



THE LAW SOCIETY OF NEWFOUNDLAND AND LABRADOR

Ad Hoc Law Society Mandate Review Committee Options Paper

(Prepared for Bencher's Convocation – September 28, 2018)

I. SUMMARY

In the execution of the direction from Benchers, the Ad Hoc Law Society Mandate Review Committee (the “Committee”) has considered the scope of the legislative mandate of the Law Society. After a review of relevant jurisprudence, legislative mandates of other law societies, correspondence from members of other law societies, British Columbia’s Law Society’s Strategic Plan, and the Law Society of Yukon’s Policy Paper, the Committee considered various options that could best ensure that the Law Society properly discharges its legislative duty to regulate the practice of law and the legal profession in the public interest. The Committee proposes options for consideration by Benchers and recommends that the Law Society seek a legislative amendment to the *Law Society Act, 1999*.

II. BACKGROUND and MATERIAL CONSIDERED

The Committee is composed of Ian Patey (Chair), Ann Martin, Renee Appleby, Glenda Reid, and Philip Osborne together with Law Society Staff support of Brenda Grimes, Q.C. (Executive Director) and Aimee Rowe.

The mandate of the Committee, as approved by Benchers during the April 9, 2018 Convocation, is as follows:

The Ad Hoc Law Society Mandate Review Committee (the “Committee”) is established with a mandate to review the legislated mandate of the Law Society of Newfoundland and Labrador (the “Law Society”) as outlined in section 18 of

the *Law Society Act, 1999* and make recommendations to Benchers on whether legislative amendments, the development of policy and/or the development of a decision-making template is necessary to allow Benchers to regulate the practice of law and/or the legal profession in the public interest in a more comprehensive and effective way. The Committee is tasked with considering whether the mandate needs to be expanded in order to provide greater clarity on what issues the Law Society should be weighing in on.

In developing recommendations, the Committee will consider:

- 1) the language used in the legislation and the breadth of the Benchers' authority;
- 2) the consistency in the approach to decision making at the Bencher's table and the justifications provided;
- 3) caselaw relating to the interpretation of the mandates of other law societies in Canada, particularly relating to the breadth and purpose of their legislative mandates;
- 4) jurisdictional mandates and the activities and initiatives of other law societies in Canada; and
- 5) any other information deemed relevant by the Committee.

As outlined in the Committee's Report to Benchers, also provided for the April 9, 2018 Convocation, the Committee has gathered the following information:

- 1) research relating to judicial interpretation of the legislative mandates of other law societies in Canada;
- 2) a summary of the legislated mandates from the law societies of all provinces in Canada;
- 3) jurisdictional research outlining the legislative mandates from the Law Societies of British Columbia, Yukon, Ontario, Prince Edward Island and New Brunswick along with a summary of email correspondence from a staff member from each jurisdiction outlining the activities and/or initiatives undertaken that do not fall strictly within the regulation of the profession (these jurisdictions were elicited for information as their legislated mandates differ most significantly from the mandate in NL);
- 4) the Strategic Plan from British Columbia; and
- 5) a portion of the policy paper arising from the Law Society of Yukon dealing with proposed legislative amendments relating to the objects of the

society (in light of the fact that a new *Legal Profession Act* is being proposed in that jurisdiction).

The Committee has reviewed and discussed the information gathered in light of the approved mandate and is now in a position to present the following options which relate to: i) legislative amendments; ii) the development of a policy and/or a decision-making template; and iii) maintaining the status quo. The Committee has also provided recommendations relating to each option.

III. OVERVIEW OF INFORMATION COLLECTED

- 1) research relating to judicial interpretation of the legislative mandates of other law societies in Canada

The general trend in the caselaw is to give a broad and liberal interpretation to legislation and regulations governing regulatory bodies, and law societies in particular; this effectively ensures that regulatory bodies can comply with the principle object of protecting the public interest. See: *Green v. Law Society of Manitoba* (2017 SCC 20); *Groia v. Law Society of Upper Canada* (2018 SCC 27); *LSBC v. TWU* (2018 SCC 32); and *TWU v. LSUC* (2018 SCC 33).

- 2) a summary of the legislative mandates from the law societies of all provinces in Canada

The Committee noted that the legislative mandates of some other Canadian Law Societies include references to the administration of justice, the rule of law and access to justice. Examples include:

- to uphold and protect the public interest in the administration of justice (PEI, NB, BC)
- to preserve and protect the rights and freedoms of all persons (NB, BC, Yukon)
- duty to maintain and advance the cause of justice and the rule of law (ON)
- duty to act so as to facilitate access to justice for the people of Ontario (ON)

In addition, British Columbia's mandate includes provision for the support of members:

- supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law. (BC)

- 3) jurisdictional research outlining the legislative mandates from the Law Societies of British Columbia, Yukon, Ontario, Prince Edward Island and New Brunswick along with a summary of email correspondence from a staff member from each jurisdiction outlining the activities and/or initiatives undertaken that do not fall strictly within the regulation of the profession (these jurisdictions were elicited for information as their legislated mandates differ most significantly from the mandate in NL)

At the Law Society of British Columbia the legislative mandate to preserve and protect the rights and freedoms of all persons has manifested itself in initiatives relating to access to justice, including efforts around legal aid and the rule of law. In response to its mandate to support members in fulfilling their duties, the Law Society of British Columbia has created a mental health task force, practice advice and management programs.

The Law Society of Ontario has established a human rights monitoring group to advance the cause of justice and the rule of law. The Law Society of Ontario also has an Access to Justice Committee.

- 4) the Strategic Plan from British Columbia

The Law Society of British Columbia's strategic plan is organized such that the initiatives undertaken are delineated in accordance with each provision of the legislative mandate. See 3 above for more information.

- 5) a portion of the policy paper arising from the Law Society of Yukon dealing with proposed legislative amendments relating to the objects of the society (in light of the fact that a new *Legal Profession Act* is being proposed in that jurisdiction)

The Law Society of Yukon's policy paper contemplates that there is a range of purpose that can exist in Law Societies ranging from "Pure Regulation" to "Regulation/Member Advocacy Role". The chart outlined in the policy paper is attached as Appendix "A".

The paper suggests that the Law Societies in Manitoba, Nova Scotia, Ontario and Saskatchewan fall between "regulation plus" and "regulation plus plus". Prince Edward Island, New Brunswick and British Columbia fall under "regulation plus plus" or "regulation/member advocacy role".

The Committee has considered the chart and suggests that the Law Society of Newfoundland and Labrador currently operates as if under a "pure regulation" model. While the Committee agrees that the existing mandate does not restrict Benchers to this purpose, there was some disagreement as to the nature of the issues

that the Law Society should weigh in on so it was agreed that a proper interpretation of the purpose of the *Act* should allow for elements of “regulation plus”.

IV. DISCUSSION OF OPTIONS

Option 1: Request Legislative Amendment

Why Request Legislative Amendment?

It is agreed that the paramount function of the Law Society is the protection of the public through the supervision of the practice of the legal profession. With this in mind, there was much debate among Committee members regarding the need or wisdom in requesting a legislative amendment to expand the mandate of the Law Society.

With respect for the need for an amendment, part of the discussion was focused on considering the types of activities and actions that were circumscribed because of Benchers’ interpretation of the Law Society’s mandate. Some Committee members felt that it is inappropriate for the Law Society now, or even with an expanded mandate, to take positions on some issues in the public domain (i.e. insurance reform). However, it was agreed that activities and matters for which it is appropriate and in the public interest for the Law Society to be active included issues such as the cuts to Justice, the creation of a Law School in the Province, the renaming of the Department of Justice, the naming of the court house in Corner Brook and the public defence of judges or the legal system generally as the need arises.¹ The Committee understands that there have been times when Benchers were reluctant to take action on these issues as it was seen as debateable if the actions would fit within the mandate of the Law Society. Accordingly, it was agreed that it would be beneficial to amend the *Act* to remove ambiguity.

A copy of the Law Society’s existing legislative mandate is attached as Appendix “B”. The substance of the mandate is as follows:

¹ In a speech at the April 8, 1985 Call to the Bar, Chief Justice Hickman stated “The position of officer of the court imposes in you a very solemn duty to protect and defend the independence of the judiciary and to ensure that our courts operate without any untoward or irresponsible interference by anyone. Judges, by virtue of their office, are precluded from speaking out on matters which impinge upon their independence or which are designed to place the courts in disrepute. The Bench, therefore, looks to the legal profession to come to the defence of the courts whenever it is appropriate and necessary so to do without being asked regardless of personal consequences. I cannot emphasise too strongly the responsibility of all lawyers in their capacity as officers of the court in that regard. Failure on the part of any lawyer to quickly and vigorously defend the courts of this Province against improper interference constitutes, in my view, an act of supreme professional cowardice.” *T. Alexander Hickman, Speeches and Writings from a Life in the Law* (ed. Hon. J. Derek Green and C. Curran)

18. (1.1) The benchers have the authority to regulate the practice of law and the legal profession in the public interest.

Notably, this provision was added to the *Law Society Act, 1999* (SNL 1999, c. L-9.1) in 2008. This amendment, along with others, was debated in the House of Assembly on April 24, 2008. Relevant portions of the Honourable Jerome Kennedy's comments in relation to this provision include:

So, these amendments allow the Law Society - it increases the mandate of the Law Society to regulate the practice of law, again, and I repeat, in the public interest. Because, as lawyers, or as former - I suppose I am still a lawyer, or six months ago, in any event, a practicing lawyer - we are dealing with the public. It is important that the public - as you are aware, Mr. Speaker, in the nature of a solicitor-client relationship we are not always going to agree. In fact, as lawyers, we or they have to make decisions with which sometimes the client does not agree. The role of the lawyer is to advise the client, but the client makes the decision. As long as that decision does not involve any breach of ethics, any involvement in criminal activity, it is the client's choice; however, oftentimes, as you are aware, Mr. Speaker, when things do not go necessarily the way the client wanted them to go, then they sometimes can look to the lawyer as being the individual, he or she, who gave them bad advice. So, it is important to distinguish between bad advice and, as I go through this, what is referred to as conduct deserving of sanction.

...

The point I am trying to make is that there is a difficult mix in trying to make sure we protect the public, but also we have to ensure too that lawyers are treated fairly. However, there is a higher obligation placed upon us because of the nature of the fiduciary duty. A lawyer-client relationship is one where there is a special relationship. There is an obligation to ensure that the client is treated fairly and honestly and provided with all of the information.

Over the last twenty years, Mr. Speaker, I have seen numerous examples of activities of lawyers who have been subjected to censure, and you wonder, what was he or she thinking at the time. Again, I am not trying to make excuses for anyone, but there are two sides to every story.

What the Law Society has to do, it has to ensure that it treats its members fairly, it encourages rehabilitation and counselling where necessary, but also that it acts firmly in the public interest. Some of these amendments, I would suggest, Mr. Speaker, will accomplish exactly that.

It appears, from the above noted comments, that the amendment was intended to clarify the Law Society's role as a professional regulator. Notwithstanding the intended purpose, there is still debate among Benchers as to the proper level of involvement of the Law Society in the regulation of law in the public interest.

While the above-noted caselaw suggests that the existing mandate would be given a broad and liberal interpretation, the Committee expressed some concern that the mandate is restrictive, or has, on some occasions, been applied by Benchers in a restrictive manner.

In addition, the Committee noted that: i) some of the decisions and/or initiatives made by Benchers may not be explicitly authorized by the existing mandate (i.e. access to justice initiatives undertaken by the Law Society); ii) the mandate should be sufficiently clear to provide guidance to Benchers on the issues that come to the Benchers' table; and iii) a broader mandate and/or particularization of the principles that govern the mandate should be aspirational in light of the Law Society's commitment to being a leader in regulation.

Proposed Amendments

The Committee suggests that a balance must be struck between broadening the Law Society's mandate and requiring action on the part of Benchers. While an aspirational mandate is recommended, a mandate which requires particular action is not. Further, some Committee members expressed concern that too broad an amendment may allow a creep from a proper "regulation plus" to something more akin to advocacy thereby diluting the paramount function of the Law Society and possibly eroding the underlying independent nature of the Law Society (for example, weighing in on insurance reform). Such advocacy is more properly the role for associations like the CBA.

The Committee recommends amendments that would reflect the following principles:

- i) To uphold and protect the public interest in the administration of justice,
 - ii) To support access to justice, and
 - iii) To uphold the rule of law
- i) **To uphold and protect the public interest in the administration of justice**

As outlined above, the law societies of Prince Edward Island, New Brunswick and British Columbia are all mandated "to uphold and protect the public interest in the administration of justice".

In *Law Society of British Columbia v. Trinity Western University* (2018 SCC 32) the Supreme Court of Canada found that the Law Society of British Columbia's declaration that Trinity Western University's proposed law school was not approved for the law society's admissions program was reasonable in light of its statutory duty to uphold and maintain the public interest in the administration of justice. The Court held that "promoting equality by ensuring equal access to the legal profession, supporting diversity within the bar, and preventing harm to LGBTQ law students were valid means by which the LSBC could pursue its mandate" (at para. 40).

The Committee believes that a broad principle of this sort would provide Benchers with greater certainty of the authority to engage in more fulsome discussion about issues relating to the administration of justice that affect the interests of the public. An example of this is the naming of a courthouse after a former or practicing member or defending judges or the judiciary when necessary. A more comprehensive mandate would also support strategic planning. All initiatives undertaken by the Law Society of British Columbia in its strategic plan fall under the provisions of its mandate.

ii) **To support access to justice**

The Law Society currently has an Access to Justice Committee which is mandated to:

1. provide leadership to a cohesive and collaborative approach for initiatives intended to improve access to the civil and family justice systems in Newfoundland and Labrador;
2. provide, as appropriate, a forum for engaging the public and public sector participants on issues related to access to justice;
3. share information, monitor and co-ordinate work undertaken, and educate the public about efforts of the committee and working groups;
4. promote innovation in all aspects of the delivery of civil and family justice services; and
5. gather feedback from various stakeholders on initiatives being implemented in the various sectors of civil and family justice services to ensure that we are meeting the needs of the targeted audience.

The Committee supports access to justice pop-up clinics where members provide free legal advice to members of the public.

While this initiative does not explicitly fall under the existing mandate, it is a positive program that has a real benefit for the public. As a result, the Committee recommends that the legislation be amended to reflect the existing reality that the Law Society supports, where feasible, access to justice initiatives. Such an amendment would also provide the Law Society with clear authority to publicly address access to justice issues (including the closure of courthouses across the Province).

iii) **To uphold the rule of law**

As outlined in the preface to the Code of Professional Conduct:

One of the hallmarks of civilized society is the Rule of Law. Its importance is manifested in every legal activity in which citizens engage, from the sale of real property to the prosecution of murder to international trade. As participants in a justice system that advances the Rule of Law, lawyers hold a unique and privileged position in society.

The majority of the Supreme Court of Canada also reflected on lawyers' duty to uphold the rule of law in *Groia v. Law Society of Upper Canada* (2018 SCC 27):

50 Unquestionably, lawyers are vital to the proper functioning of the administration of justice in our free and democratic society. As Major J. observed in *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445 (S.C.C.), at para. 2:

The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system.

By guiding clients through this "complex web of interests", lawyers uphold the rule of law. They provide those subject to our legal system a means to self-determination under and through the law and guard against arbitrary or unjustified state action: see A. Woolley, *Understanding Lawyers' Ethics in Canada*, (2nd ed. 2016), at pp. 33-35.

In light of the pivotal role lawyers play in upholding the rule of law, the Committee suggests that the Law Society should have a complementary mandate. As a professional regulator, the Law Society should uphold the values that it expects members to uphold.

In addition, such an amendment would provide the Law Society with the authority to: i) comment on challenges to the rule of law; and ii) educate about the importance of upholding the rule of law.

How to Request Legislative Amendments and the Risks Associated therewith

In order to request legislative amendments, the Law Society would have to petition the Minister of Justice and Public Safety (the “Minister”) for support. This would involve writing a letter outlining why legislative amendments are being requested. While not determinative, the requirement to remedy a mischief is generally persuasive.

It may also be argued that our legislation is antiquated and should be brought in line with legislation related to other professional regulators, i.e. the College of Physicians and Surgeons, the Association of Registered Nurses, the Pharmacy Board, etc. all of which have legislated objects (see Appendix “C”) and other law societies across Canada (Appendix “D”).

A final argument to support legislative amendment relates to the unique role lawyers play in society. As noted in *Groia* above, lawyers owe a duty not only to their clients, but to society as a whole, upholding the rule of law and thereby ensuring the proper administration of justice. Similarly, Law Societies are required to uphold Constitutional and Charter values when making discretionary decisions (see *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, para. 41). Lawyers’ unique position in society should be reflected in the Law Society’s mandate.

If the Minister supports the amendments, he would bring the request to Cabinet where a process would be followed referring the matter to legislative counsel.

In the event the reasons for the proposed amendments are not deemed to be sufficiently substantive, the amendments could be added to others that may be proposed in the future, i.e. amendments that would be required for the Law Society to start a fitness to practice program.

One risk associated with such a petition is the possibility, and perhaps probability, that the Law Society will not be involved in the drafting of the amendments as this task is generally assigned to legislative counsel.

The following excerpt from Hansard suggests that, while legislative counsel did consult with the Law Society when proposing amendments to the *Law Society Act, 1999* in 2008, not all amendments were agreed upon by the Law Society (unfortunately particulars were not provided):

These amendments, or suggested amendments, Mr. Speaker, have been made in consultation with the Law Society, although the Department of Justice and the Law Society did not necessarily agree on all of the amendments, and I will explain that as we go through this.

Another risk associated with legislative amendment is how that amendment might be interpreted. As noted above, the Committee is not proposing mandatory action on particular issues. However, if included in the mandate, the Law Society may be obliged to take action in certain circumstances.

Option 2: Create a Decision Template

The Committee considered whether policy and/or decision-making templates would remedy any concern relating to the legislated mandate and/or the consistency of decision making at the Benchers' table. Some concern was raised that decisions were often made on the basis that the issue did not fall squarely within the legislated mandate of regulating "the practice of law and the legal profession in the public interest".

The Committee agreed that a decision-making template would be a useful tool to help ensure consistency. However, the Committee suggested that a template would not be sufficient as it would require that Benchers shoe-horn every issue into the existing mandate. While the caselaw suggests that the mandate would be interpreted in a liberal and purposive manner, it would be beneficial to have clear authority to take action in some circumstances.

Option 3: Maintain the status quo

Given the fact that the Supreme Court of Canada has given a broad and liberal interpretation to legislation and regulations governing regulatory bodies, serious consideration was given to maintaining the status quo. This approach would certainly be cost and time efficient, however without further action, it would not likely have the desired impacts of expanding the issues that the Law Society could be weighing in on or improving the quality of decision making at the Benchers' table.

V. RECOMMENDATIONS

The Committee seeks approval to post this Options Paper on the Law Society's website for a period of thirty (30) days and forward to all members of the Law Society an email requesting feedback.

The Committee recommends that, subject to any comments received from the membership, the Law Society approve petitioning the Minister for legislative amendment broadening the Law Society's mandate in relation to:

- i) the administration of justice;
- ii) access to justice; and
- iii) the rule of law.

The petition would include a request to be involved in a consultation process with government so that the Law Society, and the Committee in particular, could be involved in the particulars of the amendments.

The Committee also recommends that a decision-making template be drafted for approval by Benchers pending the proposed legislative amendments.