# EQUITY AND DIVERSITY IN LEGAL PRACTICE

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**EQUITY AND DIVERSITY IN LEGAL PRACTICE**

"… you Indians [ or preferred descriptor of equity seeking group] come here all the time and talk nonsense" [1]

Over the last 50 years words like oppression, othering, equality, diversity and inclusion have gained increasing currency in the social and societal dialogue. While many of these concepts are widely debated, active steps to implement the insights gained from this debate have been relegated to intentions, suggestions, and voluntary adoption. They have not yet found traction in guidelines, standards or policies specifically in the practice of law.

Borrowing from the famous and often quoted one liner of Simone de Beauvoir "On ne nait pas femme; on le deviant"[2] the passivity of "being made" is still deeply rooted in society's treatment of women and other equity seeking groups living and working within it. These groups are "being made" by the overwhelming press of social and legal expectation and their resulting prejudices. With respect to access to justice, administration of justice and especially the delivery of legal services within Nova Scotia, any address and redress of those seeking to build a life here is preconditioned on a justice system and a profession that has its foundation in the conformity with white European social and legal expectations.

Increasingly juridictions[3] have taken active regulatory steps to enshrine principles of equity and diversity into the management of law practices. This has resulted in two distinct aspects in which such regulation has impacted law practices. It has led to employment equity and diversification of the profession and enshrined cultural competency in terms of professional competency as a requirement in the legal representation of individuals and corporate entities.

In Nova Scotia, the Nova Scotia Barristers Society (NSBS) has adopted regulatory objectives which are now part of its vision and values. These visions and values are suffused with concepts of equality and inclusion but specifically state: "We promote equality and encourage the profession to embrace the value of diversity. We are inclusive and supportive of women and men from diverse backgrounds, cultures, practice environments and life experiences."[4]

As part of the regulatory objective the Society formulated the following directive:

> In order to understand and properly protect and promote the public interest, the Society must show leadership in this regard by promoting a diverse and inclusive legal profession

[1] Shah v. George Brown College [2009] O.H.R.T.D. No. 934 (Ont. Human Rights Trib.)
[2] La deuxieme Sexe, Simone de Beauvoir, 1949 Paris, France "One is not born a woman; one becomes (is made)
[3] Specifically England Scotland and Wales have adopted Equity and Diversity Regulations for the legal profession
[4] http://cdn2.nsbs.org/sites/default/files/cms/menu-pdf/nsbsvisionvalues.pdf

> and being able itself and with members to identify, respect and promote the interest of the public and clients in a culturally competent and non-discriminatory manner.

In its Code of Professional Conduct in force since the 1st January, 2012, the Society requires members of the profession:

> s. 6.3-5 A lawyer must not discriminate against any person.[5]

The requirement adopts both the principles and definitions of applicable Human Rights legislation and related case law. Moreover, the commentary to the rule provides:

> 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.

It is important to note that the responsibilities of lawyers in this respect are "special". This qualifier in our submission mandates heightened awareness for the requirement that lawyers conduct their practices without discrimination within the lawyers professional conduct. It establishes a proactive rather than a reactive approach to discrimination in the workplace as well as in the delivery of services.

In addition the Code requires lawyers to:

> A lawyer must perform all legal services undertaken on a client's behalf to the Standard of a competent lawyer[6]

Competence is defined;

> "Competent lawyer" means a lawyer <u>who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer's engagement</u>,[7]
>
> [emphasis added]

[5] Code of Professional Conduct, s. 6.3
[6] Code of Professional Conduct, s. 3.1-2
[7] Code of Professional Conduct, s. 3.1-1

The Nova Scotia Human Rights Act (NSHRA) prohibits discrimination by "professional organizations" which "has power to admit, suspend, expel or direct persons in the practice of an occupation or calling". [8]

It is within the purview of the NSHRA that professional organizations regulate and direct their members to refrain from any of the prohibited acts contemplated by the statute. To some degree the discrimination provisions of the Code of Conduct answers this statutory requirement-. However, the push towards transformed regulation in the public interest, should bear the implication that the passive fiat of non-discrimination as exemplified by the act and previous regulation is transformed to a more pro-active view on how to properly regulate the profession. Part of the overall scheme to transform regulation in the profession is the development of standards which front load direction and policies for an ethical practice rather than regulate failure to adhere to an ethical practice after the fact.

In our submission, this signifies a paradigm shift in the regulation of the profession, because "competence" of a lawyer now requires members to conduct their business, including delivery of services as well as office and business management not only with professional competence but cultural competence as well.

The Canada Employment Equity Act[9] was passed in 1995. Its purpose is to:

> … achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfilment of that goal, to correct the conditions of disadvantage in employment experienced by women, aboriginal peoples, persons with disabilities and members of visible minorities by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences.

[8] Nova Scotia Human Rights Act, R.S.N.S chapter 214, s. 3
[9] **Employment Equity Act, S.C. 1995, c. 44**

The designated groups listed it in the Employment Equity Act were drawn from the 1984 Abella Report. Noticeable missing are references to sexual orientation and gender identity and expression.

The Employment Equity Act s. 5 applies with some significant constitutional limitations and size of employer workforce limitations to the private sector[10] and imposes on applicable private sector employers a duty:

> **5.** Every employer shall implement employment equity by
>
> (*a*) identifying and eliminating employment barriers against persons in designated groups that result from the employer's employment systems, policies and practices that are not authorized by law; and
>
> (*b*) instituting such positive policies and practices and making such reasonable accommodations as will ensure that persons in designated groups achieve a degree of representation in each occupational group in the employer's workforce that reflects their representation in
>
> - (i) the Canadian workforce, or
> - (ii) those segments of the Canadian workforce that are identifiable by qualification, eligibility or geography and from which the employer may reasonably be expected to draw employees.

While this duty is qualified by s. 6[11] of the act to account for "undue hardship", "lack of qualification" of an employee and "creation of new position" for the purpose of meeting the duty, it does require employers to "**institute such policies and practices and such reasonable accommodations**" as are required to meet the duty.

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[10] "private sector employer" means any person who employs one hundred or more employees on or in connection with a federal work, undertaking or business as defined in section 2 of the *Canada Labour Code* and includes any corporation established to perform any function or duty on behalf of the Government of Canada that employs one hundred or more employees, but does not include

> (*a*) a person who employs employees on or in connection with a work, undertaking or business of a local or private nature in Yukon, the Northwest Territories or Nunavut, or
>
> (*b*) a departmental corporation as defined in section 2 of the *Financial Administration Act*;

[11] Employment Equity Act, 1995 c. 44, s.6

Bearing in mind the foregoing Equity and Diversity Committee has developed the following standard to be adopted by Council:

## EQUITY AND DIVERSITY STANDARD

Lawyers must take reasonable steps to ensure that in relation to the management and the conduct of their practice the following exists:

1. there is in force a written statement of policy on equality and diversity; and
2. there is in force a process to enforce that policy;

In developing the statement of policy lawyers shall consider the following:

a. development of fair and unbiased criteria in the recruitment, selection and retention of clerks, lawyers and staff;
b. an anti-harassment and anti-discrimination policy;
c. parental leave policy;
d. Adjustment and accommodation policy for persons with disabilities;

## Practice Notes

### Preamble:

This standard should be read with and is informed by the Vision and Values Statement of the Nova Scotia Barristers Society[12], the Nova Scotia Human Right Act[13], the Employment Equity Act[14] and the Code of Professional Conduct[15].

Since the Marshall Inquiry and the recommendation coming out of it the Nova Scotia Barristers Society and its members have been acutely aware of the issues of equity, diversity and inclusion as a necessary and guiding principle for the profession. The recent initiative of transforming regulation which shifted the focus from a discipline after the fact model to a the proactive standard. In such a regulation based model, intention and suggestions around equity and diversity now require a more robust approach by requiring firms and lawyers to promulgate and/or adopt policies that are transparent and enforceable in the public interest.

### Introduction

Lawyers live and practice in an increasingly diverse world. Clients, even in rural and small communities are no longer culturally uniform groups but rather diverse individuals and companies with a variety of cultural, ethnic or gendered backgrounds. The building of capacities of lawyers and law firms to meet and address the demands for service in a diverse environment is the subject of this standard. Both from a business perspective and from an ethical perspective the traditional "remaking of clients" into uniformly compatible actors in a uniform system of both administration of justice and delivery of legal service, has to be replaced with culturally competent lawyers that are able to facilitate and negotiate clients cultural uniqueness in both business dealings and an access to justice frameworks.

In order to facilitate this paradigm shift the following principles guided the drafting of the standard:

1. Creation of equity and diversity metrics against which conduct can be measured;
2. The development of equity and diversity policies to meet an increasingly diverse workforce;
3. Equity and diversity policies to develop cultural competency;
4. Development of enforcement mechanisms based on policies.

[12] http://cdn2.nsbs.org/sites/default/files/cms/menu-pdf/nsbsvisionvalues.pdf
[13] http://nslegislature.ca/legc/index.htm
[14] http://lois-laws.justice.gc.ca/eng/acts/e-5.401/page-1.html#docCont
[15] http://nsbs.org/sites/default/files/cms/menu-pdf/2015-01-23_codeofconduct.pdf

The intention is to require lawyers to direct their minds to the issues of equity and diversity in their respective practices and develop appropriate policies.

**General Principles**

In preparation for formulating the Standard, Canadian and International Jurisdictions were canvassed to better understand the work being done outside of the province.[16]

The research was organized in three phases:

> (i) Research into the policies, standards, and positions of regulators in U.S., Canada, England, 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.

It is important to note the Law Societies of England, Scotland and Wales are the most advanced in regulating equity and diversity.

The Solicitors Regulation Authority (SRA) is the independent regulatory body of the Law Society in England and Wales. The statutory framework in Great Britain contains among other things the *Equality Act* which places an equality duty on the public sector of which SRA is considered a member. The duty requires the SRA to:

a. Eliminate unlawful discrimination, harassment and victimization;
b. Advance equality of opportunity between people who share a protected characteristic and those who do not;
c. Foster good relationships between people who share a protected characteristic and those who do not.

Framed in terms of the SRA regulatory objective, the SRA stated its objective as follows: "encourage an independent strong, diverse and effective legal profession".

SRA incorporated the following into its regulation, [that solicitors must] "run their business in a way that encourages equality of opportunity and respect for diversity" and set expected outcomes

[16] Cultural Competency and Diversity in the Nova Scotia Legal Profession, (Babiuk, Buchert, Chiekwe, Hong)Final Summary Report, November 25th, 2014 Halifax (attached)

for equality and diversity in the profession.[17] The SRA has regulated equality and diversity in its Equality and Diversity Requirements.[18]

Scotland has its own independent regulator, the Law Society of Scotland (LSS). The LSS is similarly subject to the *Equality Act* and is considered a public authority. It has formulated its regulatory objective and its mandate as follows:

> The Society is thus entitled in respect of all of its roles and in relation to both members of the public and the profession to take special measures to address any particular disadvantages identified, and in particular to treat disabled people more favourably.
>
> The Society is also covered by the public sector equality duty which places an obligation on the Society not only to eliminate discrimination, harassment and victimisation but also to advance equality of opportunity in relation to the protected groups and to foster good relations between protected groups and others in respect of our public functions.[19]

The regulatory bodies of the legal profession in the UK have included as part of their regulatory framework the objectives of promoting equality and diversity. Both bodies now regulate solicitors conduct by including them in standards to be adhered to by the profession.

The Bar Standards Board (BSB) which regulates barristers in England passed explicit rules[20] from which our standard has been modeled.

**Principles arising from Case Law**

The guiding principles were formulated in *Andrews* v. *Law Society (British Columbia)*[21]. The Court in para. 17 of the decision makes the following observation:

> The right to equality before and under the law, and the rights to the equal protection and benefit of the law contained in s. 15, are granted with the direction contained in s. 15 itself that they be without discrimination. Discrimination is unacceptable in a democratic society because it epitomizes the worst effects of the denial of equality, and discrimination reinforced by law is particularly repugnant. The worst oppression will result from discriminatory measures having the force of law. It is against this evil that s. 15 provides a guarantee.

[17] Solicitors Regulatory Authority, http://www.sra.org.uk/sra/equality-diversity.page
[18] Solicitors regulatory Authority, http://www.lawsociety.org.uk/advice/practice-notes/equality-and-diversity-requirements--sra-handbook/
[19] Equality and Diversity Strategy 2011-2014, http://www.lawscot.org.uk/media/465296/lss%20_%20equality_%20diversity%20strategy%20_%202011-14.pdf
[20] https://www.barstandardsboard.org.uk/about-bar-standards-board/equality-and-diversity/equality-and-diversity-rules-of-the-bsb-handbook/
[21] 1989 CarswellBC 16

It is interesting to note that the conceptualization of equality as envisioned by McIntyre J. (Lamer J. concurring), McIntyre J. considered the legal requirement of, (the regulation of admission allowing only Canadian citizens to be admitted to the bar) that is, the making of Andrews to be compatible by presumably forcing him to become a citizen as "the worst oppression". While finding that it infringed on s.15 Charter Rights, in his opinion such infringement was saved by s.1 of the Charter.

Central to the decision of Wilson J. for the majority was the following passage at para 62:

> To my mind, even if lawyers do perform a governmental function, I do not think the requirement that they be citizens provides any guarantee that they will honourably and conscientiously carry out their public duties. They will carry them out, I believe, because they are good lawyers and not because they are Canadian citizens.

The majority opinion J., in principle stated that "compatible" as used here was not a criteria but competence was. Translated into the workplace and service delivery context, being a "good lawyer" measured by objective criteria (see NSBS admissions regulation and policies) is the only criteria against which the efficacy of a lawyer should be measured.[see also Gichuru v. Law Society (British Columbia)[22]]

In *Shah v. George Brown College*[23]the Ontario Human Rights Tribunal was unwilling to uphold a complaint where the employer undertook a thorough investigation and behaved appropriately in light of an allegation of discrimination on the basis of race. The complainant was a student who alleged that the student services officer during an admission application stated: "..you Indians come here all the time and talk nonsense". The employer had solid policies in place to investigate and address discrimination complaints. It acted with great dispatch, took the matter seriously and dealt with the matter:

> In my view, the College did indeed handle this matter in a completely appropriate way. It had a comprehensive human rights and complaints policy. The applicant complained to the President of the College on the evening of June 30, 2008. On July 1, 2008, a statutory holiday, the President refereed the matter to Dale Hall, Advisor to the President, Equity, Diversity and Human Rights and to Dean Trotter. Mr. Porter was assigned the responsibility to investigate, and immediately began to work on the file. He contacted the applicant on July 1, 2008 and set up a meeting for July 4, 2008. He interviewed Ms. Kang and all the persons who were identified as individuals who

[22] 2011 BCHRT 185. The Tribunal stated at para. 219-220: "I think it is fair to take notice that there remains a significant level of racial discrimination within Canadian society as a whole. Further, given the extent of the research and writing on this issue by Law Societies across Canada, and by the Canadian Bar Association, it is fair to take notice that there remains a significant level of racial discrimination within the legal profession. **As highlighted in a number of the reports relied on by Mr. Gichuru, discrimination of this nature can be distinguished from outright racism and is much more likely to be subtle and systemic, premised on the notion of "fit" or appropriateness. "** The notion of "fit" is an important one. For instance social events around the practice of law such as golf tournaments etc. which hold no interest for many oppressed or equity seekinggroups, are expected to be attended for professional bonding purposes. Non attendance is often seen as "not fitting in".

[23] [2009] O.H.R.T.D. No. 934 (Ont. Human Rights Trib.)

> may have relevant knowledge of the alleged incident. He reported back and concluded his investigation on July 10, 2008. Mr. Porter prepared a Memorandum of Understanding which summarized the results of the investigation and outlined specific outcomes. He provided the Memorandum to the applicant.

The principle arising from *Shah* shows that existence of policies, the prompt and comprehensive application for investigation and enforcement purposes provides both a process and a resolution for the successful resolution of discrimination complaints.

A number of cases[24] have raised the issue of cultural competence with varying success. In *R.* v. *Fraser*[25] Justice Saunders of the Nova Scotia Court of Appeal found that the incompetence of counsel resulted in a miscarriage of justice. The accused was a former high school teacher who was alleged to have touched a student for a sexual purpose. The accused was black and immediately expressed profound concerns over the surrounding race issue since the complainant was white. The accused was not properly advised by counsel, that he had the right to challenge potential jurors for cause, among others things for potential discriminatory conduct. The case turns on professional incompetence, however, the underlying rationale was that counsel was dismissive of the accused's concerns with respect to the systemic discrimination aspect of black men accused by white females before an all white jury.

Justice Saunders stated:

> I find that the intervenor's failure to provide advice to the appellant in response to his client's explicit and perfectly reasonable inquiries, effectively denied him his statutory right to challenge potential jurors for cause. I accept what the appellant says in his affidavit, that had he been told he had this right, he would have asked his lawyer to challenge each juror for cause on the basis that he was black and the complainant was white and that jurors might discriminate against him for those reasons.
>
> In his final submissions, Mr. Scott, counsel for the respondent Crown, properly acknowledged that if we were to reach such a conclusion, prejudice would in law be presumed (without any requirement that it be demonstrated) and a new trial ought to be ordered. With his customary candour, Mr. Scott conceded:
>
> If that were to be the Court's finding, we should pack up our tents and go home.

Proper representation requires a minimum of understanding of the social and cultural environment in which discrimination can occur.

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[24] J.(E.) v. Catholic Children's Aid Society of Toronto, 2014 ONSC 3277
Johal v. Dhesi, 2012 BCSC 550
Law Society of Upper Canada v. Robinson (2013), 4C.N.L.R. 129

[25] 2011 NSCA 70

This is explained in R. v. Kennedy[26] in which the Court dealt the issue of jury list preparations. The court in this case decided that the steps taken by the court administration and specifically the Sherriff to include jurors from aboriginal communities had been sufficient. No evidence had been presented with respect to cultural sensitivities in participating in the compilation of the potential juror list but the Judge specifically stated, that "[he took] into account the necessity for cultural sensitivity" in coming to this conclusion.

> In the case before me, the sheriff, the most senior representative, participated and made direct contact with the bands in order to assess and compose on-reserve participation in the jury roll. In *Kokopenace*, as indicated at paras. 99-120, a junior employee with little to no training in these matters solely had the task of carrying out work related to s. 6(8) of the *Juries Act*. Some of her work has now been demonstrated as incompetent, for example: for one reserve she did not have any record from which to complete her work for the purpose of drawing a jury roll from on-reserve residents; several of her efforts, though perhaps well-intentioned, produced no results; from 2002-2005, little to no efforts were made by her to obtain updated lists of on-reserve residents in the Kenora District; well into 2005, she relied on outdated band lists from 2000, which were knowingly inaccurate; once she received updated lists for four reserves in 2006, she continued to use the outdated band lists for the 38 remaining identified bands, while continuing with zero information whatsoever for one band; it was not until 2007 that she clarified the boundaries of the Kenora District and, as a result, in 2007 she discovered that two bands had been totally excluded. In my view, these circumstances and failures heavily influenced the majority's disposition in *Kokopenace*.

In our submission this demonstrates, that the judiciary will take into consideration cultural and racial factors when presented with appropriate evidence.

This requirement was made clear in R. v. Spence[27], where the Supreme Court of Canada stated that the presumption of impartiality could be rebutted by establishing that a realistic potential for the existence of partiality exists. The Court required that it be established on evidence that a "widespread" bias exists in the community. If such is demonstrated an inference can be drawn that a jury will include such individuals who harbor such prejudices.

In R. v. T.(B.H.)[28] Crown brought an application to compel the complainant to testify. The Court stated as follows:

> 22 I believe that generally witnesses have the following problems;
>
> 1. *Fear Of Repercussions*. This may apply to any witness in a judicial proceeding but in my view it is a special concern for Stoney people because of the degree of violence that

[26] 2013 ONSC 6419
[27] 2005 SCC 71
[28] [1998] 4 C.N.L.R. 262

exists in this community and the isolation experienced by many of the people there.

2. *Cultural ethics*. Confronting an offender, face to face, in a public courtroom, is doing something that is specifically forbidden by the ethic of non-criticism. Rupert Ross in *Dancing With a Ghost* says;

> For many of them, testifying against someone to his or her face in a public court room may well have seemed an even greater wrong than what was done to them in the first place (especially when the accused had acted in a drunken state while the witness, in contrast, was being asked to act with full and sober deliberation).

3. *Community Pride*. The Stoney are a proud people and a witness may have difficulty speaking about matters which bring shame to the community.

4. *Fear of Bad Spirits*. A part of the concept of interconnectedness is a belief that behaviour is influenced by spirits and that a person may have done wrong because of the influence of bad spirits. Confronting the wrongdoer may invite the wrath of those spirits.

5. *Fear of Bad Medicine*. Part of the ancient tradition which I believe to be very strong is the belief in the power of certain people to use bad medicine to hurt people and I am satisfied that there are witnesses who do not wish to testify because of a belief that an accused, or someone who supports him, may be able to do this to them.

6. *Fear of being alone*. This would not apply in this case as the victim and accused were no longer together, but I mention it for completeness. There is much isolation on the reserve and a woman may not wish to testify against the man who beats her because if he goes to jail she will be alone and that may be something she sees as worse than staying with him.

7. *Fear of Fines*. Again this would not apply in this case, but it is often a source of reluctance for a woman to testify against her man. If he is convicted and fined she will suffer the hardship with him.

8. *Lack of Confidence in the "White" System of Justice*. Not only do *The Cawsey Report* and *The Royal Commission* confirm that the justice system has failed the Aboriginal people, but the history of their treatment by the **Canadian Government** is, when viewed in the light of the 1990's, a history of human rights violations that have had lasting and debilitating effects on them.

23 In view of the **Canadian Government's** recent promises to act on the recommendation of the report of the *Royal Commission on Aboriginal Peoples* and the specific reference to the 'circumstances of Aboriginal offenders' in the new sentencing provisions of section 718 of the Criminal Code, it is my view that a heightened cultural sensitivity is required in all aspects of justice as it relates to Aboriginal people.

24 There are those who argue that this is contrary to the concept of all Canadians being treated as equals. *The Cawsey Report* calls this view, systemic discrimination:

> Systemic 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.

25 **I take this to mean that in order to give the Aboriginal people equality before the law, allowances must be made for the particular difficulties they have**

**in the 'white" justice system or they will in fact continue to be the victims of discrimination.**

26 This can be said of anyone of non-European origin, but it is uniquely so in the case of Aboriginal people for a number of reasons.

1. As mentioned above they were here before the Europeans and therefore the justice system was imposed upon them. The English and French brought their laws with them and all other races that came here accepted the laws that were in place when they arrived. This cannot be said of the Aboriginal People.

2. Not only were the Aboriginals made subject to the law of the settler society, but they were in fact racially and religiously persecuted by it.

27 The report of *The Royal Commission on Aboriginal Peoples* records the following:

> In most, if not all the treaties, the Crown promised not to interfere with their way of life, including their hunting, fishing, trapping, and gathering practices. (Vol 1, p174)
>
> Sir John A. Macdonald, soon informed Parliament that it would be Canada's goal "to do away with the tribal system and assimilate the Indian people in all respects with the inhabitants of the Dominion". (Vol 1, p. 179)
>
> Parliament was moved to action. ... It crafted educational systems, social policies and economic development plans designed to extinguish Aboriginal rights and assimilate Aboriginal People. ( Vol 1 p.179)
>
> Across the country, communities were trapped in a colonial system that denied them any degree of self-determination, consigned them to poverty, corroded families and individuals, and made them too often the objects of social welfare agencies and penal institutions. (Vol 1, p. 187)
>
> In subsequent legislation - The Indian acts of 1876 and 1880 and the Indian Advancement Act of 1884 - the federal government took for itself the power to mould, unilaterally, every aspect of life on the reserves and to create whatever infrastructure it deemed necessary to achieve the desired end - assimilation through enfranchisement and, as a consequence, the eventual disappearance of Indians as distinct peoples. (Vol 1, p. 180)
>
> In 1884 and 1885, the potlatch and sundance, two of the most visible and spiritually significant aspects of coastal and plains culture respectively, were outlawed, although in practice the prohibition was not stringently enforced. (Vol 1, p. 183)

28 I suggest that in the Canada of today, where our *Charter of Rights and Freedoms* guarantees freedom of religion, it is too easy to forget that this freedom has not always existed and that for the Aboriginal peoples there was a time when their religious practices could be the subject of Criminal prosecutions. The importance of the Sundance to the Plains Indians was not only spiritual, but was a part of their survival technique. It consisted of a gathering of clans for the observance of spiritual observances, fasting, prayer, and feasting, and those who had enjoyed good hunting would share their surplus with those who had not. The **Canadian Government** wished to put a stop to the practice to increase the dependency of the Indians on the government.

29 Another aspect of the racist and religious persecution of the Aboriginal was the system of residential schools. This consisted of the systematic removal of Indian children from their families, not only to teach them the ways of white, Christian, Europeans, but to prevent them from learning the ways of their own people.

The removal of children from their homes and the denial of their identity through attacks on their language and spiritual beliefs were cruel. But these practices were compounded by the too frequent lack of basic care - the failure to provide adequate food, clothing, medical services and a healthy environment, and the failure to ensure that the children were safe from teachers and staff who abused them physically, sexually, and emotionally. In educational terms, too, the schools - day and residential - failed dramatically, with participation rates and grade achievement levels lagging far behind those for non-aboriginal students. (Vol 1, p. 187)

30 In my view the horror of these schools for the Indian people and their continuing effect cannot be overstated, and must be remembered when Aboriginal people appear before the justice system, because, for them, and in fact, these courts are part of the same system that so abused them. The Royal Commission report describes many problems; cruelty, lack of proper nutrition and health care, and poor education.

Children were frequently beaten severely with whips, rods and fists, chained and shackled, bound hand and foot and locked in closets, basements, and bathrooms, and had their heads shaved or hair closely cropped. (Vol 1, p. 369)

Badly built, poorly maintained and overcrowded, the schools' deplorable conditions were a dreadful weight that pressed down on the thousands of children who attended them. For many of those children it proved to be a mortal weight. (Vol 1, p. 356)

Scott (Duncan C. Scott, "Indian Affairs, 1867-1912) asserted that, system wide, "fifty per cent of the children who passed through these schools did not live to benefit from the education which they had received therein." (Vol 1, p. 357)

The system failed to keep pace with advances in the general field of education and because the schools were often in isolated locations and generally offered low salaries, the system had been unable to attract qualified staff. ... as late as 1950, "over 40 per cent of the teaching staff had no professional training. Indeed some had not even graduated from high school." (Vol 1, p.345)

Although the department admitted in the 1970's that the curriculum had not been geared to the children's "sociological needs", it did little to rectify the situation. (Vol 1, p. 346)

Consultants working for the Assembly of First Nations amplified this behaviour, detailing the "social pathologies "that had been produced by the school system.

The survivors of the Indian residential school system have, in many cases, continued to have their lives shaped by the experience in these schools. Persons who attend these schools continue to struggle with their identity after years of being taught to hate themselves and their culture. The residential school lead to a disruption in the transference of parenting skills from one generation to the next. Without these skills, many survivors had had difficulty in raising their own children. In residential schools they learned that adults often exert power and authority through abuse. The lessons learned in childhood are often repeated in adulthood with the result that many survivors of the residential school system often inflict abuse on their own children. These children in turn use the same tools on their children. (Vol 1, p.379)

31 I believe that all of these things are relevant to the Aboriginal view of the Canadian Justice system and that special steps must be taken to overcome them.

> 9. *Lack of Relationship or Familiarity*. In my view it is essential that a prosecutor, who is going to call an Aboriginal woman as a witness, should be aware of all of the above difficulties and should discuss these with her and assist her in dealing with them. I believe that most will need this help to be able to give the evidence he will need to establish his case. She will need the opportunity of this preparation to think things through as described in the conservation-withdrawal tactic, and if she does not have this she will likely refuse to act 'until the terrain is familiar'. If it does not become familiar she will not act.

32 It is a strange result that an alleged domestic abuser is set free because of concerns for the victim, but it is my view that unless some over-all program is established to deal with the widespread incidence of this problem in this community, the hit and miss prosecution of a few offenders will do more harm than good. If offenders are unsuccessfully prosecuted they will get the message that they are above the law, and I believe that they will continue to be unsuccessfully prosecuted until something more is done for victims than just handing them a subpoena and leaving them to their own resources to deal with all of the fears and difficulties that they encounter in our justice system.

33 I therefore refused this adjournment, and will refuse others where the Crown is unable to satisfy me that real steps have been taken to prepare the witness. To do otherwise in my view will only add to the difficulties of the victims of domestic violence by putting them through the very traumatic experience of taking the witness stand without getting them any solution.

The statement by the Court represents a culturally sensitive and competent analysis of the interaction between cultural communities and the legal system. In this case the Crown had failed to take into consideration the cultural issues arising from the clash of first nations culture and a white British common law based Court process. While not explicitly stated the import of this decision cast a harsh light on professional competence and underlines that effective representation must among many other things facilitate and negotiate the cultural divide between individuals from cultural minorities and the court system and process.

## SPECIFIC ISSUES

### Gender

The realities of women in the practice of law continue to raise concerns. Reference is made to the Ontario LSUC report titled "Retention of Women in Private Practice"[29]. While the Malatest report[30] recently released by NSBS gives rise to cautious optimism, the trend shows that a disproportionate number of female lawyers still prefer government or public sector employment. As stated in the LSUC report:

> Women have been entering the legal profession and private practice in record numbers for at least two decades. However, they have been leaving private practice in droves largely because the legal profession has not effectively adapted to this reality.

In developing the Standard, regard must be had to recruitment and retention criteria that no longer punish women in the practice of law for being women.

> The legal profession should not assume that change will occur without conscious efforts to create a shift in the legal culture. Law firms have a legal responsibility to provide environments that allow women to advance without barriers based on gender. It is in the public interest for the providers of private legal services to reflect the make up of the society in which we live.

## Persons with Disabilities

The Law Society of British Columbia's Disability Research Working Group found that lawyers with disabilities faced discrimination, prejudice, and barriers to access.[31] Due to a belief that accommodation would be financially burdensome, legal employers are hesitant to accommodate disabilities.[32] Lawyers are faced with the choice to disclose their disability and face the potential for discrimination and harassment, or to remain silent and make do. In the latter scenario, burn out or termination of employment was common.[33] A majority of participants in the Working Group's consultations reported experiencing prejudice or stigmatization while practicing.[34]

For those with physical disabilities, inaccessible spaces are a common issue.[35] Mobility both in and between buildings was limited. Lawyers may have disabilities that prevent them from

[29] http://www.lsuc.on.ca/media/convmay08_retention_of_women_executive_summary.pdf
[30] http://nsbs.org/sites/default/files/ftp/EQSept2014_MalatestRpt_EmploymentEquityNSBS.pdf
[31] Disability Research Working Group, *Lawyers with Disabilities: Overcoming Barriers to Equality*, (Vancouver: Law Society of British Columbia, 2004) at 7.
[32] *Ibid*.
[33] *Supra*, note 33.
[34] *Ibid*.
[35] *Ibid*.

communicating using certain forms of communication.[36] This has a negative impact on their ability to participate fully in social situations harming their ability to practice.

Reference is made to the Manitoba Guidelines for developing an accommodation policy[37].

**LGBT Persons**

Compared to other equity-seeking groups, LGBT lawyers face the unique struggle of having to deal with balancing the separation of their private and public lives. They may find the process of deciding to whom to disclose their sexual orientation exhausting.[38] Due to low response rates from lawyers and lack of studies in area, it is difficult to gauge the number of LGBT lawyers and the specific barriers they face.[39] Nevertheless, it is clear from the experiences of openly-LGBT lawyers that they face discrimination and barriers to entry into the profession.

The Honourable Michael Kirby, a former justice on the High Court of Australia, noted in an interview that members of the legal profession still face barriers to disclosing their sexuality to their employers.[40] Studies done in the 1990s and 2000s also found the biases existed against LGBT lawyers.[41] Aside from its malevolent forms, these biases may seem more innocuous, such as assumptions that an LGBT lawyer only wants to work on LGBT issues.[42] These issues may dissuade law students from entering the profession, or have detrimental effects on career development or mental health.

**Racialized Persons**

The Law Society of Upper Canada conducted a comprehensive review of the challenges faced by racialized lawyers.[43] The issues they identified are present in Nova Scotia where racialized

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[36] *Ibid*.
[37] http://www.manitobahumanrights.ca/developingapolicy.html
[38] Gail H. Morse, "Is It Time for a LGBT Call to Action?" (2009) 2:4 *Embracing Diversity* at 2, online: <https://jenner.com/system/assets/publications/1133/original/GailMorse_EmbracingDiversity.pdf?1314196141>.
[39] Joan Brockman, *Gender in the Legal Profession: Fitting Or Breaking the Mould* (Vancouver: UBC Press, 2001) at 227.
[40] Lawyers Weekly, "Kirby says gay lawyers still face discrimination", (24 June 2010), *Lawyers Weekly*, online: < http://www.lawyersweekly.com.au/news/6363-kirby-says-gay-lawyers-still-face-discrimination>.
[41] Jennifer Brown, "Survey of lawyers to examine experience of sexual minorities in profession", (20 September 2013), *Legal Feeds* (blog), online: < http://www.canadianlawyermag.com/legalfeeds/1687/survey-of-lawyers-to-examine-experience-of-sexual-minorities-in-profession.html>.
[42] Hanna N. Rouse, "Lawyers Discuss LGBT Barriers", (18 November 2010), *The Harvard Crimson*, online: <http://www.thecrimson.com/article/2010/11/18/law-gay-students-school/>.
[43] Challenges Faced by Racialized Licensees Working Group, *Developing Strategies for Change: Addressing Challenges Faced by Racialized Licensees*, (Toronto: Law Society of Upper Canada, 2014).

lawyers an even smaller minority. Being a racialized lawyer introduces three major challenges: discrimination, "fit" issues, and lack of mentoring and networking opportunities.[44]
Direct discrimination remains an issue in legal workplaces. Racialized lawyers face derogatory remarks and negative stereotyping, such as mistaken for an assistant, student, or client. They may face professional barriers such as being passed over for promotion, not being invited to networking events, or feeling as though they had to prove themselves more than non-racialized colleagues.[45]

Issues of fit result from hiring practices that emphasize the recruitment of lawyers who can successfully integrate into a firm's workplace culture. Applicants' potential is often evaluated on their interests and social interactions. This has adverse effects on those from different socio-economic and cultural backgrounds. For example, making eye contact may be seen as a sign of respect in some cultures, but deceitful in others.

Racialized lawyers face career disadvantages due to the lack of mentorship and networking opportunities available.[46] As a result, they are unable to find colleagues who are able to provide advice on files or are willing to sponsor and advocate on their behalf. The lack of access to a professional network may also be detrimental to the business development and the construction of a client base.

The impact of these challenges manifests itself in different ways. They may result in a barrier to entry to the profession, a barrier to advancement, or may lead to exit from the practice of law.

**Aboriginal Persons**

The Law Society of British Columbia released a report on the barriers facing Aboriginal law students and lawyers.[47] 81% of Aboriginal lawyers surveyed agreed that they had faced barriers due to their background.[48] The primary barrier identified was discrimination or insensitivity by lawyers and judges.[49] Respondents noted that while they may have been socially accepted, they were not seen as competent lawyers. They found they were not given the opportunity to practice in certain areas. Respondents noted that in some cases, even Aboriginal clients had internalized the racism and did not view them as competent.[50]

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[44] *Supra*, note 44 at 11.
[45] *Ibid* at 12.
[46] *Ibid* at 13.
[47] Aboriginal Law Graduates Working Group, *Addressing Discriminatory Barriers Facing Aboriginal law Students and Lawyers* (Vancouver: Law Society of British Columbia, 2000).
[48] *Ibid* at 38.
[49] *Ibid* at 39.
[50] *Ibid*.

Aboriginal lawyers in Ontario have experienced the same treatment. LSUC in their Aboriginal Bar Consultation Final Report additionally noted that there was a lack of awareness of Aboriginal law issues and of the community.[51]

**Work to be done**

The next steps forward include assembling sample policies that address equity concerns in the management of law entities. Some of the firms in Nova Scotia may already have done work around these issues and developed such policies that both address internal management and external relationships with clients, the public and the courts.

Most importantly however, the development of policy based enforcement mechanisms which provide avenues for investigation and discipline internally without having in all cases to resort to disciplinary procedures under the Code. *Shah, supra* makes it clear that is appropriate mechanisms are used no outside intervention is required.

## Conclusion

The work of this committee is heavily engaged with the regulatory change towards entity regulation. Equity, Equality and Diversity are core principles both in the Society's mandate to protect the public and its Entity Regulation work.

The LOMC is among other committees tasked with developing frameworks for law practice and law office management that realize and sets standards arising from the core principles as they apply to the practice of law in Nova Scotia.

[51] Equity Initiatives Department, *Final Report – Aboriginal Bar Consultation* (Toronto: Law Society of Upper Canada, 2009) at 16.

## Appendix 1

## EQUITY AND DIVERSITY STANDARD

Lawyers must take reasonable steps to ensure that in relation to the management and the conduct of their practice the following exists:

3. there is in force a written statement of policy on equality and diversity; and
4. there is in force a process to enforce that policy;

In developing the statement of policy lawyers shall consider the following:

e. development of fair and unbiased criteria in the recruitment, selection and retention of clerks, lawyers and staff;

f. an anti-harassment and anti-discrimination policy;

g. parental leave policy;

h. Adjustment and accommodation policy for persons with disabilities;