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Cultural Competency and Diversity in the Nova Soctia Legal Profession

Final Report

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I. Introduction

We are pleased to present this summary of our research into diversity, inclusion, and cultural competency in legal workplaces. This report is the culmination of two months of research and analysis of jurisdictions across North America and the world. The impetus behind it was the work done by the Nova Scotia Barrister Society's Ad Hoc Committee on Employment Equity in the Legal Profession, and the work of Kathryn Dumke and Emma Halpern in particular. Kathryn's *Preliminary Report for an Equity and Diversity Standard*, prepared for the Law Office Management Standards Committee, was a starting point for our research.

The project was organized into three phases:

(i) Research into the policies, standards, and positions of regulators in U.S., Canada, Scotland, Ireland, Australia, and New Zealand;
(ii) Research into Canadian case law surrounding issues of diversity, inclusion, and cultural competency; and
(iii) Research into the case law of the Canadian law societies' disciplinary committees, international law, and other countries.

The purpose of this final report is to add some colour and context to our research, providing commentary and insight into our findings. As well, it will highlight any particularly progressive policies, standards, or cases. It should be noted that we used a broad definition of culture; one that describes sets of shared experiences and viewpoints. This included civilian vs. military, able-bodied vs. disabled, LGBTQ vs. straight, aboriginal vs. non-aboriginal for example.

We hope that this research will help to inform the creation of new standards and ensure the Nova Scotia legal profession becomes a leader in diversity and inclusion.

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II. Policies, Standards, and Positions

Our focus in this area was on the provinces and territories not covered by Kathryn's *Preliminary Report for an Equity and Diversity Standard*, prepared for the Law Office Management Standards Committee. These were Manitoba, New Brunswick, Northwest Territories, Nunavut, Prince Edward Island, Quebec, Saskatchewan, and Yukon. Research efforts were hampered by law societies which either did not publish information about their diversity efforts or made them available only to members.

The provincial and territorial bar associations of Canada usually have supporting material on their websites, but these are rarely relevant to everyday practice. They are broad guidelines that do not offer enforceable standards or practical guidance to lawyers or firms. There does seem to be some development however in the territories to adapt the practice of law for the large Inuit populations there.

Quebec, being a civil law jurisdiction, has a different relationship with the law. However, their website is similar to common law jurisdictions in its support of diversity but few concrete policies to realise the objective.

Saskatchewan remarkably, considering its significant indigenous population, contains almost no reference on its website whatsoever to diversity. Perhaps this could be explained by its small population, but the policies of the territories weaken this argument.

Yukon recommends cultural competency training, and even has specific recommendations to exempt indigenous court workers from new procedures to increase participation. Considering its small size, the Yukon's policies are relatively developed.

Similarly, the Law Society of Nunavut has recognized the importance of respect for cultural differences and practices that are unique to the Inuit and the north. The Ethics and Unauthorized Practice Committee drafted a two year action plan in 2014 to incorporate these obligations into legal training. Plans include a revised reading list and online ethical training focused on cultural differences. The Law Society has also identified the need for translation services in the territory and the obligation of lawyers to inform clients of their availability.

Manitoba, New Brunswick, the Northwest Territories, and Prince Edward Island have no notable documents or plans relating to diversity and cultural competency.

III. Case Law

The case law has recognized that the Canadian legal system is also the white legal system. To move beyond this label and confront systemic discrimination, it must increase culturally sensitivity – especially towards the aboriginal peoples. The *Cawsey Report* defined systemic discrimination as "[s]ystemic discrimination involves the concept that the application of uniform standards, common rules, and treatment of people who are not the same constitutes a form of discrimination. It means that in treating unlike people alike, adverse consequences, hardship, or injustice may result."

Where employees have accused their employers of discrimination, tribunals and the courts have generally not intervened if the employer has promptly taken appropriate steps to address the complaint (*Cardinal v. Douglas College*, 2013 BCHRT 64, [2013] B.C.W.L.D. 4303, *Wilkie v. Insurance Corp. of British Columbia*, 2005 BCHRT 318, [2006] B.C.W.L.D. 5293).

R. v. Kennedy, 2013 ONSC 6419, [2013] O.J. No. 4647 is an important reminder that tackling discrimination is a two-way process that requires the co-operation of the plaintiff. Reasonableness of accommodation is difficult to determine unless the courts and the defendant have the necessary information as well as cultural context to make an informed decision. In many cases, it is incumbent on the plaintiff to provide it. However, all parties have a responsibility facilitate this, by helping victims of discrimination deal with the difficulties of the historical and cultural context. For some groups, the Courts they now turn to for resolution were the same ones that historically propagated the discrimination. To call a victim to testify without preparation will only lead to a traumatic experience without a satisfactory outcome (*R. v. T. (B.H.)*, [1998] 4 C.N.L.R. 262, 37 W.C.B. (2d) 452).

In order to improve outcomes in cases of discrimination, consensual solutions are required rather than those adjudicated by the courts (*Williamson v. Mount Seymour Park Housing Co-operative*, 2005 BCHRT 334, [2005] B.C.H.R.T.D. No. 334). This would help foster mutual respect and understanding leading to stable long-term solutions.

IV. Law Society Disciplinary Committees

The decisions of the various law society disciplinary committees evidence a lack of a unified approach towards misconduct involving diversity and inclusion. The lack of enforceable standards or even concrete policies in this area has left committees to impute their own experiences and beliefs into their decisions. This has resulted in somewhat inconsistent results across provinces or even between panels.

Our research covered the law societies which made their decisions publically available *via* the Canadian Legal Information Institute (CanLII). These were: the Law Society of British Columbia, the Law Society of Alberta, the Law Society of Saskatchewan, the Manitoba Law Society, the Law Society of Ontario, the Barreau du Québec, the Nova Scotia Barristers' Society, the Law Society of Newfoundland and Labrador, and the Law Society of the Northwest Territories.

The primary issue facing the disciplinary committees was determining the appropriate balance between considerations of tolerance for diversity and the public interest. This point is much more salient in these cases than in those from the Courts given the regulatory mandate of the law societies.

Misconduct

One broad theme in the case law is the determination of what constitutes misconduct. As the rules currently stand, a distinction must be made between misconduct and behaviour that is "stupid", as the panel in *Law Society of Alberta v. Hansen*, 2009 ABLS 34 put it. It emphasized the point that misconduct must be an action that violates the *Code of Conduct* and not simply intolerant beliefs. If an individual airs thoughts that if acted upon would constitute a breach, they would most likely not be deserving of sanction, only condemnation. An issue with the panel's reasoning is that discrimination may be practiced unconsciously or in a subtle form. As the Court noted in *Gichuru v. Law Society (British Columbia)*, 2011 BCHRT 185, 2011 CarswellBC 1872, discrimination can be "be subtle and systemic, premised on the notion of "fit" or appropriateness."

One way law societies have approached the issue of diversity is to ignore it completely. In practice, this means having strict culture-blind rules. Misconduct would occur even if a lawyer was trying to accommodate a client's needs. The panel in *Chan (Re),* 2009 LSBC 20 took such an interpretation of the Law Societies' rule prohibiting cash for transactions over $7,500. They interpreted it to mean that lawyers have no discretion in its application. Rather, "By making a hard and fast rule, the Law Society is clearly conveying the message to its members that accepting cash carries with it unacceptable risk". This was in response to the claim that the rule should have been slackened for Chinese clients who belong to a culture that relies on cash more than North Americans.

In this case, the strictness may be justified due to Canada' anti-money laundering laws. However, while bright line rules may reduce the opportunity for discrimination, it creates rigid standards for behaviour. This prevents lawyers from behaving in a way that is appropriate and

sensitive to the cultural context of their clients. What may more helpful, would be guidelines for interpreting these rules and how they should be adopted in varying circumstances.

Mitigating Factors

Disciplinary committees have not viewed cultural considerations as defences for misconduct. Rather they have applied them as mitigating factors when determining sanctions. However, it is not enough for panels to simply be aware of adversity faced by minorities groups. The panel in *Law Society of Upper Canada v. Selwyn Milan McSween*, 2012 ONLSAP 3 stated that they must give "appropriate weight to the context of being a lawyer from a racial minority in Canadian society and its connection to the misconduct." This can be extended to any group marginalized on the various human rights grounds.

The issue of balancing tolerance and human rights with the public interest is readily apparent in these cases. In *Law Society of Alberta v. Madeline Wood*, 2008 LSA 18, the panel considered the suspension of a member whose misconduct was possibly a result of a mental disability she possessed. They found that the purpose of sanctions is to protect the public and not punishment. Therefore while a disability is a mitigating factor, sanctions must be considered in view of the public interest.

Two cases arise from the Law Society of Manitoba which illustrate how Courts have weighting the public interest differently. The panel in *Law Society of Manitoba v. Nadeau*, 2013 MBLS 4 felt that despite Nadeau's aboriginal background, their responsibility to protect the public from unscrupulous lawyers outweighed any potential benefit arising from an additional figure in the underrepresented aboriginal legal community. They therefore proceeded to disbar him.

However, in *The Law Society of Manitoba v. Shawa*, 2000 MBLS 5, the panel viewed the hardships faced by Africans fleeing war-torn and failed states to be the most significant factor in their decision in agreeing with the joint submission. They appreciated that the adversity they faced would force Shawa, who was born in Africa, to make difficult and improper decisions. Thus despite the finding of misconduct, they were relatively lenient.

False Claims of Systemic Discrimination

While there is undoubtedly pervasive and deep-rooted systemic discrimination in the legal profession (see the Law Society of Upper Canada's *Developing Strategies for Change: Addressing Challenges Faced by Racialized Licensees*), it must be recognized that these claims may be insincere. There are numerous cases where the lawyer charged with misconduct has made unsubstantiated claims of bias and discrimination by the law society.

V. International Law and Foreign Jurisdictions

United States of America

Many states have recognized the implicit need for diversity in their bar associations. However, the degree varies greatly and very few states create diversity policies that become compulsory. Some states, such as Vermont or Wyoming, are perhaps either too small or their populations are too homogenous to have any overt policy. However, the presence of some reference to diversity in similar states such as South Dakota and Utah may undercut these explanations.

Most state bars have some reference to diversity. However, they only go to the extent of the odd supportive reference in a mission statement, a continuing legal education course, or supportive article in on the bar's newspaper. Some may even have a diversity or minority-group committee, but information on these committees is either non-existent or hidden. States that are in this category are typically hostile to direct regulation and small. These include West Virginia, Tennessee and South Carolina.

The states that have the more substantial equality programs are usually larger and have a more prominent minority population. These states typically have more developed diversity committees and even their own minority bar associations. Moreover, it is here that we see the first allusions to cultural competency as an element of legal education. Wisconsin has a conference on "cultural defences" in law, Washington DC has optional cultural competency training for their parole workshops, and Utah and Virginia each have voluntary cultural competency training. However, the key word in all of this is "voluntary." The more progressive states tend to have instituted or recommended a data collection program in order to gather demographic data.

Two state bar associations have commissioned broad plans to outline their approach to tackling diversity issues. The Pennsylvania Bar Association has released a Strategic Diversity and Inclusion Plan with the goal of creating a "genuine, sustainable diverse and inclusive environment within the PBA and throughout its membership." The Ohio State Bar Association has released a Policy on Diversity and Inclusion in the Profession and the Justice System which elaborates this goal slightly more. In this policy, the Bar Association states that it will work towards removing barriers to entry into and advancement in the profession, developing interests of underrepresented groups in the profession, and monitoring progress. Unfortunately, it does not expand on how it will enhance diversity in the justice system at large.

In only two states was there a comprehensive plan to directly change rules. Washington State's bar association has encouraged the inclusion of cultural competency as part of the University of Washington's 1L orientation program. Texas has encouraged the setting up of gender-neutral courtroom procedures. Although these policies are more concrete than any other state, they are relatively mild in terms of their effect.

Scotland

The law society of Scotland has one of the most developed diversity and cultural competency policies in the world. Although still in its inchoate state, the stated diversity strategy is far-reaching. It recognizes diversity as a core process. It recommends mandatory diversity training not only for the law society's leadership but broadly. Even more encouraging for those who support such a policy, it is apparently supported by its membership.

Africa

As a continent with a history of ethnic turmoil, many countries in Africa recognize the need for diversity. However, many of the policies are underdeveloped and the law societies are in more complex circumstances than other continents. South Africa, being one of the largest and richest countries on the continent, contains the greatest reference to diversity. Many in the legal community see diversity as necessary consideration in practice and cultural competency training could be a part of that. However, none of the examined bar association websites has any reference to ethnic diversity.

Latin America

Being entirely composed of civil law countries, the bar associations of Latin America have a different mandate than those of common law countries. Most contain no reference to diversity outside of its inclusion on a generalized list of positive goals. Brazil, interestingly, has established a quota for female representation in bar association elections.

Asia

There are no references to diversity in any of the bar association websites examined in Asia. This is true of ethnically homogenous countries and countries with substantial diversity, such as India. This is also true of common law countries like Hong Kong and India as well as of Civilis countries.

Europe

Continental Europe has few references to promoting diversity on their bar association websites. Perhaps this is due to the researcher's language barrier; perhaps it is due to the fact that most associations are civil law countries. (Although Ireland's lack of reference defies both of these explanations.) However, France's Paris association has issued a press release announcing its intention to increase benefits and participation among women. The announcement was one of the stronger ones since it focused on getting diversity statistic and training; however, the ultimate aim was to tear down discrimination rather than promote diversity.

VI. Conclusion

Lawyers are advocates not just for their clients, but also for society. As the world shrinks with the advent of globalization, this means more now than it ever did before. Now representing society requires understanding a diverse community and the complex relationships within it. Cultural competency may not be the silver bullet, but it is essential to fostering diversity and inclusion within the profession, and competent representation for clients.

Currently, the provinces and territories have made very little formal progress towards making diversity and cultural competency required elements for lawyers. The Nova Scotia Barristers' Society is leading in this respect. The courts have been more progressive in this respect, recognizing that our justice system is one built on a history of discrimination and oppression. As such, they have required heightened cultural sensitivity and factored these considerations into rulings.

The cases referenced have demonstrated that the cultural competence of lawyers is a factor in determining the outcome of cases. This underscores the point that the focus of any new standards and policies must be on outcomes. For without satisfactory outcomes for clients there cannot be true access to justice.

The disciplinary committees of the law societies have taken a less unified approach as a result of the lack of enforceable standards emerging from the societies. At the heart of the debate is the proper balance between the public interest and tolerance for different cultural practices. Disagreements have formed around what exactly constitutes misconduct, and how cultural considerations should be factored in as mitigating factors.

Internationally, aside from the UK, there does not seem to be significant progress made beyond Canada.

As society changes, those who represent society must change with it. Law is primarily a helping profession, and this evolution is required to ensure clients receive satisfactory outcomes and that the justice system is accessible to all on a fair and equal basis.