EQUITY AND DIVERSITY IN NOVA SCOTIA'S ENTITY REGULATION[1] MANAGEMENT SYSTEM

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NOVA SCOTIA'S UNIQUE HISTORICAL and social context has resulted in a legal profession acutely aware of issues involving equity and diversity. These issues exist between lawyers, in lawyer-client relationships, and during interactions with the justice system as a whole. They include race or gender and also beyond. They speak to interactions between cultures in the term's broadest sense: the shared values, beliefs and learned patterns of behaviour that provide meaning to experiences.

The Nova Scotia Barristers' Society's two strategic directions – excellence in regulation and governance, and improving the administration of justice – in some part seek to address these issues. The two are complementary and can be conceived of as two rails of the same track. Indeed, Jeff Hirsch, the president-elect of the Federation of Law Societies of Canada, recently

[1] The Nova Scotia Barristers' Society now refers to entity regulation as legal services regulation. The former term was used at the time of writing and is used in this paper.
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spoke on access to justice being a core business of legal regulators.[5] To promote the interface between the two, the Working Group on Equity, Diversity, Equality, and Inclusion: In and By the Legal Profession has requested that this paper be prepared for the Entity Regulation Steering Committee. The Working Group believes that given these factors, the Management System for Ethical Legal Practice and the associated Self-Assessment Questionnaire should address equity and diversity considerations in an explicit and expansive manner.

It is recognized that the Society's entity regulation development is still in early stages. Nevertheless, as mentioned, the two strategic directions are parallel and working towards the same goal. Therefore, a nexus must be formed at the outset to ensure that firstly, work is not being replicated; and secondly, that they continue to support each other. Both are taking the Society into areas of regulation that are unprecedented in Canada[6] and it is not only important that the one hand know what the other is doing, but also that it helps guide it.

This paper is organized into four parts. The first will review the existing regulatory framework which sets out the equity mandate of the Society. It will emphasize that institutional continuity requires these values not be lost in the transition to entity regulation. The second part will discuss the case law from the courts and tribunals that articulate the case for equity and diversity in entity regulation. It will demonstrate that equity is fundamental in achieving access to justice. The third section will identify the opportunities for equity and diversity to inform the draft elements. The fourth section will discuss next steps to ensure equity becomes internalized both at the Society and within the entities it regulates.

Principles Arising from the Regulatory Framework

The regulatory framework established by the Society addresses equity and diversity in two places: the 2013-2016 Strategic Framework[7] and the NSBS Regulatory Objectives[8].

The Strategic Framework established access to justice as a fundamental part of the Society's work. One of the two directions comprising the Strategic Framework is "Improving the Administration of Justice". The strategic initiatives that fall under this head are "[a]dvocate for

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[5] Jeff Hirsch, "Access to Justice – Core Business for Law Societies" (Keynote address delivered at the AGM of the Nova Scotia Barristers' Society, Cape Breton University, 13 June 2015) [unpublished].

[6] Canadian Bar Association Equality Committee, "Futures and diversity: What changes will you make?" (2015), *Canadian Bar Association*, online: <http://www.cba.org/CBA/equity/newsletters2015/futures.aspx?utm_source=cba&utm_medium=email>.

[7] Nova Scotia Barristers' Society, "2013-2016 Strategic Framework" (2013), *Nova Scotia Barristers' Society*, online: <http://nsbs.org/sites/default/files/cms/menu-pdf/strategicframework.pdf >.

[8] Nova Scotia Barristers' Society, "NSBS Regulatory Objectives" (4 November 2014), *Nova Scotia Barristers' Society*, online: <http://nsbs.org/nsbs-regulatory-objectives>.

enhanced access to legal services and to the justice system **for equity-seeking and economically disadvantaged groups**" and "[e]valuate the effectiveness of advocacy activities and the experience **of equity-seeking groups** in the justice system" (emphasis added). Both indicate the central focus on equity-seeking groups in addressing access to justice issues.

In practice, the Society is guided by the Regulatory Objectives approved by Council on November 14, 2014. Equity is contained in Regulatory Objective #5: "[p]romote diversity, inclusion, substantive equality and freedom from discrimination in the delivery of legal services and the justice system." As a regulatory objective, this mandates that the Society's regulatory initiatives should promote equity and diversity.

Equity and diversity have already been incorporated into the regulatory framework enacted by the Society. The *Code of Conduct* was amended in 2014 to state that lawyers have 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."[9] The continued expanded presence of these concepts into the framework would thus not be novel or unexpected to members.

Creative Consequences noted in their Phase 3 report that the regulatory targets reflect the content and theme of the Society's existing regulatory framework.[10] Thus, the elements should incorporate equity to a degree commensurate with its prominence in the Society's regulatory framework. This is necessary for two reasons. First, the current regulatory model has broad support and acceptance amongst the profession in the province.[11] Continuity is crucial for buy-in and continued support for entity regulation. Second, the Management System for Ethical Legal Practice must be the product of the Nova Scotian experience. A system successful in another jurisdiction cannot simply be transplanted into this province. For the Management System to effectively regulate the legal profession in Nova Scotia, it must account for the province's unique social, political, and economic context and history.

Principles Arising from Case Law

The Courts and other authorities in the justice system have recognized the importance of culturally competent practice in achieving access to justice. This section will first review a set of cases that call for cultural competency. It will then introduce cases that demonstrate the impact

[9] Nova Scotia Barristers' Society, *Code of Conduct* (Halifax: Nova Scotia Barristers' Society, 22 May 2015) at 91.
[10] Creative Consequences Pty Ltd, *Transforming Regulation and Governance Project: Phase 3* (Halifax: Nova Scotia Barristers' Society, 2015) at 4-5.
[11] Creative Consequences Pty Ltd, *Transforming Regulation and Governance Project: Phase 1* (Halifax: Nova Scotia Barristers' Society, 2015) at 14.

equity can have on outcomes. The last case discussed speaks to the systemic nature of equity issues.

In Nova Scotia particularly, the *Royal Commission on the Donald Marshall, Jr., Prosecution* casts a long shadow over the work of the Society and the provincial justice system. The findings and recommendations of the Commission reinforce that the appropriate knowledge, competencies, and attitudes are required to prevent similar future miscarriages of justice. Amongst many other recommendations, the Commission stated:

> In order to ensure that those involved in the criminal justice system are aware of – and sensitive to – the concerns of visible minorities, we recommend that…the Nova Scotia Barristers Society…support courses and programs dealing with legal issues facing visible minorities…We also recommend that the Attorney General establish continuing education programs for Crown prosecutors that will familiarize them with the problem of systemic discrimination and suggest ways in which they can reduce its impact.
> […]
> In our view, Native Canadians have a right to a justice system that they respect and which has respect for them, and which dispenses justice in a manner consistent with and sensitive to their history, culture and language.[12]

The Commission recognized that visible and cultural minorities face distinct barriers to justice that are the result of both their unique cultural backgrounds and discrimination that exists within the system. Although the Commission's ambit was the criminal justice system, these recommendations are applicable to the justice system as a whole. Recklessness or ignorance to a client or stakeholder's needs will not result in a satisfactory outcome regardless of the area of law practiced.

Despite the Commission's recommendations being made 26 years ago, the issues that resulted in Marshall's wrongful conviction still exist both in Nova Scotia and nationally. The Commission's findings and recommendations are still relevant to the Canadian justice system as a whole. Nova Scotia had a catalyst for an inquiry in the form of the Marshall prosecution, but the same issues have nevertheless been recognized elsewhere. In *Gichuru v. Law Society (British Columbia)*, 2011 BCHRT 185, [2011] BCWLD 7752, the British Columbia Human Rights Tribunal concluded that racial discrimination is still a prevalent problem in the legal profession.

> [219] 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

[12] The Royal Commission on the Donald Marshall, Jr., Prosecution, *The Royal Commission on the Donald Marshall, Jr., Prosecution: Digest of Findings and Recommendations* (Halifax: The Commission, 1989) at 10, 11.

> 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.[13]

The tribunal went on to recognize that much of this discrimination is subtle and systemic, making it difficult to tackle with a human rights complaint.[14] As such, these issues cannot be solved on a case-by-case basis; systemic remedies are required.

The principles arising from *R v Gladue*, [1999] 1 SCR 688, [1999] SCJ No 19 established that justice cannot be blind to the varying circumstances of those who interact with the system. The Supreme Court was focused on s. 718.2(e) of the *Criminal Code*, RSC 1985, c C-46, which explicitly calls for sentencing judges to pay "particular attention to the circumstances of Aboriginal offenders."[15] It could be construed that *R v Gladue* applies solely to the Aboriginal peoples. Several cases though have acknowledged that while special attention must be paid to the circumstances of Aboriginal clients, cultural considerations are relevant for anyone.

[13] *Gichuru v. Law Society (British Columbia)*, 2011 BCHRT 185 at para 219, [2011] BCWLD 7752.
[14] *Ibid.*
[15] *Criminal Code*, RSC 1985, c C-46, s718.2(e).

Judge Reilly of the Alberta Provincial Court noted in *R v T (BH)*, 1998 ABPC 135, [1998] 4 CNLR 262 stated:

> [23] ...it is my view that a heightened cultural sensitivity is required in all aspects of justice as it relates to Aboriginal people.
> [25] ... 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.[16]

More recently, Justice Nakatsuru of the Ontario Court of Justice was widely praised[17] when he applied the *Gladue* principles in *R v Armitage*, 2015 ONCJ 64, [2015] OJ No 701. In explaining his decision, he wrote:

> [3] I say this because in the *Gladue* court at Old City Hall, accused persons who share a proud history of the first people who lived in this nation, not only have a right to be heard, but they also have a right to fully understand. Their voices are heard by the judges. And they must also know that we have heard them. I believe that the accused persons who have been in this court have had good experiences in this. This is something that they have come to appreciate. This is something they have a right to expect.
> [4] **I know that all accused, whether they have any Aboriginal blood or not**, **should have this right.**[18]

While he was speaking on the role of judges, his declaration is nevertheless apropos for lawyers. Lawyers are the conduit between their clients and the Bench. Lawyers must be able to communicate their clients' unique circumstances to the Bench in order for their cultural backgrounds to be considered. They must also effectively communicate a judge's decision to create closure for their client and to create a satisfactory outcome.

The Truth and Reconciliation Commission of Canada released a list of recommendations in response to the legacy of residential schools in this country. The 27th recommendation in the Commission's Calls to Action was:

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[16] *R v T (BH)*, 1998 ABPC 135 at paras 23, 25-26, [1998] 4 CNLR 262 [emphasis added].
[17] See e.g. Federation of Asian Canadian Lawyers, Media Release, ""Inspiring" Decision by Justice Shaun Nakatsuru in R. v. Armitage" (March 2015), online: FACL <http://facl.ca/inspiring-decision-by-justice-shaun-nakatsuru-in-r-v-armitage/>.
[18] *R v Armitage*, 2015 ONCJ 64 at paras 3-4, [2015] OJ No 701 [emphasis added].

> 27. We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.[19]

The Society has the opportunity to be one of the first jurisdictions to implement this recommendation. Given that the Marshall Commission before had also called for cultural competency, adopting this training is even more imperative.

These considerations extend to all participants in the legal system regardless of cultural background. It is sufficed to say that clients and stakeholders are entitled to understand and be understood in any interaction with the legal profession. These cases focused on the aboriginal peoples and the criminal justice system as that is where the consequences of a lack of cultural competence and discrimination have been most visible. However, there are several other cases that demonstrate the need for cultural competent practice outside the Aboriginal context. In the following cases, more general equitable considerations played a crucial part of the judges' reasoning.

In the potentially precedent-setting decision of *R v X*, 2014 NSPC 95, [2014] NSJ No 609, expert evidence entered on race and culture helped convince Judge Anne Derrick to impose a youth sentence despite the circumstances swaying towards treating the offender as an adult.[20] Judge Derrick was not aware of a precedent that considered the relevancy of race and culture in a case of an African-Canadian youth who was subject to an application for an adult sentence.[21] But based on adult offender cases and the wording of the *Youth Criminal Justice Act*, SC 2002, c 1, she concluded that they were indeed material factors.[22]

The expert evidence entered by the defence provided Judge Derrick a "more textured, multi-dimensional framework for understanding "X", his background and his behaviours."[23] Judge Derrick wrote that the evidence "suggests that "X"'s character and maturity are still in a formative stage."[24] Based on this evidence, despite the seriousness of the offences, she found the Crown had not rebutted the presumption of diminished responsibility. The sentence would have likely been much harsher had defence counsel not recognized and argued that race and culture were factors in the determination.

In *R v S (RD)*, [1997] 3 SCR 484, [1997] SCJ No 84, the Supreme Court of Canada incorporated cultural awareness into the reasonable person standard.

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[19] Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at 3.

[20] *R v X*, 2014 NSPC 95 at para 53, [2014] NSJ No. 609.

[21] *Ibid* at para 194.

[22] *Supra*, note 15 at 196.

[23] *Ibid* at para 198.

[24] *Ibid*.

> 47. The reasonable person is not only a member of the Canadian community, but also, more specifically, is a member of the local communities in which the case at issue arose (in this case, the Nova Scotian and Halifax communities). Such a person must be taken to possess knowledge of the local population and its racial dynamics, including the existence in the community of a history of widespread and systemic discrimination against black and aboriginal people, and high profile clashes between the police and the visible minority population over policing issues: *Royal Commission on the Donald Marshall Jr. Prosecution* (1989); *R. v. Smith* (1991), 109 N.S.R. (2d) 394 (Co. Ct.). The reasonable person must thus be deemed to be cognizant of the existence of racism in Halifax, Nova Scotia. [25]

The reasonable person standard plays a prominent role in many different areas of law including administrative, criminal, tort, and contract. In order for a lawyer to competently work with it, they themselves must first have an understanding of the racial dynamics and context of the community they work in. The real import of this case is broader however. It underscores that the Courts will use equity considerations to inform existing principles where appropriate. Lawyers must be adequately prepared in order to engage with the Bench on these issues and to introduce them when it has a bearing on the services they provide to clients or stakeholders.

Cultural competency is also necessary for systemic changes that address the biases and inequalities that exist in the justice system. In *R v Parks*, [1993] OJ No 2157, 15 OR (3d) 324, Justice Doherty observed that:

> A significant segment of our community holds overly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes. These elements combine to infect our society as a whole with the evil of racism. Blacks are among the primary victims of that evil.[26]

Systemic issues require systemic remedies. The current strategy of occasional workshops and professional development programs is insufficient. To effectively recognize and challenge these negative stereotypes, the Society must normalize culturally competent behaviour and attitudes.

These cases illustrate the need for cultural competence and redress of the systemic discrimination that exists. Needless to say, there are many other rulings where the Courts have either taken equity considerations into account or they have taken notice of the discrimination, negative biases and discrimination that exist in the justice system.[27] They all demonstrate that lawyers cannot be culture-blind in their practice. To meet obligations to their clients and

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[25] *R v S (RD)*, [1997] 3 SCR 484 at para 47, [1997] SCJ No 84.

[26] *R v Parks*, [1993] OJ No 2157 at para 54, 15 OR (3d) 324.

[27] While the cases cited have dealt with race, it is a result of the historic prominence racial discrimination has held in the equity discourse. Other issues, such as those involving LGBT and disabled individuals or victims of trauma, have recently begun to develop their own corpus of case law. See e.g. *R v MacDonald*, 2013 NSSC 255, [2013] NSJ No 407.

stakeholders, lawyers must be able to recognize and incorporate these considerations in their work.

Equity Reflected in the Regulatory Targets

Creative Consequences' Phase 3 report discussed the inclusion of equity and diversity in the ten regulatory targets (or "elements").[28] It was recommended that equity and diversity should not form their own element, but should rather be read into the others. The rationale was that having a separate equity and diversity element would result in entities ignoring such considerations in the rest. However, it is our position that it is false to argue that the two are mutually exclusive; explicitly mentioning equity in an element does not preclude it from being read into the others. In fact, the exact opposite is equally plausible: by not explicitly referencing equity, it will be overlooked.

This section will explain how the interpretation of elements 1, 2, 6, 9, and 10 can be expanded to more explicitly and effectively address equity and diversity. It is our hope that these suggestions will be incorporated into the statements that articulate each element in the Management System, practice notes, and commentary. That said, the Working Group is of the view that the wording of element 9 requires more than an expansive interpretation: it is proposed that the existing wording be modified.

In keeping with the purpose of ethical infrastructure, these additions are meant to be persuasive, not prescriptive. They should demonstrate best practices while allowing for the flexibility required for firms of different sizes to meet the elements. The following proposals are not draft language, but general thoughts on how the elements can be expanded and should be approached going forward.

By including references to equity and diversity in each element, it may seem like there is repetition and overlap. However, as Creative Consequences noted, these considerations are present in each element and are multi-faceted.[29] . Attempting to consolidate them into a single element would miss their varied impacts depending on circumstances. For example, how one practices cultural competence in relation to a client is different from cultural competency in office management. Nor would such a condensation be helpful for entities as the result would be too vague to be of any guidance.

The goal here is to mitigate the risk and minimize the potential for harm from cross-cultural interactions. To do so, discrimination must be prevented and cultural competency must

[28] *Supra* note 4 at 10.
[29] *Supra* note 4 at 10.

be realized. For this to happen, the proper attitudes must be internalized. It is through the development of the necessary knowledge, skills, and attitude that behaviours will begin to change.

Element 1: Developing Competent Practices to Avoid Negligence[30] [31]

For this element, the Working Group suggests that the Management System should incorporate and reference cultural competency. In the regulatory context, cultural competence can be defined as the knowledge, skills, and attitude required by a lawyer in Nova Scotia to effectively meet the legal needs of the diverse communities they serve. Lawyers must be aware of the impact cultural differences may have on the experiences clients may have with the legal system and on their relationship. They must then have the skills to lessen the effects of these differences on the thinking and behavior of both themselves and their clients. Lawyers must approach these cultural differences with a willingness to practice law competently in the pursuit of justice.

As mentioned above, culture is broadly interpreted here as including the shared values, beliefs and learned patterns of behaviour that provide meaning to our experiences. It is not limited to racial or religious backgrounds and may also include sexual orientation or history of trauma.

In its current wording, the articulating statement states "[y]our entity ensures that all legal services are delivered in a manner that respects diversity and which does not discriminate, victimize or harass anyone."[32] However, cultural competence goes beyond direct discrimination and harassment on a single ground. It also encompasses intersectionality and adverse effects. For example, ensuring a single parent in poverty is not unduly burdened by court scheduling due to childcare expenses. The Working Group therefore suggests that this element be revised to expand the scope.

One way to do this for example would be to revise the statement to read "Your entity ensures that all legal services are delivered in a manner that respects diversity**, reflects an awareness and understanding of its clients' unique cultural and other circumstances,** and which does not **(whether intentionally or on the basis of adverse effects)** discriminate,

[30] Creative Consequences Pty Ltd, *Transforming Regulation and Governance Project: Phase 4* (Halifax: Nova Scotia Barristers' Society, 2015) at 26.

[31] This paper was originally drafted on the basis of the Creative Consequences report. However, the language of the elements has subsequently been modified. However, the content and articulating statements have remained the same. In the latest draft of the Management Systems for Ethical Legal Practice (MSELP), Element 1 is now "Develop competent practices".

[32] *Supra* note 14.

victimize or harass anyone" (emphasis added to identify changes). Again, the intention here is not to necessarily provide draft text, but to provide an idea of how the language can be revised to bring these considerations to the forefront.

Element 2: Achieving Effective, Timely and Courteous/Civil Communication[33] [34]

In its current form, this element focuses on communication from lawyers to clients and stakeholders. However, effective communication flows both ways. As the Marshall Commission noted in its recommendations, those involved with the justice system must be aware of and sensitive to the concerns of visible minorities.[35] The Working Group suggests that the articulating statements and accompanying commentary be modified to reflect the listening aspect of communication. How does the entity ensure staff confirm and understand the legal needs of the client? While maintaining client expectations, do staff thoughtfully consider the client or stakeholder's wishes?

Also, the element as currently drafted introduces cultural competency and equity only where language barriers exist. However, given the broad interpretation of culture, inter-cultural gaps can exist even between two people who share a common linguistic and racial background. It is suggested that a separate statement addressing cultural competency and equity, independent of language barriers, be drafted.

Element 6: Ensuring Effective Firm/Staff Management[36] [37]

This element is comprehensive and sufficiently inclusive. The Working Group especially welcomes the addition of disabilities, which are not explicitly mentioned in any other element. It is important that the reference remains throughout any further changes to the Management Framework. No changes to this element need to be recommended.

Element 9: Sustaining Effective Relationships with Clients, Colleagues, Courts, Regulators and the Community[38] [39]

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[33] *Ibid.*

[34] In the latest draft of the MSELP, Element 2 is now "Communicate in a manner that is effective, timely and civil".

[35] *Supra* note 6.

[36] *Supra* note 14 at 29.

[37] In the latest draft of the MSELP, Element 6 is now "Ensure effective management of legal entities and staff".

[38] *Supra* note 14 at 31.

[39] In the latest draft of the MSELP, Element 9 is now "Sustain effective and respectful relationships with clients, colleagues, courts, regulators and the community".

The Working Group proposes that "equitable" be inserted into this element. The revised element would thus be, "Sustaining Effective *and Equitable* Relationships with Clients, Colleagues, Courts, Regulators and the Community". Cultural competency is already a part of the articulating statements, so the addition does not make a substantive difference. However, it does serve to emphasize the prominent place equity has in the Society's framework. This will not detract from equity being a part of the other elements, but rather cements equity as a central tenet of the Management System rather than simply a product of interpretation.

In the latest version of the Management Systems for Ethical Legal Practice, the language of this element has been revised to read, "Sustain effective and respectful relationships with clients, colleagues, courts, regulators and the community". Despite the addition of "respectful", "equitable" is still the preferable term for two reasons. It is important to be explicit about the inclusion of equity and diversity. Using seemingly synonymous terms and euphemisms may lead to misinterpretation or skirting of the issue. If legal service providers are expected to generate effective solutions to deal with issues of equity and diversity, they should have clear and explicit direction.

Secondly, respectful is not synonymous with equitable; Respect is a component of equity. It is focused on present and future interactions on a personal level and does not necessarily address historical or systemic issues. In that vein, it does not mandate substantive equality. Respect for an individual is possible without ensuring that they are treated in an equal manner to others taking into account their unique background and experiences.

The Nova Scotia Barristers' Society's Rules of Legal Ethics and Professional Conduct recognizes this important distinction. Rule 24 states that "A lawyer has a duty to respect the human dignity and worth of all persons and to treat all persons with equality and without discrimination." Respect is differentiated from (presumably substantive) equality. This distinction should remain in the MSELP.

Element 10: Achieving Access to Justice[40] [41]

This element as currently expressed focuses almost exclusively on legal costs as a barrier to justice. However, as indicated by the Strategic Framework, barriers faced by equity-seeking groups other than the economically disadvantaged are a significant portion of society that is being denied access. The courts in the decisions referenced above have also highlighted this

[40] *Supra* note 14 at 32.

[41] In the latest draft of the MSELP, Element 10 is now "Sustain Work to improve the administration of justice and access to legal services".

aspect of access to justice. In its #TalkJustice initiative[42], the Equity Office canvassed the community to discuss their experiences with the justice system. One person asked "[h]ow can a lawyer represent me when they don't even have the time to get to know me? And if they don't believe me or can't try to understand where I'm coming from, they can't really represent me." [43] Other respondents criticized the poor representation they received from lawyers who were overworked or burnt out.[44]

The Working Group suggests that this element include statements that address the experience of the client or stakeholder. Are staff encouraged to be empathetic with clients or stakeholders? Are they ensuring clients or stakeholders feel as though they are being heard (independent of whether they actually are)? How does the entity manage the risks associated with the mental health of staff? Some of these overlap with other elements, such as elements 2 and 6. But they should nevertheless have a presence under this element to bring attention to the fact that access to justice affects more than just the economically disadvantaged.

Next Steps: Inclusionary Process & Implementation

To ensure that equity considerations are not overlooked, it is crucial that there is representation of equity-seeking groups on the Entity Regulation Steering Committee and associated working groups. Issues of intersectionality and adverse effects may not be apparent to those who have not been extensively exposed to the experience of equity-seeking groups. As noted in *Gichuru v. Law Society (British Columbia)*, discrimination and lack of cultural competence is often subtle and systemic.[45] Complicating things further is fact that equity and diversity are sensitive topics. Proper representatives will be change champions. They will identify issues and ensure they are managed in a respectful manner. Furthermore, the Society's equity committees and Equity Office should be seen as centres of excellence on these issues and should be utilized as resources.

Looking beyond the current stage of planning, comments should also be made on the enforcement mechanisms. The Self-Assessment Questionnaire must include questions that address equity. Aside from serving as an evaluation, the SAQ also provides suggestions and guidance on the policies entities should ideally have in place. The Equity Office is currently developing an online portal with resources to help firms implement policies and standards

[42] Nova Scotia Barristers' Society, "Let's #TalkJustice!" (April 2015), *Nova Scotia Barristers' Society*, online: <http://nsbs.org/public-interest/2015/04/lets-talkjustice>.

[43] LaMeia Reddick, *#TalkJustice: Community Voices on Justice in #NovaScotia* (Halifax: Nova Scotia Barrister's Society, 2015) at 16.

[44] *Ibid* at 33.

[45] *Supra*, note 7.

relating to equity and diversity. These resources can be used in the drafting of questions. Once work proceeds on the drafting of the SAQ, the Equity Office can provide input.

Conclusion

The regulation of the legal profession in Nova Scotia will transform dramatically with the move to entity regulation. The redesign of the regulatory framework in this province provides the opportunity to address longstanding structural issues that have hindered access to justice for equity-seeking groups. The courts have found that the justice system must recognize and account for the systemic circumstances of clients or stakeholders. This is an imperative for access to justice, especially in a diverse community as found in this province. The Nova Scotia Barristers' Society has adopted these principles in the form of the *2013-2016 Strategic Framework* and its Regulatory Objective #5. Both recognize the need for equity and diversity.

It is insufficient to leave these considerations implicit. Unfortunately, these issues are subtle and embedded to the extent where even those with the best intentions may neglect to recognize them. And as a core part of the Society's mandate, they are far too critical to the functioning of the justice system to allow practitioners to read them into the Management System for Ethical Legal Practice at their discretion. They must be explicitly referred to both in the elements themselves and in the accompanying practice notes and commentary. It is recognized that the Management System must remain flexible to be effective. Thus, the proposed changes to the elements themselves are mostly modest. Rather the recommendations are in regards to the interpretive aids.

As the design of the Management System changes, further modifications may be required to account for equity and diversity concerns. Therefore, the participation and representation of equity-seeking groups is needed. The Working Group and the Equity Office continue to offer themselves as project resources in facilitating this participation and offering advice on equity issues.