



CANADIAN
BAR ASSOCIATION
Alberta

Written Submission Responses Government of Alberta's Survey Regulation of the Legal Profession in Alberta November 29, 2024

1.) Lawyer Association.

The Canadian Bar Association (CBA) is proud to be the voice of the profession, representing over 39,000 law students, lawyers and judges across Canada; and nearly 5,500 of which practice in Alberta.

2.) Can you describe any policies, code of conduct or other limitations placed on members of the Law Society of Alberta's ability to express their personal opinions and beliefs when not practicing or representing their profession?

A lawyer in Alberta will always be “representing their profession” in both their personal and work life. As a member of a regulated profession, there is never a time when a lawyer is “not a lawyer.” Lawyers have ongoing obligations to abide by the *Law Society of Alberta Code of Conduct* [“the *Code*”] and the *Rules of the Law Society of Alberta* [“the *Rules*”], which are authorized by the *Legal Profession Act*, RSA 2000, c L-8 [*LPA*].

a.) If so, what are the conditions in which the policies or code of conduct may apply to personal activities? What is the significance of these conditions or activities to the public interest in regulation of lawyers?

The *LPA* presently provides that members must not engage in conduct that either: “is incompatible with the best interests of the public or of the members of the Society, or” [*LPA* s 49(a)] or “tends to harm the standing of the legal profession generally” [*LPA* s 49(b)].

The *Code* provides a limited set of specific examples of behaviour which is prohibited (see *Code* 6.3-1 to 6.3-4 regarding discrimination and harassment) and also general guidance on the type of conduct which could harm the public's view of the profession or the justice system, due to the variety of situations that could give rise to that conduct (see *Code* 5.6-1, regarding respect for the administration of justice; *Code* 7.3-1, 7.4-1, or 7.5-1 regarding external roles, public office, and communications with the public).

3.) How are restrictions balanced with a member's rights, freedoms and ability to fully participate in society?

Properly applied, these restrictions should have little to no impact on a lawyer's ability to participate in society. Restrictions that extend beyond a lawyer's professional role and into a lawyer's personal life

should be limited to either unlawful activities or activities that are directly tied to harming the public's trust in the profession, such as dishonesty.

Notably, these restrictions are subject to scrutiny under the *Charter of Rights and Freedoms*, and thus any limitation could be challenged as being an infringement of a lawyer's Section 2(b) *Charter* rights.

4.) How are these policies developed and how often are the policies reviewed? Are members able to dispute or disagree with policies? If so, what is the process?

Originally, the *Code* was modelled upon the Canadian Bar Association's Code of Professional Conduct; however, it has now been aligned with the Federation of Law Societies of Canada's *Model Code of Professional Conduct*. Ultimately, the authority for developing and reviewing the *Code* and the *Rules* lies with the Law Society of Alberta.

Lawyers influence this process by electing directors of the Law Society (known as "Bencher"). Lawyers can also directly call for special meetings, as another example, the process for which is provided for in the *LPA* at Sections 28 and 29.

5.) Do the code of conduct and the rules of the Law Society of Alberta currently extend into a member's personal life? If so, how?

As explained above, a lawyer's conduct always has the potential to affect the reputation of the profession. As noted in the *Code*, "dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession."

Some examples where the *Code* speaks to obligations that are not directly related to the practice of law are: the obligation to act with integrity (*Code* 2.1-1), the obligation to encourage public respect for the administration of justice (*Code* 5.6-1), and the obligation not to engage in discrimination, harassment, sexual harassment, or reprisal against anyone seeking to remedy those issues (*Code* 6.3-1 through 6.3-4).

6) Describe your understanding of how the Law Society of Alberta provides guidance to the profession regarding freedom of expressing one's own opinion?

The *Code* and its associated commentary provide guidance to lawyers on permissible and impermissible conduct. This is supplemented by materials on the LSA's website related to "Key Resources and Professional Conduct." Finally, the LSA also employs Practice Advisors and an Equity Ombudsperson, whom members may contact to advise on compliance with the *LPA* and the *Code*.

7.) Describe your understanding of how the Law Society of Alberta provides guidance to the profession regarding engaging in a secondary role irrespective of practicing law?

The *Code* clearly outlines guidance in relation to engaging in secondary roles in Rules 7.3-1 and 7.4-1. Once again, the LSA also employs Practice Advisors and an Equity Ombudsperson for members to who can provide advice and direction in this area.

8.) Does the LSA currently require any mandatory training not directly related to professional competence or ethical conduct? If so, what does it consist of?

No, there is no mandatory training for Alberta lawyers not related to professional competence or ethical conduct. In particular, the CBA views the requirement for lawyers to complete “The Path,” on the subject of Indigenous competency training, as a matter of basic legal competency.

9.) What training do you believe is required to support professional competence and ethical behavior in the legal profession?

This is best determined through the processes of the LSA which establish appropriate competencies and training.

10.) What is the value of cultural competency training?

“Cultural” competency training is valuable insofar as it relates to a lawyer’s ability to practice effectively and ethically.

In specific reference to the requirement to take “The Path,” this requirement was a response to the Truth and Reconciliation Commission’s Call to Action #27. The value is that this one-time training can fill a gap in knowledge for lawyers, who might not have had the chance to receive education in the area of Indigenous legal history. Currently, all law schools in Canada require this training, so any recent graduate of a Canadian law school would not be required to complete “The Path.” Notably, all (approximately 30,000) public service employees in Alberta were required to participate in “Introduction to Indigenous Awareness”, a mandatory Indigenous learning initiative facilitated by the Government of Alberta.

11.) In your opinion, is cultural competency training required to practice law? Should this be required for a practitioner to maintain their licence?

With reference to the specific area of Indigenous education and “The Path” course, this type of training is necessary. Lawyers must understand the history of the relationship between Canada’s Indigenous people and the legal system. This content of this course, as recommended by the Truth and Reconciliation Commission, has been recognized by all Canadian law schools as an essential component of legal training. Moreover, all Alberta lawyers may encounter an Indigenous client; most notably in the criminal justice and child and family welfare systems, where there is an overrepresentation of Indigenous Canadians.

There is no ongoing requirement to maintain or continue training or education in cultural competency. The requirement to take a one-time course, is not equivalent to an ongoing obligation for a practitioner to maintain their license.

There is nothing objectionable about a one-time requirement that seeks to bridge a knowledge gap between the training received by recent law school graduates and those who have not received the same training.

12.) Given government’s intention to ensure regulatory bodies limit their oversight to areas of professional competence and ethics, do you expect changes may be required, or should changes be made, to the Law Society of Alberta’s oversight and training policies? If so, what changes do you expect may be required and why? If not, please explain.

The CBA believes that the LSA appropriately limits its oversight functions to areas of “professional competence and ethics” and that no statutory changes are necessary to achieve the government’s stated intention.

Speaking to training requirement, and specifically “The Path,” note that the vast majority of lawyers in Alberta have already completed this training. Current students and recent graduates in Alberta will not be required to take this training, as Canadian law schools have changed their mandatory requirements to include the completion of at least one Indigenous law course. Furthermore, lawyers who complete the Practice Readiness Education Program (“PREP”) in Alberta are also exempt from the requirement, as this material is already included in that course.

Broadly speaking, it is important for the Law Society of Alberta to be able to identify gaps in a lawyer’s education and take steps to rectify those gaps. A lawyer’s competency is not fixed-in-time; the regulator’s ability to impose additional requirements, where necessary, are essential in order to keep all members of the profession practice-ready.

Speaking to the question of appropriate oversight of the profession, the LSA restricts its oversight to conduct that is captured by Section 49 of the *LPA*. This means the LSA sanctions conduct that is:

- (a) is incompatible with the best interests of the public or of the members of the Society, or
- (b) tends to harm the standing of the legal profession generally,

Behaviour caught by these categories are inherently matters of “competence and ethics,” as they refer to the regulator’s ability to take steps to prevent and sanction conduct that has caused damage to the profession.

13.) If changes should be made to oversight and training policies, are there any actions that would be required by government to implement changes?

If the government wishes to implement legislative change, the CBA suggests that the direction of that change should be to equip the regulator with better tools to quickly dispose of complaints that are merely attempts to use the regulatory process for an inappropriate purpose.

After a conduct hearing, the LSA often reaches conclusions that completely vindicate the rights and freedoms of the member, who has been subject to a conduct complaint. However, the process may be more time-consuming and cumbersome than it needs to be. The government should consider regulatory reforms that would enable the LSA to dispose of politically motivated or obviously unmeritorious claims in a more expedient way.

Although the report was prepared in a different context, note that the Final Report of the Public Health Emergencies Governance Review Panel, at page 78, found that strengthening the rights and freedoms of professionals “is best achieved, not through heavy handed intervention by the provincial government

in the affairs of the colleges, but by initiatives taken by the colleges themselves, facilitated by some modest amendments”, to the relevant legislative regimes.

Any proposed changes should be provided to stakeholders in draft format prior to implementation. This would allow stakeholders to provide suggestions for improvement.

14.) What are the potential impacts for lawyers if changes are implemented?

There is a reputational risk to the profession, if the LSA is unable to sanction lawyers who are engaging in conduct that brings the profession or legal system into disrepute. This could have the effect of diminishing the “standing of the legal profession” in the eyes of the public, which would have negative consequences for the public’s confidence in the administration of justice as a whole.

15.) What are the impacts for the Law Society of Alberta?

Changes that are made to the *LPA* that have the effect of limiting the LSA’s ability to oversee the profession may result in a law society that is less able to fulfill its primary mandate of protecting the best interests of the public.

16) What are the risks and/or concerns if changes are not made?

None. The LSA ably fulfills its mandate of serving the public’s interest by governing the professional conduct of its members.

17.) What implementation impacts would need to be considered to ensure these changes are successful?

Draft legislation should be circulated for comment before implementation occurs. We strongly recommend that the government consult with marginalized groups, including Indigenous peoples to assess the impact of these proposed changes.

88.) If legislative changes are introduced to ensure that the Law Society of Alberta limits their oversight to areas of professional competence and ethics, what benefits and risks, if any, would exist for members of the Law Society of Alberta?

As explained above, changes that would limit the LSA’s ability to oversee conduct could create a reputational harm to the profession. This would happen if conduct that undermines the standing of the profession cannot be sanctioned.

19.) What benefits and risks, if any, would exist for members of the public who may have dealings with members of the Law Society of Alberta?

Where the public has less confidence in our legal profession, and our systems of justice more generally, that calls into question the legitimacy of the legal system’s outcomes. In turn, this undermines the public’s confidence in the rule of law. When people do not see the legal system as a reputable institution where justice is served, then it can erode the public’s confidence in our entire system of government.

20.) Conversely, what are the benefits and risks of government inaction to both groups?

As explained, the current system works well to balance the rights and freedoms of individual members against the LSA's mandate to govern in the best interest of the public.

21.) Who does the Law Society of Alberta accept complaints from against a lawyer?

Currently, there is no restriction on who may file a complaint against a lawyer.

22.) Who should be able to file complaints against a lawyer?

Complaints against a lawyer should not be restricted only to clients or opposing lawyers. There may be instances where a third-party becomes aware of a lawyer's misconduct, but is not otherwise directly involved with lawyer. For example, if a bank employee in another jurisdiction becomes aware of a lawyer's financial misconduct, they should be able to report that misconduct to the LSA.

That said, the government may be concerned about the ability of third-parties to abuse the regulatory process for an improper purpose. Rather than restrict third-parties' abilities to file complaints, the CBA would suggest empowering the LSA with tools that would allow it to better manage frivolous or vexatious complaints. Examples of such tools might be the ability to award costs, an ability to restrict complaints from making future complaints, or an enhanced ability to summarily dispose of complaints.

23.) The Law Society of Alberta's 2023 Annual Report indicates that there has been an increase in complaints brought against lawyers in the province. Based on your experience, to what extent do you believe this is driven by bad faith complaints?

The CBA does not have access to the statistics and figures that would be able to provide a full and complete answer to this question. Rather than relying on anecdotes, this would be a question that the regulator would be in the best position to answer.

24.) Is there any other information that would be helpful for government to consider in its review?

During the CBA's participation in the in-person consultation session, a question arose regarding situations where a regulated member is facing discipline because of actions that have also generated a criminal investigation. In a case where the criminal process has concluded (lack of charge(s) being laid, charge(s) being stayed, or through a dismissal or acquittal), what role should the regulator play?

These situations are highly fact-specific and resistant to a general rule of applicability. The CBA would caution against instituting a blanket rule that prevents the regulator from pursuing disciplinary action in these types of circumstances. Furthermore, note that the regulatory process attracts a different standard of proof than the criminal process: "clear and cogent evidence" versus "proof beyond a reasonable doubt." Differing standards and burdens of proof in parallel proceedings are not inherently problematic; consider the difference in procedure between a civil forfeiture hearing under the *Civil Forfeiture Act*, SA 2001, c C-15.2 and a forfeiture hearing under Section 490.1 of the *Criminal Code*, RSC 1985, c C-46. The regulator should be free to pursue discipline, even where the criminal standard of proof has not been satisfied.

However, it is also important that the regulatory discipline process not be used as a "second-chance" or "re-litigation" for a complainant who did not get their desired result in the criminal stream. The comments the CBA has made earlier in our submissions regarding the regulator's ability to quickly and efficiently weed out unmeritorious complaints, also apply equally to these situations.

CBA Alberta appreciates the opportunity to participate in this consultation on behalf of its members and is prepared to provide further input to the government's review of professional regulatory bodies as needed.