocol, and is not from the current NMA.

SUMMARY OF ISSUE

We are of the view that Rule 5-27 is offside our obligations under the Act and the domestic trade agreements and that it does not align with the objectives of the NMA. The issue of whether Rule 5-27 and the possible imposition of an articling requirement for Canadian transfer applicants was raised with other jurisdictions' admissions representatives. All of the jurisdictions that were canvassed (BC, AB, SK, ON, NFLD and NS) were also of the view that attempting to impose additional articling requirements on Canadian lawyers was not permissible.

RECOMMENDATION

Since Rule 5-27 does not comply with our obligations, it is recommended that the Rule be removed. We have not frequently considered the application of Rule 5-27, as there have been very few transfer applicants who have not completed the full articling period or do not have the required practising experience in their home jurisdiction. Therefore, we do not anticipate that the removal of the Rule will have a significant impact on the ability of the Law Society to protect the public.

Recommendation:

That Rule 5-27 be removed due to it being offside the Society's obligations under *The Fair Registration in Regulated Professions Act* and the domestic trade agreements, and not being in alignment with the objectives of the NMA.

Duty to Comply with Domestic Trade Agreements Policy

November 2021

This policy explains the purpose of this duty, what is required for compliance and the Fair Registration Practices Office's review process.

Legislative Requirements

The Fair Registration Practices in Regulated Professions Act requires Manitoba professions subject to the legislation to comply with domestic trade agreements. Specifically:

Duty to comply with domestic trade agreements

4.1 A regulated profession must ensure that its registration practices comply with the obligations of a domestic trade agreement.

Purpose

The purpose of this duty is to improve compliance among Manitoba professions with the labour mobility provisions of these trade agreements. This duty provides direction to regulated professions to proactively identify and address barriers to labour mobility before they become informal or formal complaints and it strengthens recognition of certified workers applying to Manitoba from other jurisdictions.

Implementation

The duty refers to the labour mobility obligations under Chapter 7 of the Canadian Free Trade Agreement (CFTA) and Article 13 of the New West Partnership Trade Agreement (NWPTA). These agreements apply to all certified workers in regulated occupations and implementation of the obligations extends to all occupational regulators.

Under the CFTA and NWPTA, regulated professions and trades have a general obligation to ensure application requirements of all workers certified in other jurisdictions are non discriminatory, accessible, timely and transparent.

A fundamental principle of labour mobility is license-to-license recognition. Any worker certified for an occupation by a regulatory authority in one jurisdiction shall, upon application, be certified for that occupation by all other jurisdictions that regulate the occupation. No material requirements for additional training, experience, examinations or assessment are permitted for labour mobility applicants, except in limited circumstances when a government has approved exceptions to labour mobility.

A regulated profession's policies and practices for labour mobility applicants are monitored and reviewed for compliance to the mobility agreements as part of the Fair Registration Practices Office's regular review process. This duty is not subject to a compliance order under The Fair Registration Practices in Regulated Profession Act. Enforcement is under The Labour Mobility Act.



Areas of Focus

Permissible Requirements

Under labour mobility agreements, it is acceptable to request labour mobility applicants:

- complete an application and pay a fee
- provide proof of current certification in another/all other jurisdictions in Canada
- provide evidence of good standing in the other jurisdiction(s)
- provide evidence of good character (including criminal background checks)
- provide proof of proficiency in English or French (only applicable when the applicant has not already met a requirement)
- show evidence of insurance/malpractice coverage
- post a bond
- demonstrate local knowledge (non-material) (e.g., write a jurisprudence exam)

Non-Permissible Requirements

Under labour mobility agreements, application requirements cannot create a disguised restriction to labour mobility. It is unacceptable to request labour mobility applicants:

- meet residency requirements
- complete a reassessment of competency, education/training or ability to practice
- complete more onerous application requirements than workers originally certified within the jurisdiction to which they are applying

Acceptable Restrictions, Limitations and Conditions

Provided the requirement is no more onerous than that imposed on a province/territory's own workers and it is not a disguised barrier, certification restrictions, limitations or conditions may be imposed or a worker may be refused certification. This can occur under the following circumstances:

- an applicant is subject to a complaint, or disciplinary/criminal proceedings – in this case, the worker may be refused certification, or terms/conditions/restrictions may be imposed on their ability to practice
- an applicant has had a substantial break in practice (this does not refer to new graduates or newly certified individuals, etc.) – in this case, conditions may be imposed (e.g., training/exam/assessment/experience)
- an applicant had a limited, restricted or conditional certificate – in this case, an equivalent practice restriction/limitation/condition as currently imposed on the worker can be applied or, if no equivalent practice restriction/limitation/condition exists, the worker can be refused certification



Duty to Comply with Domestic Trade Agreements Policy

November 2021

Exceptions

Exceptions to labour mobility must be clearly justified (e.g., based on a difference in scope of work between jurisdictions) as necessary to achieve a legitimate objective, such as public safety or consumer protection. Exceptions must be approved and posted publicly by the government maintaining the exception. If they are not, a regulatory authority can be found to be in non-compliance with the agreements. Currently, only one profession in Manitoba has an approved exception in place.

Obligation to Notify

If a regulatory authority is planning to introduce new or revise/remove existing occupational standards, they have an obligation to base these standards on existing or common standards, when possible and practical and to notify the department responsible for their profession. This includes any changes to acts, regulations, by-laws, rules, etc. with the potential to impact labour mobility. Examples of changes could include, but are not limited to, creating or removing a certification category, changing the scope of practice, creating a new occupation or no longer regulating an occupation. The department responsible will notify their counterparts in other provinces and allow them the opportunity to comment through the process set out in the agreements.



Chapter Seven - Labour Mobility

Article 700: Purpose

The purpose of this Chapter is to eliminate or reduce measures adopted or maintained by the Parties that restrict or impair labour mobility within Canada and, in particular, to enable any worker certified for an occupation by a regulatory authority of one Party to be recognized as qualified for that occupation by all other Parties.

Article 701: Scope and Coverage

1. This Chapter applies to any measure adopted or maintained by a Party relating to:
 - (a) residency requirements for workers as a condition of access to employment opportunities or as a condition of certification relating to a worker's occupation;
 - (b) certification requirements, other than residency requirements, for workers in order to practice an occupation or use a particular occupational title; and
 - (c) occupational standards.
2. This Chapter does not apply to:
 - (a) social policy measures including labour standards and codes, minimum wages, employment insurance qualification periods, and social assistance; and
 - (b) Quebec's, Nunavut's, and the Northwest Territories' measures pertaining to their official language requirements.

Article 702: Extent of Obligations

1. For the purposes of Article 103(d) (Extent of Obligations), each Party shall, through appropriate measures, ensure compliance with this Chapter by non-governmental bodies that exercise authority delegated by law.
2. Each Party shall, through appropriate measures, seek compliance with this Chapter by non-governmental bodies other than those that exercise authority delegated by law.

Article 703: Relationship to Other Agreements

If there is an inconsistency in a particular case between a provision of this Chapter and a provision of any other agreement between two or more Parties respecting matters covered by this Chapter, the agreement that is more conducive to labour mobility in that particular case prevails to the extent of the inconsistency. For greater certainty, any such agreement may prevail only as between the Parties that are party to that agreement.

Article 704: Residency Requirements

1. Subject to Article 707, a Party shall not require a worker of a Party to be resident in its territory as a condition of:

- (a) eligibility for employment; or
- (b) certification relating to the worker's occupation.

2. With respect to the Government of Canada, paragraph 1(a) means that, subject to Article 707, it shall not require a worker of a Party to be a resident of a particular province or territory as a condition of eligibility to apply, in an external appointment or hiring process, for appointment or hiring to a position or job in:

- (a) federal public service departments, departmental corporations, Crown corporations, separate agencies, and other portions of the public administration, that are listed in Schedules I to VI of the *Financial Administration Act* (Canada), as amended; and
- (b) other Crown corporations, as defined in the *Financial Administration Act* (Canada), as amended, that are not covered under paragraph (a).

Article 705: Certification of Workers

1. Subject to paragraphs 2, 3, 4, and 6, and Article 707, any worker certified for an occupation by a regulatory authority of a Party shall, upon application, be certified for that occupation by each other Party that regulates that occupation without any requirement for any material additional training, experience, examinations, or assessments as part of that certification procedure.

2. Subject to paragraphs 3 and 4, and Article 707, each Party shall recognize any worker holding a jurisdictional certification bearing the Red Seal endorsement under the Interprovincial Standards Red Seal Program as qualified to practice the occupation identified in the certification.

3. A regulatory authority of a Party may, as a condition of certification for any worker referred to in paragraphs 1 or 2, impose requirements on that worker (other than requirements for material additional training, experience, examinations, or assessments), including requirements to:

- (a) pay an application or processing fee;
- (b) obtain insurance, malpractice coverage, or similar protection;
- (c) post a bond;
- (d) undergo a criminal background check;

- (e) provide evidence of good character;
- (f) demonstrate knowledge of the measures maintained by that Party applicable to the practice of the occupation in its territory; or
- (g) provide a certificate, letter, or other evidence from the regulatory authority in each territory in which they are currently certified confirming that their certification in that territory is in good standing;

provided that:

- (h) subject to paragraph 5(c), any requirements referred to in paragraphs (a) through (f) are the same as, or substantially similar to, but no more onerous than, those imposed by the regulatory authority on its own workers as part of the normal certification process; and
- (i) the requirement does not create a disguised restriction on labour mobility.

4. Nothing in paragraphs 1 or 2 limits the ability of a regulatory authority of a Party to:

- (a) refuse to certify a worker or impose terms, conditions, or restrictions on his or her ability to practice if such action is considered necessary to protect the public interest as a result of complaints or disciplinary or criminal proceedings in any other jurisdiction relating to the competency, conduct, or character of that worker;
- (b) impose additional training, experience, examinations, or assessments as a condition of certification if the person has not practiced the occupation within a specified period of time;
- (c) notwithstanding Article 808 (Language), require the worker to demonstrate proficiency in either English or French as a condition of certification if no equivalent language proficiency requirement was imposed on, and satisfied by, the worker as a condition of the worker's certification in his or her current certifying jurisdiction; or
- (d) assess the equivalency of a practice limitation, restriction, or condition imposed on a worker in his or her current certifying jurisdiction to any practice limitation, restriction, or condition that may be applied by the regulatory authority to a worker in its territory, and apply an equivalent practice limitation, restriction, or condition to the worker's certification, or, if the regulatory authority has no provision for applying an equivalent limited, restricted, or conditional certification, refuse to certify the worker;

provided that:

- (e) any such measure is the same as, or substantially similar to, but no more onerous than, that imposed by the regulatory authority on its own workers; and

(f) the measure does not create a disguised restriction on labour mobility.

5. Subject to Article 707, each Party shall ensure that any measure that it adopts or maintains relating to certification of workers of any other Party:

- (a) is published on the website of the relevant regulatory authority or through a readily accessible website of the Party;
- (b) results in expeditious certification; and
- (c) except for actual cost differentials, does not impose fees or other costs that are more burdensome than those imposed on its own workers.

6. If a worker has been certified for an occupation by a regulatory authority of a Party, nothing in this Article prevents a regulatory authority of any other Party from permitting the worker to practice that occupation in its territory without further certification.

Article 706: Occupational Standards

1. Each Party may adopt or maintain any occupational standard, and in doing so, may establish the level of protection that it considers to be appropriate in the circumstances. The Parties agree to take steps to reconcile differences in occupational standards, to the extent possible and where practical.

2. Further to paragraph 1, each Party shall, to the extent possible and where practical, adopt occupational standards based on common interprovincial standards, including occupational standards developed for the Interprovincial Standards Red Seal Program, or international standards. The Parties acknowledge their continued commitment to the Interprovincial Standards Red Seal Program, including the use of National Occupational Analyses, as a well-established means of establishing common interprovincial standards for trades.

3. If occupational standards have not been established in the territory of a Party in respect of a particular occupation but exist in the territory of any other Party, and the Party without the occupational standards wishes to develop such occupational standards, it shall do so in a manner conducive to labour mobility. A Party intending to develop such occupational standards shall notify the other Parties of its intent and afford them an opportunity to comment on the development of those occupational standards.

4. If occupational standards do not exist in the territory of any other Party in respect of an occupation and a Party considers it necessary to establish occupational standards for that occupation, the process of development of new occupational standards shall occur in a manner conducive to labour mobility. A Party intending to develop new occupational standards shall notify the other Parties of its intent and afford them an opportunity to comment on the development of those occupational standards.

5. If a Party considers it necessary to make changes to any standards in respect of an occupation, the process for making such changes shall occur in a manner conducive to

labour mobility. A Party intending to make such changes shall notify the other Parties and afford them an opportunity to comment on the change to those standards.

Article 707: Legitimate Objectives for Labour Mobility

1. If it is established that a measure falling within the scope and coverage of this Chapter is inconsistent with Article 201 (Non-Discrimination), Article 704, or Articles 705.1, 705.2, or 705.5, that measure is permissible under this Chapter provided that:

- (a) the purpose of the measure is to achieve a legitimate objective for labour mobility;
- (b) the measure is not more restrictive to labour mobility than necessary to achieve that legitimate objective for labour mobility; and
- (c) the measure does not create a disguised restriction to labour mobility.

2. For greater certainty, for purposes of the application of paragraph 1(b) to Articles 705.1, 705.2, or 705.5, a mere difference between the certification requirements of a Party related to academic credentials, education, training, experience, examination, or assessment methods and those of any other Party is not, by itself, sufficient to justify the imposition of additional education, training, experience, examination, or assessment requirements as necessary to achieve a legitimate objective for labour mobility. In the case of a difference related to academic credentials, education, training, or experience, the Party seeking to impose an additional requirement must be able to demonstrate that any such difference results in an actual material deficiency in skill, area of knowledge, or ability. As an example, the imposition of a requirement for additional education, training, or experience may be justified under paragraph 1(b) if a Party can demonstrate that:

- (a) there is a material difference between the scope of practice of the occupation for which the worker is seeking to be certified in its territory and the scope of practice of the occupation for which the worker has been certified by the regulatory authority of another Party; and
- (b) as a result of that difference, the worker lacks a critical skill, area of knowledge, or ability required to perform the scope of practice of the occupation for which the worker seeks to be certified.

3. If a Party adopts or maintains a measure under paragraph 1, it shall give notice in writing to the Forum of Labour Market Ministers ("Forum") of the measure, in the form, and containing the information, considered appropriate by the Forum. The notice shall indicate the Party's justification for the measure and the anticipated duration of the measure.

4. The Forum shall develop and implement a framework for the Parties to establish a list of specific measures taken under paragraph 1 for which notice has been given to the Forum under paragraph 3. This list will be published online by the Forum.

Article 708: Implementation, Administration, and Assessment

1. The Forum shall:
 - (a) promote the implementation of and ongoing adherence to this Chapter, and develop a work plan or plans related to the objectives of this Chapter;
 - (b) develop and implement the framework for the implementation of Article 706;
 - (c) develop the form and content required for notices under Article 707.3;
 - (d) develop and implement the framework for the posting of measures under Article 707.4; and
 - (e) annually produce a report on the operation of this Chapter and submit that report to the Committee.

2. The annual report referred to in paragraph 1(e) shall include:
 - (a) an assessment of the effectiveness of this Chapter, including an assessment of whether there have been any unintended adverse consequences, together with appropriate recommendations to address concerns identified in the assessment, including recommended amendments to this Chapter;
 - (b) a list of measures for which notice has been given under Article 707.3, together with a description of their respective justification and their anticipated duration; and
 - (c) a summary of any disputes that have arisen between the Parties during the year concerning the interpretation or application of this Chapter, and the results of any consultations or other dispute resolution procedures resorted to by the Parties concerned to resolve the disputes.

3. The Forum may establish any committees that it considers necessary to assist it in the implementation of any work plan. The committees may be composed of representatives of the Parties and, if appropriate, of relevant regulatory authorities, other non-governmental bodies, and interest groups.



MEMORANDUM

To: Benchers

From: Darcia Senft

Date: December 8, 2022

Re: **Proposed Code Amendments on Discrimination, Harassment,
and *Ex Parte* Communications**

INTRODUCTION

At its meeting in October 2022, the Federation of Law Societies Council was asked to approve revised proposed amendments to the national *Model Code of Professional Conduct* (“Model Code”) related to discrimination, harassment, and ex parte communications. The amendments were approved by Council. You are being asked to consider adopting the amendments for Manitoba’s *Code of Professional Conduct*.

MODEL CODE OF CONDUCT

Nearly a decade ago, when the Law Society revised Manitoba’s *Code of Professional Conduct*, the amendments generally were made in step with amendments to the national Model Code. The benchers agreed that it was beneficial to adopt a harmonized approach to rules about professional conduct, especially in light of increased mobility within the profession. From time to time, further amendments to the *Model Code* have been recommended with the goal that the 14 Canadian law societies will arrive at wording that is acceptable to all. Reaching consensus invariably requires some compromise.

PROPOSED AMENDMENTS: BACKGROUND

The original impetus for the examination of Rule 6.3 on Harassment and Discrimination came from the Law Societies Equity Network (“LSEN”), a group of law society staff members engaged in issues related to equity and diversity. In June 2019, the LSEN wrote to the Standing Committee suggesting

that the existing rules and commentary did not adequately reflect the importance of preventing discrimination and harassment. Our Law Society was involved through its participation in the LSEN.

After canvassing the considerable empirical and anecdotal evidence that discrimination, harassment and bullying remain prevalent in the legal profession, the Standing Committee decided to clarify the harassment and discrimination provisions of the Model Code and to include specific guidance on bullying.

The Standing Committee conducted two rounds of consultations with stakeholders on the proposed amendments. The first consultation report was released in January 2020. The response to the Standing Committee's 2020 Consultation Report was complex and lengthy. There were challenges associated with considering and integrating the important feedback. Many of the recommendations were adopted.

Given the considerable feedback to the first consultation report and the extraordinary interest in these proposed amendments, the Standing Committee further revised the draft amendments and undertook a limited second consultation with law societies during the summer of 2021. The Standing Committee sought further comment, signaling the hope that all law societies recognize the enormous work that had gone into this project, both in the initial drafting of amendments and in response to suggestions made following the first consultation.

In September 2021, the benchers were provided with the second consultation report. In reviewing the detailed report and keeping in mind the over-arching harmonization goal, you directed that we provide to the Standing Committee suggested amendments confined to three issues. In keeping with your direction, we advised the Standing Committee that while we would appreciate consideration being given to the recommendations outlined, the Law Society would support the amendments proposed in the second consultation report. Attached as **Appendix 1** is a copy of our letter of September 14, 2021.

After considering all of the responses to the second consultation, the Standing Committee arrived at a final version and the proposed amendments were presented to Federation Council in the spring of 2022. As noted above, the amendments were approved by council at the October 2022 meeting.

The final amendments reflect a careful review of all feedback received. The Standing Committee's detailed description of the proposed amendments is contained in the memorandum of its Chair dated May 24, 2022, attached as **Appendix A**. The amendments themselves are outlined in **Appendices A-1** and **A-2** to that attachment.

As you will note, the proposed amendments incorporate one of the three recommendations that were outlined in our letter of September 14, 2021, namely that the proposed rule on discrimination and harassment not use terminology that certain conduct is "prohibited." Rather, at your direction

we urged the committee to adopt the same terminology used throughout the balance of the Code that lawyers “must do” or “must not do” certain acts. We were very pleased to note that they accepted this recommendation.

RECOMMENDATION

In keeping with your past practice and recognizing the benefit of adopting a harmonized approach to rules about professional conduct, we recommend that you approve the amendments outlined in Appendix A-1 relating to Discrimination and Harassment (Rules 6.3-1, 6.3-2, 6.3-3 and 6.3-4) and in Appendix A-2 relating to *Ex Parte* Proceedings (Rules 5.1-2B and 5.1-2C) for Manitoba’s *Code of Professional Conduct*.

**Leah Kosokowsky, B.A., LL.B.**

Chief Executive Officer

Direct: 204-926-2030

lkosokowsky@lawsociety.mb.ca

September 14, 2021

Sent via email to: kgalldin@flsc.ca

Mr. David Swayze, Chairperson
FLSC Standing Committee on the
Model Code of Professional Conduct

Dear Mr. Swayze:

RE: Second Consultation Report on Discrimination, Harassment and *Ex Parte* Proceedings

Thank you for the opportunity to consider the proposed amendments to the Model Code of Professional Conduct as they relate to Discrimination and Harassment as well as *ex parte* communications.

While the Law Society of Manitoba generally supports the proposed amendments, we have a few recommendations which I will outline below. That said, I wish to clarify that if the recommendations are not adopted, the Law Society of Manitoba will nevertheless support those that are set out in the Second Consultation Report.

1. Rule 6.3-2 – Commentary 2(g) – Assigning work inequitably

While the wording in commentary 2(g) is quite general and perhaps vague, we found that the wording used in the explanatory report to be compelling wherein it is stated that the intent of commentary 2(g) is to address abuses of authority and assignment of work that are demeaning to someone's expertise or abilities.

We recommend that commentary 2(g) be revised to add the explanatory wording, as follows:

2(g) Assigning work inequitably or that is demeaning to someone's expertise or abilities.

Such wording would encompass situations where both the quantity and the quality of work is inequitable.

2. Rule 6.3-4

Throughout the *Model Code*, each rule is drafted in terms of what lawyers “must do” or “must not do”. The commentaries, by using the wording of what lawyers “should do” or “should not do”, provide some guidance on how to comply with the rules.

The amended wording “is prohibited” represents a departure from the wording used in the rest of the Model Code and it does not change the substance of the rule. Accordingly, for consistency and to avoid the impression that the importance of another rule in the Code is of less importance or diminished by the wording in Rule 6.3-4, we recommend that the rule not be amended as proposed.

3. Rule 5.2-1B – Commentary 3

We appreciate that the intention of commentary 3 to Rule 5.2-1B is to clarify that the Rule does not prohibit communication with a tribunal on routine administrative or procedural matters. However, the second sentence of the commentary only goes so far as to say that a lawyer “should consider notifying” the other party or their lawyer of administrative communications with the tribunal.

In our own dealings, we have experienced matters where a lawyer may treat a communication as a routine or administrative matter and refrain from advising the other party of the communication in circumstances where the other party would not have agreed to the outcome (setting a hearing date, for example).

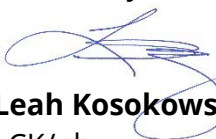
In our view, it would be preferable to remove the word “consider” in commentary 3 such that the second sentence would read:

A lawyers should notify the other party or their lawyer of administrative communications with the tribunal.

An amendment to this effect could reduce the potential for misunderstanding or mischief to occur.

As indicated above, although we would appreciate that consideration be given to the recommendations outlined herein, the Law Society will support the amendments as attached to the second consultation report.

Yours truly,



Leah Kosokowsky
LCK/pb

Federation of Law Societies
of Canada



Fédération des ordres professionnels
de juristes du Canada

MEMORANDUM

FROM: Carsten Jensen, Chair,
Standing Committee on the Model Code of Professional Conduct

TO: Council of the Federation
Law society Presidents, CEOs (for information)

DATE: May 24, 2022

SUBJECT: Model Code of Professional Conduct – Omnibus Amendment Package

AT A GLANCE FOR INFORMATION

- The Standing Committee on the Model Code has prepared a package of amendments to the rules on Harassment and Discrimination and *Ex parte* communications. The proposed amendments are described in detail in this memorandum, and will be put to Council for approval at a later date.

INTRODUCTION

1. The Standing Committee on the Model Code of Professional Conduct (“Standing Committee”) has prepared a package of amendments to the Model Code of Professional Conduct (“Model Code”) for submission to the Council of the Federation and approval at a later date. The package includes proposed revisions to the rules on discrimination and harassment, as well as the creation of new rules addressing *ex parte* and single-party communications with a tribunal. The proposed changes to the Model Code are included as Appendix “A-1” and “A-2” to this memorandum.
2. Pursuant to the timetable agreed to with the Law Society Model Code Liaisons Group, the Standing Committee recommends circulating the amendment package well in advance of its consideration by Council to ensure that all law societies have an opportunity to review the proposed amendments prior to Council being asked to approve them.
3. This memorandum sets out background information on the development of the package, together with an overview of the proposed amendments to the Model Code.

BACKGROUND

4. The original impetus for the examination of Rule 6.3 on Harassment and Discrimination came from the Law Societies Equity Network (“LSEN”), a group of law society staff members engaged in issues related to equity and diversity. In June 2019 the LSEN wrote to the Standing Committee suggesting that the existing rules and commentary did not adequately reflect the importance of preventing discrimination and harassment. After canvassing the considerable empirical and anecdotal evidence that discrimination, harassment and bullying remain prevalent in the legal profession, the Standing Committee decided to clarify the harassment and discrimination provisions of the Model Code and to include specific guidance on bullying.

5. In January of 2020, the Standing Committee issued its [Consultation Report](#) (“the 2020 Consultation Report”) addressing duties related to non-discrimination and harassment and *ex parte* communications with courts and tribunals.

6. In the months following the release of the Standing Committee’s 2020 Consultation Report, the Federation formally committed to reconciliation with Indigenous peoples and adopted Guiding Principles for Fostering Reconciliation that inform all aspects of Federation work. The Standing Committee, as with other Federation bodies, is encouraged to be in genuine, transparent, and ongoing dialogue with Indigenous stakeholders about its work.

7. The response to the Standing Committee’s 2020 Consultation Report was complex and lengthy. In addition to law society feedback, the proposed language attracted significant comment from representative organisations within the legal profession. Understanding that the 2020 Consultation Report prompted lively discussions at the Indigenous Bar Association’s fall 2020 annual conference, the Standing Committee also initiated, and has since maintained, open dialogue with representatives from the IBA about the Model Code.

8. Given the considerable feedback to the first consultation report and the extraordinary interest in these proposed amendments, the Standing Committee undertook a limited second consultation with law societies during the summer of 2021. Feedback was accepted until early November 2021, after which the Standing Committee conducted a careful review of comments received and finalized its proposed revisions.

9. The following paragraphs provide an overview of the feedback received from the two consultations and a description of the final proposed amendments. The full amendments to Model Code Rule 6.3 on discrimination and harassment are set out in “Appendix A-1” to this report. Gender-neutral language has been employed in the drafting of these proposed amendments, which the Standing Committee endorses as a Model Code drafting convention going forward.

I. DISCRIMINATION & HARASSMENT

Feedback from the 2020 Consultation

10. Eleven (11) law societies (Alberta, Nunavut, Yukon, Northwest Territories, Newfoundland, Saskatchewan, British Columbia, New Brunswick, Nova Scotia and the Barreau du Québec) provided submissions in response to the 2020 Consultation. In addition, submissions were provided by the Canadian Bar Association (the CBA), the Canadian Association for Legal Ethics (CALE), the Advocates' Society, the Federation of Asian Canadian Lawyers of Ontario, Canadian Defence Lawyers, the Women's Law Association of Ontario, and the Christian Legal Fellowship. The Standing Committee also consulted representatives of the Indigenous Bar Association about its members' reactions to the proposed new Rules and Commentary pursuant to discussions held at their 2020 conference.

11. Key feedback from the 2020 consultation included questions about the sufficiency of a prohibition on discrimination and harassment, suggestions to incorporate positive obligations into the provisions, and concerns about whether the definition of discrimination adequately captured its contemporary meaning or evolving nature. Some also suggested that the rules be amended to clarify that the provisions apply both within and outside a lawyer's practice. A comprehensive summary of all feedback received can be found in pages 4 to 13 of the second consultation report distributed to law societies in June of 2021 (online [here](#)).

2021 Consultation

12. After considering the feedback, the Standing Committee developed additional amendments to the discrimination and harassment language. In light of the extent of the revisions and the importance to law societies of the harassment and discrimination provisions, the Standing Committee conducted a targeted consultation with the law societies seeking final comment on the revised amendments. An overview of some of the key amendments included in the Standing Committee's Second Consultation Report on Discrimination, Harassment, and *Ex Parte* Proceedings (the "2021 Consultation Report"), issued on July 13, 2021, are included below. The full report can be found online [here](#).

13. The 2021 Consultation included amendments intended to clarify provisions in response to specific comments and concerns expressed by law societies and other respondents., including, for example, additional commentary indicating that lawyers should avoid condoning or being wilfully blind to conduct in their workplaces that constitute sexual harassment.

14. The Standing Committee rejected calls to include an overarching positive obligation to promote equality, diversity and inclusion, but did propose additional language about the obligation to foster respectful and inclusive workplaces and services and to stay abreast of developments in the law of discrimination.

15. Recognizing the importance of acknowledging the unique challenges that may be faced by Indigenous people when interacting with the Canadian legal system, the Standing Committee also proposed language reminding legal professionals to take

particular care to avoid engaging in, allowing, or being wilfully blind to actions which constitute discrimination or any form of harassment against Indigenous people.

16. The Standing Committee also proposed language calling on legal counsel to reflect on their complicity in systemic racism and the unconscious or implicit biases that may inform their perspectives.

17. Twelve (12) law societies (Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Ontario, Prince Edward Island, Saskatchewan, Yukon, Nova Scotia and the Barreau du Québec) provided responses to the Standing Committee's second consultation. The feedback received was generally supportive of the proposed amendments.

18. The Law Society of British Columbia was alone in suggesting that it would not be able to support the amendments. While recognizing the significance of the Standing Committee's project of reimagining and expanding the Model Code's provisions to address discrimination, harassment, and sexual harassment, the LSBC feedback expressed concerns that the draft provisions were not sufficiently well developed. The Standing Committee gave serious consideration to the LSBC's concerns, but in light of the general support for the proposed amendments, elected not to make significant changes. The LSBC has advised that it will not oppose the amendments to the Model Code.

19. The Standing Committee did make some amendments to the draft proposals based on the feedback received, including explicitly recognizing disability-based discrimination in Rule 6.3-1. Language suggested by the Law Society of Prince Edward Island to clarify the proposed amendments relating to systemic biases also have been incorporated into the final proposals.

PROPOSED FINAL AMENDMENTS

20. The final proposed amendments address the ongoing problems of harassment and discrimination faced by members of the profession whose personal characteristics are covered by human rights protections. The language recommended by the Standing Committee reflects contemporary understandings of discrimination and harassment law, while also acknowledging that legal professionals must stay abreast of developments in the law, understand the past and ongoing impacts of colonialism on Indigenous members of the profession, and remain aware of their own biases. The proposed amendments have been shared with the members of the Model Code Liaisons Group for their information.

Rule 6.3-1

21. Rule 6.3-1 reminds counsel of the obligation not to discriminate. The Standing Committee is suggesting that the prohibition on discrimination be the first rule in this section because it is the broadest duty, and as indicated in relevant case law, encompasses the duty not to harass.

22. The proposed Commentary to Rule 6.3-1 provides guidance on these obligations. As in the current version of the Model Code, the first paragraph of the Commentary addresses the special responsibility of legal professionals to respect the requirements of human rights laws. The amended Commentary also refers to the requirement to respect workplace health and safety laws, reflecting the fact that these laws contain duties relevant to the obligations not to discriminate or harass and to create safe work places.

23. The second paragraph in the proposed Commentary reminds lawyers that discrimination and harassment undermine confidence in our profession and in our legal system. In addition, the Commentary affirms that a professional environment is one that is respectful, accessible, and inclusive. Finally, the Commentary reminds legal professionals to be mindful of the existence and impact of unconscious biases.

24. The third paragraph draws on the Truth and Reconciliation Commission's Calls to Action, as well as the Federation's commitments to reconciliation, by noting that legal professionals should be aware of the ongoing repercussions for Indigenous peoples of Canada's colonial legacy and advising that they should take particular care to avoid engaging in, allowing, or being willfully blind to actions which constitute discrimination or any form of harassment against Indigenous peoples.

25. In keeping with recent case law, the fourth paragraph notes that discrimination includes adverse effect and systemic discrimination and can result from organizational policies, practices, and cultures, and the fifth paragraph defines discrimination.

26. The fifth paragraph provides a definition of discrimination.

27. The sixth paragraph notes that the principles of human rights and workplace health and safety laws and related case law apply to the interpretation of this Rule and to Rules 6.3-2 to 6.3-4.

28. The seventh paragraph provides a non-exhaustive list of behaviours which amount to discrimination. This list is intended to help legal professionals interpret their obligation of non-discrimination. Many of these examples are drawn from Supreme Court of Canada case law or human rights statutes.¹ Other examples have been drawn from the reports of the IBA and law societies.

29. The eighth paragraph of advises that providing ameliorative programs, services or activities is not discrimination. This clarification is drawn from s. 15(2) of the *Canadian Charter of Rights and Freedoms* and human rights legislation.²

30. The final paragraph of the proposed Commentary reminds lawyers that the provisions of this Rule do not only apply to conduct related to, or performed in, the lawyer's office or in legal practice. This is in keeping with Rule 2.1-1, and with

¹ Some of the relevant cases include: [Ont. Human Rights Comm. v. Simpsons-Sears](#), [1985] 2 S.C.R. 536; [British Columbia Human Rights Tribunal v. Schrenk](#), 2017 SCC 62, [2017] 2 S.C.R. 795; [British Columbia \(Public Service Employee Relations Commission\) v. BCGSEU](#), [1999] 3 S.C.R. 3; [British Columbia \(Superintendent of Motor Vehicles\) v. British Columbia \(Council of Human Rights\)](#), [1999] 3 S.C.R. 868.

² See for example the [Canadian Human Rights Act](#), RSC 1985, c H-6, s 16(1).

jurisprudence affirming that rules of professional conduct can apply to conduct outside of practice.

Rule 6.3-2

31. Rule 6.3-2 is currently an interpretive provision: it provides that a term used in the Rule that is defined in human rights legislation has the same meaning as in the legislation. The Standing Committee is proposing to define key terms in the Commentary to the rules instead. The new proposed Rule 6.3-2 would express the prohibition on harassment (replacing current rule 6.3-4) with Commentary providing guidance to this obligation.

32. The first paragraph of the Commentary defines harassment for the purposes of the Model Code. It also expresses the well-established principle of human rights law that intent is not required to establish harassment.³

33. The second paragraph of the Commentary provides examples of behaviours that constitute harassment. Like the examples used in the Commentary to Rule 6.3-1, these examples are drawn from case law, statutes, and law society reports.

34. The third paragraph provides a definition and examples of bullying, which is a form of harassment.

35. The final paragraph of the proposed Commentary reminds lawyers that the provisions of this Rule do not only apply to conduct related to, or performed in, the lawyer's office or in legal practice. This is in keeping with Rule 2.1-1, and with jurisprudence affirming that rules of professional conduct can apply to conduct outside of practice.

Rule 6.3-3

36. The Standing Committee is proposing that the Rule 6.3-3 prohibition on sexual harassment be revised slightly to ensure its consistency with the proposed changes to the language in Rules 6.3-1 and 6.3-2. Proposed new Commentary defines sexual harassment, acknowledges that it can be directed at someone based on their gender, gender identity or gender expression, and provides a non-exhaustive list of examples of behaviour that amounts to sexual harassment. As in the Commentary to Rule 6.3-2, the Commentary to 6.3-3 clarifies that sexual harassment may be found in the absence of intent on the part of an alleged harasser. The Commentary concludes with a provision identical to the Commentary to Rule 6.3-2 on the scope of the obligation.

Rule 6.3-4

37. The proposed new Rule 6.3-4 prohibits reprisals against persons inquiring about their rights or the rights of others, complainants, witnesses, and those assisting in investigations or proceedings related to a complaint of discrimination, harassment or

³ See for example [Ont. Human Rights Comm. v. Simpsons-Sears](#), [1985] 2 S.C.R. 536.

sexual harassment. The Commentary to the new rule contains a non-exhaustive list (drawn from legislation) of behaviours that amount to reprisal.⁴

II. EX PARTE COMMUNICATIONS

Background

38. This issue was first raised with the Standing Committee by the Law Society of Alberta, which raised concerns about legal professionals engaging in communications with courts and tribunals contrary to the general rule against discussing specific cases with judges in the absence of the other party except in exceptional cases. After reviewing the issues, the Standing Committee proposed the addition of rules and commentary to Chapter 5: Relationship to the Administration of Justice to note the exceptional nature of *ex parte* proceeding and to highlight the care lawyers should take when engaging in routine, single-party correspondence with a tribunal.

Feedback from the 2020 Consultation

39. These proposed amendments attracted much less comment than the proposed changes to the discrimination and harassment provisions. Most of the feedback suggested changes to clarify the proposed rule. Some concerns were expressed about whether the issue should be addressed in a separate rule, or through amendments to existing rules, but there was general support for the Standing Committee's approach.

40. A comprehensive summary of all feedback received to the first consultation report can be found in pages 11 to 13 of the second consultation report distributed to law societies in June of 2021 (online [here](#)).

41. The Standing Committee's review of the feedback received led to some clarification of the proposed amendments and some additional amendments to the *ex parte* language. The revised amendments were shared with the law societies in the 2021 Consultation Report.

Feedback from the 2021 Consultation

42. Eight (8) law societies (Alberta, Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Ontario, Prince Edward Island, Saskatchewan, Yukon, and the Barreau du Québec) provided feedback to the second consultation report. Most indicated either that they had no comments to provide to the latest proposed language or that they supported the proposed language.

43. Alberta, Manitoba, Newfoundland and Labrador, and Saskatchewan all raised concerns about the relationship between the proposed Rule on *Ex Parte* communications and the proposed Rule on single-party communications with a tribunal. Overall, it was

⁴ A non-exhaustive list of the legislation consulted includes: the [Saskatchewan Human Rights Code, 2018](#), SS 2018, c 24.2; [The Human Rights Code](#), CCSM c H175; [Human Rights Act](#), SNWT 2002, c 18; [Public Service of Ontario Act, 2006](#), SO 2006, c 35, Sch A; [Labour Code](#), CQLR c C-27; [Adult Protection Act](#), SNL 2011, c A-4.01; [Public Service Act](#), SNU 2013, c 26 and [Occupational Health and Safety Act](#), RSY 2002, c 159.

suggested that the draft amendments could benefit from additional clarity on the distinctions between the two Rules and their respective *raison d'être*. Alberta noted the difference between a communication with a tribunal and an appearance in an *ex parte* proceeding. Manitoba recommended providing more certainty with respect to the need to notify other parties of single-party communications. Newfoundland and Labrador similarly suggested that the provisions on single-party communications should recognize those that are expressly permitted by law, including local rules of practice. Saskatchewan commented that the proposed text did not sufficiently capture the validity of single-party communications with a tribunal, such as where they are authorized by law, or when invited by the tribunal to engage in such communication.

44. The Standing Committee made changes to the amendments to address the concerns raised about the distinction between the proposed Rule on *ex parte* communications and the proposed Rule on single-party communications with a tribunal. The final amendments were shared with the Model Code Liaisons Group for their information.

PROPOSED FINAL AMENDMENTS

Rule 5.1-2B

45. The proposed new Rule 5.2-1B addresses the duties of counsel in *ex parte* proceedings. It expresses the existing duty to “act with utmost good faith and inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision.”

46. The Commentary to the Rule reminds counsel of the exceptional nature of *ex parte* proceedings and the special obligations which arise as a result. The Commentary provides guidance about two obligations in particular: the duty of candour to the tribunal and the obligation to proceed *ex parte* only when it is justified.

47. The first paragraph of the Commentary reminds counsel of the special disclosure duties that arise in *ex parte* proceedings: the duty to make “full, fair and candid disclosure.” The second paragraph of the Commentary clarifies that this disclosure obligation is subject to the duty of confidentiality.

48. The third paragraph of the Commentary reminds counsel that they should only initiate *ex parte* proceedings where doing so is permitted by law and justified. The Commentary suggests that if a lawyer’s client would not suffer prejudice the lawyer should consider proceeding with notice even when an *ex parte* proceeding is permitted.

Rule 5.2-1C

49. Rule 5.2-1C sets out the established ethical principle that communicating with a tribunal on a matter of substance in the absence of opposing counsel or parties is not permitted except (1) where authorized by law or the tribunal, (2) where the opposing counsel or party has been made aware of the content of the communications and has consented, or (3) where the opposing counsel or party has appropriate notice. The

Commentary that follows the rule provides guidance on the types of single-party communications that are and are not permitted.

50. The first paragraph reminds legal professionals that it is improper to attempt to influence, discuss a matter with, or make submissions to, a tribunal without the knowledge of the other party or the lawyer for the other party (when they are represented). It also makes specific reference to diligence when engaging in single-part communications with a tribunal by electronic means.

51. The second paragraph highlights the principle that even where a tribunal requests or invites a communication from counsel, counsel should still consider whether to inform the opposing counsel or parties. The general rule remains that the opposing counsel or party should be given notice of a communication or should be copied on the communication.

52. The third paragraph of the Commentary notes that communications on routine administrative matters are permitted but, suggests that counsel should still consider providing notice.

53. The fourth paragraph of the Commentary notes that legal professionals should review relevant local authorities when considering whether a single-party communication with a tribunal is authorized by law.



DISCRIMINATION AND HARASSMENT - TRACKED CHANGES**6.3 HARASSMENT AND DISCRIMINATION AND HARASSMENT****Discrimination**

6.3-1 ~~The principles of human rights laws and related case law apply to the interpretation of this rule.~~ A lawyer must not directly or indirectly discriminate against a colleague, employee, client or any other person.

Commentary

[1] Lawyers are uniquely placed to advance the administration of justice, requiring lawyers to commit to equal justice for all within an open and impartial system. Lawyers are expected to respect the dignity and worth of all persons and to treat all persons fairly and without discrimination. A lawyer has a special responsibility to respect and uphold the principles and requirements of human rights and workplace health and safety laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in such laws.

[2] In order to reflect and be responsive to the public they serve, a lawyer must refrain from all forms of discrimination and harassment, which undermine confidence in the legal profession and our legal system. A lawyer should foster a professional environment that is respectful, accessible, and inclusive, and should strive to recognize their own internal biases and take particular care to avoid engaging in practices that would reinforce those biases, when offering services to the public and when organizing their workplace.

[3] Indigenous peoples may experience unique challenges in relation to discrimination and harassment as a result of the history of the colonization of Indigenous peoples in Canada, ongoing repercussions of the colonial legacy, systemic factors, and implicit biases. Lawyers should take particular care to avoid engaging in, allowing, or being willfully blind to actions which constitute discrimination or any form of harassment against Indigenous peoples.

[4] Lawyers should be aware that discrimination includes adverse effect and systemic discrimination, which arise from organizational policies, practices and cultures that create, perpetuate, or unintentionally result in unequal treatment of a person or persons. Lawyers should consider the distinct needs and circumstances of their colleagues, employees, and clients, and should be alert to unconscious biases that may inform these relationships and that serve to perpetuate systemic discrimination and harassment. Lawyers should guard against any express or implicit assumption that another person's views, skills, capabilities, and contributions are necessarily shaped or constrained by their gender, race, Indigeneity, disability or other personal characteristic.

[5] Discrimination is a distinction, intentional or not, based on grounds related to actual or perceived personal characteristics of an individual or group, which has the effect of imposing burdens, obligations or disadvantages on the individual or group that are not imposed on others, or which withhold or limit access to opportunities, benefits and advantages that are available to other members of society. Distinctions based on

personal characteristics attributed to an individual solely on the basis of association with a group will typically constitute discrimination. Intersecting grounds of discrimination require consideration of the unique oppressions that result from the interplay of two or more protected grounds in a given context.

[6] The principles of human rights and workplace health and safety laws and related case law apply to the interpretation of this Rule and to Rules 6.3-2 to 6.3-4. A lawyer has a responsibility to stay apprised of developments in the law pertaining to discrimination and harassment, as what constitutes discrimination, harassment, and protected grounds continue to evolve over time and may vary by jurisdiction.

[7] Examples of behaviour that constitute discrimination include, but are not limited to:

- a. harassment (as described in more detail in the Commentary to Rules 6.3-2 and 6.3-3);
- b. refusing to employ or to continue to employ any person on the basis of any personal characteristic protected by applicable law;
- c. refusing to provide legal services to any person on the basis of any personal characteristic protected by applicable law;
- d. charging higher fees on the basis of any personal characteristic protected by applicable law;
- e. assigning lesser work or paying an employee or staff member less on the basis of any personal characteristic protected by applicable law;
- f. using derogatory racial, gendered, or religious language to describe a person or group of persons;
- g. failing to provide reasonable accommodation to the point of undue hardship;
- h. applying policies regarding leave that are facially neutral (i.e. that apply to all employees equally), but which have the effect of penalizing individuals who take parental leave, in terms of seniority, promotion or partnership;
- i. providing training or mentoring opportunities in a manner which has the effect of excluding any person from such opportunities on the basis of any personal characteristic protected by applicable law;
- j. providing unequal opportunity for advancement by evaluating employees on facially neutral criteria that fail to take into account differential needs and needs requiring accommodation;
- k. comments, jokes or innuendos that cause humiliation, embarrassment or offence, or that by their nature, and in their context, are clearly embarrassing, humiliating or offensive;
- l. instances when any of the above behaviour is directed toward someone because of their association with a group or individual with certain personal characteristics; or
- m. any other conduct which constitutes discrimination according to any applicable law.

[8] It is not discrimination to establish or provide special programs, services or activities which have the object of ameliorating conditions of disadvantage for individuals or groups who are disadvantaged for reasons related to any characteristic protected by applicable laws.

[9] Lawyers are reminded that the provisions of this Rule do not only apply to conduct related to, or performed in, the lawyer's office or in legal practice.

Harassment

6.3-2 ~~A term used in this rule that is defined in human rights legislation has the same meaning as in the legislation.~~ A lawyer must not harass a colleague, employee, client or any other person.

Commentary

[1] Harassment includes an incident or a series of incidents involving physical, verbal or non-verbal conduct (including electronic communications) that might reasonably be expected to cause humiliation, offence or intimidation to the person who is subjected to the conduct. The intent of the lawyer engaging in the conduct is not determinative. It is harassment if the lawyer knew or ought to have known that the conduct would be unwelcome or cause humiliation, offence or intimidation. Harassment may constitute or be linked to discrimination.

[2] Examples of behaviour that constitute harassment include, but are not limited to:

- a. objectionable or offensive behaviour that is known or ought reasonably to be known to be unwelcome, including comments and displays that demean, belittle, intimidate or cause humiliation or embarrassment;
- b. behaviour that is degrading, threatening or abusive, whether physically, mentally or emotionally;
- c. bullying;
- d. verbal abuse;
- e. abuse of authority where a lawyer uses the power inherent in their position to endanger, undermine, intimidate, or threaten a person, or otherwise interfere with another person's career;
- f. comments, jokes or innuendos that are known or ought reasonably to be known to cause humiliation, embarrassment or offence, or that by their nature, and in their context, are clearly embarrassing, humiliating or offensive; or
- g. assigning work inequitably.

[3] Bullying, including cyberbullying, is a form of harassment. It may involve physical, verbal or non-verbal conduct. It is characterized by conduct that might reasonably be expected to harm or damage the physical or psychological integrity of another person, their reputation or their property. Bullying includes, but is not limited to:

- a. unfair or excessive criticism;
- b. ridicule;
- c. humiliation;
- d. exclusion or isolation;
- e. constantly changing or setting unrealistic work targets; or
- f. threats or intimidation.

[4] Lawyers are reminded that the provisions of this Rule do not only apply to conduct related to, or performed in, the lawyer's office or in legal practice.

Sexual Harassment

6.3-3 A lawyer must not sexually harass a colleague, employee, client or any other person. ~~any person.~~

Commentary

[1] Sexual harassment is an incident or series of incidents involving unsolicited or unwelcome sexual advances or requests, or other unwelcome physical, verbal, or nonverbal conduct (including electronic communications) of a sexual nature. Sexual harassment can be directed at others based on their gender, gender identity, gender expression, or sexual orientation. The intent of the lawyer engaging in the conduct is not determinative. It is sexual harassment if the lawyer knew or ought to have known that the conduct would be unwelcome. Sexual harassment may occur:

- a. when such conduct might reasonably be expected to cause insecurity, discomfort, offence, or humiliation to the person who is subjected to the conduct;
- b. when submission to such conduct is implicitly or explicitly made a condition for the provision of professional services;
- c. when submission to such conduct is implicitly or explicitly made a condition of employment;
- d. when submission to or rejection of such conduct is used as a basis for any employment decision, including;
 - i. Loss of opportunity;
 - ii. The allocation of work;
 - iii. Promotion or demotion;
 - iv. Remuneration or loss of remuneration;
 - v. Job security; or
 - vi. Benefits affecting the employee;
- e. when such conduct has the purpose or the effect of interfering with a person's work performance or creating an intimidating, hostile, or offensive work environment;
- f. when a position of power is used to import sexual requirements into the workplace and negatively alter the working conditions of employees or colleagues; or
- g. when a sexual solicitation or advance is made by a lawyer who is in a position to confer any benefit on, or deny any benefit to, the recipient of the solicitation or advance, if the lawyer making the solicitation or advance knows or ought reasonably to know that it is unwelcome.

[2] Examples of behaviour that constitute sexual harassment include, but are not limited to:

- a. displaying sexualized or other demeaning or derogatory images;

- b. sexually suggestive or intimidating comments, gestures or threats;
- c. comments, jokes that cause humiliation, embarrassment or offence, or which by their nature, and in their context, are clearly embarrassing, humiliating or offensive;
- d. innuendoes, leering or comments about a person's dress or appearance;
- e. gender-based insults or sexist remarks;
- f. communications with sexual overtones;
- g. inquiries or comments about a person's sex life;
- h. sexual flirtations, advances, propositions, invitations or requests;
- i. unsolicited or unwelcome physical contact or touching;
- j. sexual violence; or
- k. unwanted contact or attention, including after the end of a consensual relationship.

[3] Lawyers should avoid condoning or being willfully blind to conduct in their workplaces that constitutes sexual harassment.

[4] Lawyers are reminded that the provisions of this Rule do not only apply to conduct related to, or performed in, the lawyer's office or in legal practice.

Reprisal

6.3-4 A lawyer must not engage in any other form of harassment of any person, or participate in reprisals against a colleague, employee, client or any other person because that person has:

- a. inquired about their rights or the rights of others;
- b. made or contemplated making a complaint of discrimination, harassment or sexual harassment;
- c. witnessed discrimination, harassment or sexual harassment; or
- d. assisted or contemplated assisting in any investigation or proceeding related to a complaint of discrimination, harassment or sexual harassment.

Commentary

[1] The purpose of this Rule is to enable people to exercise their rights without fear of reprisal. Conduct which is intended to retaliate against a person, or discourage a person from exploring their rights, can constitute reprisal. Examples of such behaviour include, but are not limited to:

- a. refusing to employ or to continue to employ any person;
- b. penalizing any person with respect to that person's employment or changing, in a punitive way, any term, condition or privilege of that person's employment;
- c. intimidating, retaliating against or coercing any person;
- d. imposing a pecuniary or any other penalty, loss or disadvantage on any person;
- e. changing a person's workload in a disadvantageous manner, or withdrawing opportunities from them; or
- f. threatening to do any of the foregoing.

6.3-5 A lawyer must not discriminate against any person.

Commentary

~~[1] A lawyer has a special responsibility to respect the requirements of human rights laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in human rights laws.~~

6.3 DISCRIMINATION AND HARASSMENT

Discrimination

6.3-1 A lawyer must not directly or indirectly discriminate against a colleague, employee, client or any other person.

Commentary

[1] Lawyers are uniquely placed to advance the administration of justice, requiring lawyers to commit to equal justice for all within an open and impartial system. Lawyers are expected to respect the dignity and worth of all persons and to treat all persons fairly and without discrimination. A lawyer has a special responsibility to respect and uphold the principles and requirements of human rights and workplace health and safety laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in such laws.

[2] In order to reflect and be responsive to the public they serve, a lawyer must refrain from all forms of discrimination and harassment, which undermine confidence in the legal profession and our legal system. A lawyer should foster a professional environment that is respectful, accessible, and inclusive, and should strive to recognize their own internal biases and take particular care to avoid engaging in practices that would reinforce those biases, when offering services to the public and when organizing their workplace.

[3] Indigenous peoples may experience unique challenges in relation to discrimination and harassment as a result of the history of the colonization of Indigenous peoples in Canada, ongoing repercussions of the colonial legacy, systemic factors, and implicit biases. Lawyers should take particular care to avoid engaging in, allowing, or being willfully blind to actions which constitute discrimination or any form of harassment against Indigenous peoples.

[4] Lawyers should be aware that discrimination includes adverse effect and systemic discrimination, which arise from organizational policies, practices and cultures that create, perpetuate, or unintentionally result in unequal treatment of a person or persons. Lawyers should consider the distinct needs and circumstances of their colleagues, employees, and clients, and should be alert to unconscious biases that may inform these relationships and that serve to perpetuate systemic discrimination and harassment. Lawyers should guard against any express or implicit assumption that another person's views, skills, capabilities, and contributions are necessarily shaped or constrained by their gender, race, Indigeneity, disability or other personal characteristic.

[5] Discrimination is a distinction, intentional or not, based on grounds related to actual or perceived personal characteristics of an individual or group, which has the effect of imposing burdens, obligations or disadvantages on the individual or group that are not imposed on others, or which withhold or limit access to opportunities, benefits and advantages that are available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will typically constitute discrimination. Intersecting grounds of discrimination

require consideration of the unique oppressions that result from the interplay of two or more protected grounds in a given context.

[6] The principles of human rights and workplace health and safety laws and related case law apply to the interpretation of this Rule and to Rules 6.3-2 to 6.3-4. A lawyer has a responsibility to stay apprised of developments in the law pertaining to discrimination and harassment, as what constitutes discrimination, harassment, and protected grounds continue to evolve over time and may vary by jurisdiction.

[7] Examples of behaviour that constitute discrimination include, but are not limited to:

- a. harassment (as described in more detail in the Commentary to Rules 6.3-2 and 6.3-3);
- b. refusing to employ or to continue to employ any person on the basis of any personal characteristic protected by applicable law;
- c. refusing to provide legal services to any person on the basis of any personal characteristic protected by applicable law;
- d. charging higher fees on the basis of any personal characteristic protected by applicable law;
- e. assigning lesser work or paying an employee or staff member less on the basis of any personal characteristic protected by applicable law;
- f. using derogatory racial, gendered, or religious language to describe a person or group of persons;
- g. failing to provide reasonable accommodation to the point of undue hardship;
- h. applying policies regarding leave that are facially neutral (i.e. that apply to all employees equally), but which have the effect of penalizing individuals who take parental leave, in terms of seniority, promotion or partnership;
- i. providing training or mentoring opportunities in a manner which has the effect of excluding any person from such opportunities on the basis of any personal characteristic protected by applicable law;
- j. providing unequal opportunity for advancement by evaluating employees on facially neutral criteria that fail to take into account differential needs and needs requiring accommodation;
- k. comments, jokes or innuendos that cause humiliation, embarrassment or offence, or that by their nature, and in their context, are clearly embarrassing, humiliating or offensive;
- l. instances when any of the above behaviour is directed toward someone because of their association with a group or individual with certain personal characteristics; or
- m. any other conduct which constitutes discrimination according to any applicable law.

[8] It is not discrimination to establish or provide special programs, services or activities which have the object of ameliorating conditions of disadvantage for individuals or groups who are disadvantaged for reasons related to any characteristic protected by applicable laws.

[9] Lawyers are reminded that the provisions of this Rule do not only apply to conduct related to, or performed in, the lawyer's office or in legal practice.

Harassment

6.3-2 A lawyer must not harass a colleague, employee, client or any other person.

Commentary

[1] Harassment includes an incident or a series of incidents involving physical, verbal or non-verbal conduct (including electronic communications) that might reasonably be expected to cause humiliation, offence or intimidation to the person who is subjected to the conduct. The intent of the lawyer engaging in the conduct is not determinative. It is harassment if the lawyer knew or ought to have known that the conduct would be unwelcome or cause humiliation, offence or intimidation. Harassment may constitute or be linked to discrimination.

[2] Examples of behaviour that constitute harassment include, but are not limited to:

- a. objectionable or offensive behaviour that is known or ought reasonably to be known to be unwelcome, including comments and displays that demean, belittle, intimidate or cause humiliation or embarrassment;
- b. behaviour that is degrading, threatening or abusive, whether physically, mentally or emotionally;
- c. bullying;
- d. verbal abuse;
- e. abuse of authority where a lawyer uses the power inherent in their position to endanger, undermine, intimidate, or threaten a person, or otherwise interfere with another person's career;
- f. comments, jokes or innuendos that are known or ought reasonably to be known to cause humiliation, embarrassment or offence, or that by their nature, and in their context, are clearly embarrassing, humiliating or offensive; or
- g. assigning work inequitably.

[3] Bullying, including cyberbullying, is a form of harassment. It may involve physical, verbal or non-verbal conduct. It is characterized by conduct that might reasonably be expected to harm or damage the physical or psychological integrity of another person, their reputation or their property. Bullying includes, but is not limited to:

- a. unfair or excessive criticism;
- b. ridicule;
- c. humiliation;
- d. exclusion or isolation;
- e. constantly changing or setting unrealistic work targets; or
- f. threats or intimidation.

[4] Lawyers are reminded that the provisions of this Rule do not only apply to conduct related to, or performed in, the lawyer's office or in legal practice.

Sexual Harassment

6.3-3 A lawyer must not sexually harass a colleague, employee, client or any other person.

Commentary

[1] Sexual harassment is an incident or series of incidents involving unsolicited or unwelcome sexual advances or requests, or other unwelcome physical, verbal, or nonverbal conduct (including electronic communications) of a sexual nature. Sexual harassment can be directed at others based on their gender, gender identity, gender expression, or sexual orientation. The intent of the lawyer engaging in the conduct is not determinative. It is sexual harassment if the lawyer knew or ought to have known that the conduct would be unwelcome. Sexual harassment may occur:

- a. when such conduct might reasonably be expected to cause insecurity, discomfort, offence, or humiliation to the person who is subjected to the conduct;
- b. when submission to such conduct is implicitly or explicitly made a condition for the provision of professional services;
- c. when submission to such conduct is implicitly or explicitly made a condition of employment;
- d. when submission to or rejection of such conduct is used as a basis for any employment decision, including:
 - i. Loss of opportunity;
 - ii. The allocation of work;
 - iii. Promotion or demotion;
 - iv. Remuneration or loss of remuneration;
 - v. Job security; or
 - vi. Benefits affecting the employee;
- e. when such conduct has the purpose or the effect of interfering with a person's work performance or creating an intimidating, hostile, or offensive work environment;
- f. when a position of power is used to import sexual requirements into the workplace and negatively alter the working conditions of employees or colleagues; or
- g. when a sexual solicitation or advance is made by a lawyer who is in a position to confer any benefit on, or deny any benefit to, the recipient of the solicitation or advance, if the lawyer making the solicitation or advance knows or ought reasonably to know that it is unwelcome.

[2] Examples of behaviour that constitute sexual harassment include, but are not limited to:

- a. displaying sexualized or other demeaning or derogatory images;
- b. sexually suggestive or intimidating comments, gestures or threats;
- c. comments, jokes that cause humiliation, embarrassment or offence, or which by their nature, and in their context, are clearly embarrassing, humiliating or offensive;

- d. innuendoes, leering or comments about a person's dress or appearance;
- e. gender-based insults or sexist remarks;
- f. communications with sexual overtones;
- g. inquiries or comments about a person's sex life;
- h. sexual flirtations, advances, propositions, invitations or requests;
- i. unsolicited or unwelcome physical contact or touching;
- j. sexual violence; or
- k. unwanted contact or attention, including after the end of a consensual relationship.

[3] Lawyers should avoid condoning or being willfully blind to conduct in their workplaces that constitutes sexual harassment.

[4] Lawyers are reminded that the provisions of this Rule do not only apply to conduct related to, or performed in, the lawyer's office or in legal practice.

Reprisal

6.3-4 A lawyer must not engage or participate in reprisals against a colleague, employee, client or any other person because that person has:

- a. inquired about their rights or the rights of others;
- b. made or contemplated making a complaint of discrimination, harassment or sexual harassment;
- c. witnessed discrimination, harassment or sexual harassment; or
- d. assisted or contemplated assisting in any investigation or proceeding related to a complaint of discrimination, harassment or sexual harassment.

Commentary

[1] The purpose of this Rule is to enable people to exercise their rights without fear of reprisal. Conduct which is intended to retaliate against a person, or discourage a person from exploring their rights, can constitute reprisal. Examples of such behaviour include, but are not limited to:

- a. refusing to employ or to continue to employ any person;
- b. penalizing any person with respect to that person's employment or changing, in a punitive way, any term, condition or privilege of that person's employment;
- c. intimidating, retaliating against or coercing any person;
- d. imposing a pecuniary or any other penalty, loss or disadvantage on any person;
- e. changing a person's workload in a disadvantageous manner, or withdrawing opportunities from them; or
- f. threatening to do any of the foregoing.

EX PARTE PROCEEDINGS - TRACKED CHANGES**Ex Parte Proceedings**

5.1-2B In an *ex parte* proceeding, a lawyer must act with utmost good faith and inform the tribunal of all material facts, including adverse facts, known to the lawyer that will enable the tribunal to make an informed decision.

Commentary

[1] *Ex parte* proceedings are exceptional. The obligation to inform the tribunal of all material facts includes an obligation of full, fair and candid disclosure to the tribunal (see also Rules 5.1-1, 5.1-2).

[2] The obligation to disclose all relevant information and evidence is subject to a lawyer's duty to maintain confidentiality and privilege (see Rule 3.3).

[3] Before initiating *ex parte* proceedings, a lawyer should ensure that the proceedings are permitted by law and are justified in the circumstances. Where no prejudice would occur, a lawyer should consider giving notice to the opposing party or their lawyer (when they are represented), notwithstanding the ability to proceed *ex parte*.

Single-Party Communications with a Tribunal

5.1-2C Except where authorized by law, and subject to rule 5.1-2B, a lawyer must not communicate with a tribunal in the absence of the opposing party or their lawyer (when they are represented) concerning any matter of substance, unless the opposing party or their lawyer has been made aware of the content of the communication or has appropriate notice of the communication.

Commentary

[1] It is improper for a lawyer to attempt to influence, discuss a matter with, or make submissions to, a tribunal without the knowledge of the other party or the lawyer for the other party (when they are represented). A lawyer should be particularly diligent to avoid improper single-party communications when engaging with a tribunal by electronic means, such as email correspondence.

[2] When a tribunal invites or requests a communication from a lawyer, the lawyer should inform the other party or their lawyer. As a general rule, the other party or their lawyer should be copied on communications to the tribunal or given advance notice of the communication.

[3] This rule does not prohibit single-party communication with a tribunal on routine administrative or procedural matters, such as scheduling hearing dates or appearances. A lawyer should consider notifying the other party or their lawyer of administrative

communications with the tribunal. Routine administrative communications should not include any submissions dealing with the substance of the matter or its merits.

[4] When considering whether single-party communication with a tribunal is authorized by law, a lawyer should review local rules, practice directives, and other relevant authorities that may regulate such a communication.

EX PARTE PROCEEDINGS

5.1-2B In an *ex parte* proceeding, a lawyer must act with utmost good faith and inform the tribunal of all material facts, including adverse facts, known to the lawyer that will enable the tribunal to make an informed decision.

Commentary

[1] *Ex parte* proceedings are exceptional. The obligation to inform the tribunal of all material facts includes an obligation of full, fair and candid disclosure to the tribunal (see also Rules 5.1-1, 5.1-2).

[2] The obligation to disclose all relevant information and evidence is subject to a lawyer's duty to maintain confidentiality and privilege (see Rule 3.3).

[3] Before initiating *ex parte* proceedings, a lawyer should ensure that the proceedings are permitted by law and are justified in the circumstances. Where no prejudice would occur, a lawyer should consider giving notice to the opposing party or their lawyer (when they are represented), notwithstanding the ability to proceed *ex parte*.

Single-Party Communications with a Tribunal

5.1-2C Except where authorized by law, and subject to rule 5.1-2B, a lawyer must not communicate with a tribunal in the absence of the opposing party or their lawyer (when they are represented) concerning any matter of substance, unless the opposing party or their lawyer has been made aware of the content of the communication or has appropriate notice of the communication.

Commentary

[1] It is improper for a lawyer to attempt to influence, discuss a matter with, or make submissions to, a tribunal without the knowledge of the other party or the lawyer for the other party (when they are represented). A lawyer should be particularly diligent to avoid improper single-party communications when engaging with a tribunal by electronic means, such as email correspondence.

[2] When a tribunal invites or requests a communication from a lawyer, the lawyer should inform the other party or their lawyer. As a general rule, the other party or their lawyer should be copied on communications to the tribunal or given advance notice of the communication.

[3] This rule does not prohibit single-party communication with a tribunal on routine administrative or procedural matters, such as scheduling hearing dates or appearances. A lawyer should consider notifying the other party or their lawyer of administrative communications with the tribunal. Routine administrative communications should not include any submissions dealing with the substance of the matter or its merits.

[4] When considering whether single-party communication with a tribunal is authorized by law, a lawyer should review local rules, practice directives, and other relevant authorities that may regulate such a communication.



MONITORING REPORT

To: Benchers

From: Leah Kosokowsky and Rennie Stonyk

Date: December 6, 2022

Re: Operations and Administration

INTRODUCTION

The last monitoring report that you received on the operations and administration of the Law Society was in December of 2019. As we head into 2023, it seemed like a good time to provide an updated overview of the operations of the Law Society.

The purpose of this monitoring report is:

- To assist you to judge if we are meeting the *ends* you have established;
- To assist you to judge if we are complying with the Executive Limitations; and
- To provide you with a knowledge base that will help you in your work as a bencher.

THE GOVERNANCE POLICIES

The Governance Policies contain the following *ends* that relate to the administration and operations of the Law Society:

- End #4* To the extent permitted by law, the Law Society of Manitoba conducts its business in a manner that is transparent.
- End #5* The legal profession is independent of government in a manner which best preserves and promotes the rule of law.

You will find in the Policies the Executive Limitations established by the benchers to provide for oversight of the administration and operations of the Society.

EXECUTIVE LIMITATIONS

Part 2

A. General Executive Constraint

The Chief Executive Officer shall ensure that all practices, activities, decisions or organizational circumstances are prudent and in compliance with the law, the Rules of the Law Society, professional ethics and commonly accepted business practices. . . .

B. Treatment of Public and Members

With respect to interactions with the public, members and those applying to be members, the Chief Executive Officer shall ensure that all conditions, procedures and decisions are safe, respectful, timely, that they provide appropriate confidentiality and privacy, and that they are not unnecessarily intrusive. . . .

C. Staff Relations

With respect to dealings with staff and volunteers, the Chief Executive officer shall not allow conditions that are unfair. . . .

D. Budgeting

In budgeting for all or part of any fiscal year the Chief Executive Officer shall not deviate materially from Bencher Ends, priorities or jeopardize fiscal stability and shall budget based upon a multi-year plan. . . .

E. Financial Condition

With respect to the actual ongoing condition of the organization's financial health, the Chief Executive Officer may not cause or allow the development of fiscal instability or a material deviation of actual expenditures from Bencher priorities established in Ends policies. . . .

F. Emergency Executive Succession

In order to protect the Benchers from sudden loss of chief executive services, the Chief Executive Officer shall at least have one other staff person familiar with Bencher and chief executive issues and processes. . . .

G. Asset Administration

The Chief Executive Officer shall ensure that assets are protected, adequately maintained, prudently acquired or disposed of, and not unnecessarily put at risk...

H. Compensation and Benefits

With respect to employment, compensation and benefits to employees, consultants, contract workers and volunteers, the Chief Executive Officer shall not jeopardize fiscal stability or public image. . . .

I. Communication and Advice to the Benchers

With respect to providing information to the Benchers, the Chief Executive Officer shall ensure Benchers are informed and advised. . . .

J. Education

The Chief Executive Officer shall provide mandatory pre-call training, accessible educational opportunities to lawyers outside of Winnipeg and shall articulate administrative policies and criteria for admission and education decision-making...

PEOPLE

We currently have a total of 49 employees at the Law Society which includes three who are situated at the Manitoba Law Library, two who are on a maternity leave, one on long term disability and three persons on term contracts. There are sixteen employees who play a significant role, and all support staff play at least some role, in the operations and administration of the Law Society.

Executive

At the Senior Executive level are Leah Kosokowsky, CEO, and Rennie Stonyk, Deputy CEO. Rennie has a broad range of responsibilities, including the supervision of the Continuing Professional Development, Audit, IT, CPLED and Admissions and Membership departments. She provides advice and support to the work of the benchers and various bencher committees, oversees amendments to the rules, assists in the formulation of bencher policies and oversees the bencher election process. Rennie also oversees the work of the Complaints Review Commissioner as well as the work on custodianships by regularly liaising with our external custodians. She led the development and recent launch of the Law Society's new Health Recovery Program and worked with the IT Department to implement a new electronic document management system for the Society. Rennie assists generally in the delivery of the duties of the Chief Executive Officer, sits on the Executive Committee and assumes those duties in Leah's absence.

We are incredibly well supported at the executive level by Pat Bourbonnais, whose role it is to provide primary administrative support to both the chief executive officer and to the benchers. Her institutional knowledge and ability to work independently on key bencher initiatives is critical to the work of the Law Society. Pat also provides support to the Executive Committee members and schedules and coordinates meetings and special Law Society events and meetings, including:

- the annual President's Reception
- the annual Joint Meeting and Reception with the MBA
- Lawyers for Literacy
- the Strategic Planning Retreat
- the annual Clear Lake meeting
- President's Special Committees

Most recently Pat was called upon to act as the interim administrator for the Provincial Court Appointment Committee.

Rennie is supported by her Administrative Assistant, Debra Rossol, who, in addition to providing primary administrative support to the Deputy CEO, is also responsible for the administration of the Fee Arbitration Program, Law Corporations and the Family Law Access Centre Program.

Darcia Senft, General Counsel and Director of Policy and Ethics, provides key strategic advice and support to the work of the benchers and various bencher committees. Darcia oversees amendments to the *Code of Professional Conduct*, authors many practice directions and provides ethical advice to members. She has also taken the lead on a number of Law Society initiatives, including strategic planning, creating the framework and rules for civil society organizations, developing the Practice Management tool for law firms, launching the sandbox pilot for alternative legal services providers, and consulting with the public, community service organizations and members on unmet legal needs and options for limited practitioner licensing. Darcia is supported by Lisa Ehnes, Administrative Assistant, who also provides support for the CPLED Department.

Also in the Policy and Ethics Department is Alissa Schacter, who holds the combined role of Equity Officer/Policy Counsel. As Equity Officer, Alissa provides confidential advice, information and assistance to lawyers, support staff, articling students and clients on issues of discrimination and harassment. She also provides education to the profession and Law Society staff on EDI issues and addresses a range of other equity-related concerns, including those of a systemic nature regarding policies or practices that have an unintended discriminatory effect, in an effort to initiate change. She leads the Law Society's work on responding to the TRC's Call to Action #27 on Indigenous intercultural awareness and competency training and supports the Indigenous Advisory Committee, which is currently developing a Manitoba module to supplement The Path, which will become mandatory for all Manitoba lawyers in the fall of 2023. Alissa led the implementation of the Part-

Time Practising Fees Pilot Program and continues to track feedback on the Pilot. She provides staff support for the Society's Equity Committee and organizes the annual Building Connections Networking Event for Indigenous law and articling students. Additionally, she develops policies for the Society on EDI-related issues and serves as a resource for both the Society and profession on EDI issues.

Finance

Colleen Malone is the Law Society's Chief Financial Officer and is responsible for the effective management of the Society's financial resources, including the development of procedures and policies to support that work. She is also responsible for the daily accounting, ensuring that the proper controls are in place to safeguard LSM assets, the preparation of monthly financial statements, the preparation of the annual financial budgets, payroll, the employee pension plan and liaising with our external auditors, Deloitte LLP, in respect of the preparation of the Law Society's annual financial statements.

Colleen oversees the work of the Law Society Pension Committee which is a staff committee that meets from time to time with Mercer, our Pension Fund Manager. She is responsible for monitoring the Law Society's investments, which includes coordinating the work of our investment counsel, as well as being the primary staff support for the Investment Committee. That Committee is responsible for the Society's Investment Policies and Goals and for formulating general investment and funding policies and objectives and reviewing asset allocation and return objectives.

Colleen is supported in her work by her Administrative Assistant, Carol Hiebert, who works .7 EFT to support the Chief Financial Officer, with another .3 EFT dedicated to using her creative skills in the production of the *Communiqué* and various online practice resources for the profession.

Office Management

Elaine Kinchen is the Law Society's Office Manager and is responsible for personnel administration, communications with staff, overseeing office purchases, and liaising with our property manager on parking, building maintenance and repairs and security oversight. Previously, Elaine was the organization's event coordinator but was asked to take on office management responsibilities. Elaine continues to provide invaluable support around major events and receptions at which refreshments are served. However, given the change in Elaine's primary role, support staff of a given department are now typically responsible for organizing and administering their own department's in-person events.

The face of the Law Society to many members of the profession and to the public is our Receptionist, Shari Lough. Our support staff are on a scheduled rotation to provide reception relief and we

recently hired Charlene Barber on a casual basis to provide on-call reception relief. Additionally, Charlene will be providing event planning support to Elaine on an as-needed basis.

We also have our own cleaning staff on contract, Maria Fernandes, who moved with us to the new premises after more than 20 years providing services to the Law Society. Cleaning that is external to the Law Society's leased space is provided by the Landlord and is part of our additional rent.

Technology

We have three exceptional individuals in our technology department. Sean Rivera serves as the Director of Information Technology. He is responsible for leading the development and maintenance of information technology for the Law Society. Sean also serves as the primary liaison with our building manager for issues such as building access and security and HVAC. Over the past few years Sean has worked on making various improvements to our computer systems' cybersecurity and he has been instrumental in implementing the new electronic document management system. You will also be familiar with Sean's administration of the technology needed for bencher meetings and Law Society events (especially when they are in hybrid format).

Sean is supported by Ronald Rarama, our IT Technician, who assists with daily tasks such as hardware maintenance and user support.

Simon Young is our Director of Information Systems Development. He is responsible for the development and maintenance of information systems and to support the work of Law Society staff. Simon oversees the Law Society database and has made significant upgrades to accommodate key Law Society initiatives. He developed the infrastructure for electronic bencher elections and by-elections and has done a considerable amount of work with respect to the Annual Member Report, the development of the LSM website and exploring and developing on-line payment options.

Communications

As the Law Society Communications Officer, Deirdre O'Reilly is responsible for a coordinated program of internal and external communications which includes website management, media and stakeholder relations and the development of a range of communication tools and materials for the Law Society. She was directly engaged in the work on the new branding for the Law Society and its range of communication methods and tools and, in particular, in the development of the current website, which was unveiled in early 2020. This was an enormous amount of work on the part of Deirdre, and a host of others, including Simon, to create a modern and user-friendly website that provides lawyers with resources to support competent practice. Deirdre also leads the production of our Annual Report and the *Communiqué*, and manages our social media accounts.

POLICIES AND PROCEDURES

Mission, Culture and Vision

In our policies we have incorporated some key foundational pieces around the Mission, Culture and Vision of the Law Society as a place where people come to work every day.

Staff Policy and Procedures Manual

The Law Society's Staff Policy and Procedures Manual contains, as you may have guessed, policies and procedures related to a variety of items such as:

- Our organization's values
- Code of Conduct (for staff)
- Employee benefits and compensation, including paid time off, overtime, flex time, holidays, supplemental leave
- Office procedures

The manual is currently undergoing revisions and an updated version is expected to be available in the near future.

Respectful Workplace Policy

The Law Society's Respectful Workplace Policy reflects the Law Society's commitment to ensuring that our employees will be able to work in an environment that is free of harassment and bullying.

The Respectful Workplace Policy ensures that staff will be protected from conduct that extends beyond Law Society employees and captures their interactions with contractors, members, members of the public and volunteers. This, of course, includes benchers and the Bencher Code of Conduct requires at paragraph 6(d) that benchers "*must behave so as to comply with the Law Society of Manitoba's Respectful Workplace Policy and must not engage in any of the conduct prohibited by that Policy.*"

Workplace Health and Safety

The Law Society maintains a safe and healthful work environment for all employees and visitors. The Workplace Safety and Health Policy outlines the Law Society's commitment and protocol for ensuring that safety and health are effectively maintained in our workplace. In compliance with the *Workplace Safety and Health Act*, we have an active Workplace Health and Safety Committee that meets regularly and is responsible for conducting workplace inspections and coordinating fire alarm and emergency evacuation procedures. Incorporated into the Policy is a written protocol for

threats, whether in person or over the phone. Staff have been trained from time to time in the implementation of these policies.

A few weeks ago, Society staff were invited to a “Lunch & Learn” session where members of the Winnipeg Police Service came to the Law Society to discuss personal safety tips and measures. The session was well-attended and staff received a lot of valuable advice and reminders about how to maintain personal safety, particularly when arriving at or leaving the workplace.

Security Policies

The LSM Security Policy sets the appropriate standards for access to, and acceptable use of the Society’s electronic networks and related computer and internet technologies. It includes policies related to the acceptable use of systems, management of passwords and mobile devices, clean desks, and social media, to name a few. In 2021, we developed a Cyber Incident Response Plan in order to comply with new requirements of our cyber insurer. The plan sets out the procedures to follow in the event of a cyber security incident.

Performance Management

Several years ago we introduced a performance management process which provides a link between work planning for individual staff members and overall department and organizational goals. It helps to ensure that employees understand their job responsibilities and encourages professional development. We are able to utilize a tool that was developed for the Law Society that incorporates a position profile and performance plan with annual objectives and performance indicators. This allows managers to provide constructive and effective feedback and clarifies what employees are accountable for. It is intended to be utilized on an annual basis both as part of the performance review process and when determining compensation.

Senior management at the Law Society also recently went through leadership development training which was delivered by Diana Wiesenthal. This training was an opportunity to refresh senior management’s leadership competencies and to learn about the impact these have on our workplace culture and employee satisfaction.

Compensation

As part of the Law Society’s compensation policy, we are committed to providing employees with a comprehensive and competitive compensation package. This consists not only of compensation but also comprehensive benefits, including health, insurance, disability, dental, life coverage/insurance, AD&D, travel, EAP and a defined benefit pension plan. In addition to the financial compensation, we have a wide range of features that include flexible hours and work/life balance, learning and career development opportunities, a fun and respectful work environment and challenging and

interesting work. In addition to providing for flex time, we have a paid time off bank for employees which gives them some control over their need for time off due to illness, funerals and other personal demands independent of their allotted vacation time.

CURRENT AND EMERGING ISSUES

Effects of the Pandemic on Operations

Much has happened since our last monitoring report in December of 2019. A few short months later, the pandemic hit and the Law Society, like most other organizations, moved to a remote work environment and virtual meetings. We developed a COVID-19 premises policy and safety measures to minimize the health risks associated with the pandemic for anyone working in or attending the premises. The policy addressed issues such as vaccination status, mask wearing, and COVID testing. The safety measures addressed, among other things, the need to social distance, hand sanitize, and stay home if feeling unwell.

As restrictions lifted, we developed a work-from-home policy that remained fluid and adjustments were made periodically as needed. This past summer, we surveyed staff to obtain their feedback regarding remote work vs. in-office work. Based on the majority of staff feedback and preferences, we now have a permanent “hybrid” work-from-home policy in place – employees can choose to work from home up to two days per week, provided it does not interfere with their specific work duties.

Where the work was conducted was not the only change to our operations. Online fraudsters and thieves have been taking advantage of the increase of online activity during the pandemic. Consequently, the Law Society has taken measures to reduce its own cyber risk by implementing new security measures. One example is our move to a two-factor identity authentication when logging into our network. Another is that we conducted cyber security training for all of our staff and will be looking to add to this training going forward. As previously mentioned, we also created a cyber incident response plan and have made other improvements to our security measures in order to meet the standards required of our cyber insurer.

Document Management System

As previously mentioned, we implemented a new electronic document management system (DMS) at the Law Society this fall. Staff received preliminary training and many are now going through a second round of training on the new system. Some of you may have previous experience in making a switch to a new way of managing and storing your files. As you may know, implementing a new DMS can be a daunting task. Our staff have worked hard at structuring the system for their own

departmental needs and at learning a new way of doing things. As we slowly get used to the new system, we anticipate being fully transitioned in the coming months.

Pension Review Committee

According to our last actuarial valuation report delivered this fall by Mercer, our existing defined benefit pension plan is in a financially healthy state. However, even with a financially healthy plan, it is prudent for the CEO to review the plan periodically to assess risks associated with a defined benefit format to ensure that the Law Society has mechanisms in place to mitigate these risks. Accordingly, Leah has struck a committee to review the plans and risks associated with its defined benefit structure. The committee is comprised of various senior staff at the Law Society, and external parties who have been identified as having experience and expertise in assessing pension plans. It is anticipated that the committee will conduct and complete its review over the next several months.

Interest on Lawyer Trust Accounts

In accordance with subsection 50(2) of *The Legal Profession Act*, interest earned from lawyers' pooled trust accounts is remitted directly by the lawyers' financial institutions to The Manitoba Law Foundation. In accordance with subsection 90(1) of the *Act*, the Manitoba Law Foundation provides a grant to the Law Society based on 16.67% of the total trust account interest (note that there is a minimum payment amount of \$335,383). This grant is to be used primarily for educational purposes, and accordingly, the budget of the Law Society as it relates to education is in large part subject to the amount of interest earned on lawyers' trust accounts.

Naturally, the amount of interest earned varies significantly from year to year depending on the state of the economy and interest rates generally, which can make budget planning a challenge. The Law Society and the Manitoba Law Foundation are exploring the possibility of working with law firms to leverage their influence with their financial institutions to increase interest rates on pooled trust accounts.

CONCLUSION

Under the strategic oversight of the benchers, the Law Society has been consistently able to deliver services to the public and to the profession at a very high standard. We will continue to ensure that our policies, practices and operational decisions will enable the Law Society to fulfil its mandate to protect the public, while at the same time offering much needed supports to our membership.



FLSC COUNCIL REPORT

To: Benchers
From: Lynda Troup
Date: December 7, 2022

We had our December meeting virtually on December 5, 2022. We have several new members due to turnover caused by a number of federation representatives reaching their term limits.

- **National Wellness Study** - There will be a release (likely before you receive this) of recommendations that flowed from the issuance of the Phase I report on wellness (or lack thereof) of legal professionals across Canada. Once this occurs, there will be further discussions about what work the Federation will do with respect to the recommendations. The Federation will, of course, be facilitating the Phase II process (gathering more specific data through interview processes).
- **Indigenous Advisory Council** - This council remains in its infancy stage. A first meeting is now being planned for early February, 2023
- **NCA Assessment Modernization (NCA process)** – On November 15, 2022 the NCA AMC met to discuss proposed options to re-start the work of the project and to provide guidance on stakeholder consultation activities. The Committee supported the approach of focusing on level one competencies for the next version of the Competency Profile. The Committee discussed the issue of various fairness legislation in Canada and concluded there was support for having different standards for international candidates, so long as the differences were defensible and were in the spirit of fairness. The Committee also supported the approach that it would be the NCA AMC as a group that would make the next revisions to the draft Competency Profile. To that end, the Committee requested a consolidated document outlining the themes of the feedback received to date from stakeholders. This document will inform the discussions of the Committee as they undertake the next set of revisions. After revisions are complete, a validation process will be designed and implemented. The Committee will meet in December and January to revise the draft Competency Profile. The profile looks for the competencies one would have upon entry to the Bar Admission program. Validation will start shortly thereafter.

- **National Requirement Review (law schools)** - Feedback from a consultation will be received in the next few weeks. There is otherwise not much to update on this initiative at this time.
- **Anti-Money Laundering Initiatives** – Council will be asked (following meeting but potentially before you receive this report) to approve amendments to the Model Rule on Client Identification and Verification. The word “original” will be replaced with “authentic” regarding a document to verify identity. As such, it broadens the documents that can be used to verify identity but the legal professional must be able to ensure authenticity. An agent can also be used to carry out this role.

As has been reported on a few times, the Federation continues to work on educational tools for Anti-Money Laundering rules and why the rules are needed. The online modules will build upon and supplement existing educational materials, including a comprehensive guide on the model rules for practitioners, risk advisories highlighting risks in the areas of real estate, trusts, private lending, litigation and matters involving shell corporations, Risk Assessment Case Studies for the Legal Profession, Guidance on Using an Agent and Guidance on Monitoring Obligations.

- **Public Affairs and Government Relation Committee** – On November 4, 2022, the government introduced Bill C-32, *Fall Economic Statement Implementation Act, 2022*, which includes amendments to the *Income Tax Act* reporting regime for trusts that the Federation has been monitoring. The amendments require the filing of returns for trust accounts held separately for clients. General (or pooled) trust accounts are exempt from reporting. The Bill also includes wording meant to exempt information that is subject to solicitor-client privilege. The Department of Finance pre-published these amendments in February 2022 and in August 2022. The Federation made written submissions to Finance Canada on April 7, 2022 expressing concern that the proposed amendments do not adequately protect solicitor-client privilege and the duty of loyalty that all legal professions owe to their clients. The Bill is currently at second reading in the House.

The Federation made multiple submissions on Bill C-32. The House of Commons committee completed its review of the bill on November 30th without recommending amendments. The bill will return to the House for third reading, before moving to the Senate. On November 22nd, the Federation wrote to the Ministers of Finance and Justice to express ongoing concerns about the bill and requesting a meeting. Federation staff have been coordinating with the Canadian Bar Association (“CBA”), which shares our concerns with the bill (and the proposed mandatory disclosure, discussed below), to engage with the departments.

In February and August 2022, the Department of Finance pre-published other amendments to the *Income Tax Act* proposing to expand the mandatory disclosure regime for transactions

that may constitute aggressive tax planning, including requiring legal professionals to report these transactions to the CRA. The government has not yet introduced a bill with the proposed amendments. The Federation raised concerns about the amendments in submissions made in April of 2022, stating the requirement threatened solicitor-client privilege, the independence of the legal profession, and the duty of loyalty to the clients. Law firms and individual members of the profession have also recently raised concerns about the amendments with certain law societies. The Federation will continue its advocacy on this matter.

- **Finance** – Council approved the charge of \$41.93 per lawyer (full time equivalent) to support CanLII. This continues to be a great rate for a service that gets better every year. It is not only used more and more by lawyers (keeping in mind the number of small and solo firms out there that can't afford Westlaw or Quicklaw) but also the public generally, promoting access to justice.

Next meeting is in Quebec City in March, 2023.



MEMORANDUM

To: Benchers

From: Leah Kosokowsky

Date: December 13, 2022

**Re: National Study on Health and Wellness - Phase I
- Targeted Recommendations**

At the November 10, 2022 bencher meeting, we shared with you the report of the findings of Phase I of the National Study on Health and Wellness and you will recall that, overall, the mental health and wellness of legal professionals in Canada is reported as disturbingly poor. At the time, we were advised that the research team would be delivering recommendations to the profession as a whole. The recommendations have now been released and are available for your review [here](#). There are ten targeted recommendations that relate back to the primary and secondary causes of the particular stressor. They are:

1. Improve preparation of future professionals to support them to deal with psychological health issues;
2. Improve supports and guidance available at entry to the profession;
3. Improve continuing professional development;
4. Where relevant, evaluate the implementation of alternative work organization models that limit the impact of certain risk factors on health;
5. Implement actions aimed at destigmatizing mental health issues in the legal profession;
6. Improve access to health and wellness support resources and break down barriers that limit access to these resources;
7. Promote diversity in the profession and revise practices, policies and procedures that may include or create discriminatory biases;
8. Consider the health of legal professionals as integral to legal practice and the justice system;
9. Develop a culture of measurement; and

10. Foster a better work-life balance in the legal profession.

Under each of the above listed headings, are more detailed recommendations with further discussion of the rationale for them. Many of the recommendations directed at law societies are already being implemented in Manitoba while others reflect more novel approaches that have not been considered.

Of some significance is the recommendation that each organization include a permanent wellness component in strategic planning. You will recall that in the current strategic plan, wellness remains a priority but is largely operational at this stage.

It is our intention to conduct a more in-depth examination of the recommendations and conduct an analysis of:

- The extent to which the Society is actively engaged in the work that is being promoted;
- The extent to which the recommendations fall within the purview of law societies or other organizations and workplaces; and
- Whether some of the proposed approaches can be integrated into work that is already being implemented.

We will return to the benchers with some options for consideration, which may include that a special committee be established to consider options and set priorities.