

Law Society of Nunavut TRC Consultation Feedback Report on Call
to Action 27 Proposed Amendments

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PART I: EXECUTIVE SUMMARY

The Legal, Ethics and Practice Committee (LEPC) of the Law Society of Nunavut (LSN) invited members of the Nunavut bar to provide comments with respect to the proposed amendments to the Code of Professional Conduct (Code). Of the 114 total members called to the Nunavut bar, we had a substantial participation rate of approximately 15% who provided feedback and comments. Note that some of the 114 LSN member lawyers provided feedback as members of the LEPC and LSN Rules Committee, so the participation rate is effectively higher, at approximately 20%. Feedback from membership was obtained through 3 virtual-webinars and 3-city hybrid consultations hosted in Ottawa, Iqaluit and Yellowknife.

Overall Comments/Questions:

During the consultations, the membership was asked to consider and discuss the following:

1. The **appropriateness** of the proposed amendments,
2. The **sufficiency** of the proposed amendments – are there additional/ different considerations for Inuit persons/ Nunavut as a territory?
3. Do you have any **additional comments** or feedback to provide? Please detail.

In general, LSN lawyers that were consulted query what else the FLSC intends to do, other than change the Model Code, to answer Call 27 of the TRC Report. The Call specifically contemplates the education of lawyers and, while amending the Model Code goes some distance towards meeting this Call, the FLSC has resources that are not available to the law societies of the smaller jurisdictions such as Nunavut. The LSN lawyers consulted overwhelmingly wonder what can be done towards reconciliation through equitable support of the CLE efforts of smaller jurisdictions by larger ones/ by the FLSC.

Has there been a consideration to consult with Inuit organizations on the proposed amendments?
What is the methodology for choosing the 20 groups that were consulted by the FLSC?

The FLSC did consult with 20 Indigenous organizations and persons when developing the proposed amendments but from reviewing the list, it does not appear that any Inuit organizations or persons were consulted.

It was noted that the FLSC consulted with approximately 20 Indigenous individuals and organizations, but there does not seem to be any systematic rationale provided for with whom they consulted or why they selected those individuals. Through the discussion, all the members felt that Inuit organizations should be consulted especially in regards to the competency amendments. It was noted that without consulting Inuit organizations, the FLSC and LSN run the risk of ironically effecting a perpetuation of colonization again. Members emphasized that the FLSC should mindfully provide an opportunity for Inuit individuals and organizations to provide meaningful comments related to impacts and competency of Inuit culture.

The Law Society of Nunavut strongly encourages the FLSC to consult with Inuit organizations in their next round of consultations, and to provide a rationale for with whom they consulted and why.

It was noted by Indigenous lawyers in the consultation that the overall tenor of the FLSC Model Code changes proposed is implicitly that Indigenous people are an exotic population with whom (implicitly settler) lawyers deal and queried how the Model Code can be amended to de-center the settler as lawyer and make space for Indigenous lawyers.

PART II: FEEDBACK ON PROPOSED AMENDMENTS TO MODEL CODE - CALL TO ACTION 27

Preface

Comments:

The feedback received was that there were no comments on the proposed changes to the wording in the Preface.

2.1 Integrity

The membership's main concerns with the updates to the commentary revolve around the verbiage that seems to be all encompassing of an entire population, and both updates should be fleshed out further for clarity.

Comments/ Discussion:

Commentary [2] The scoping of the word "Indigenous peoples" was questioned. Does this mean the entire group of people or is it individualized?

When reading the current added verbiage, it seems to be about an entire group of people, and this does not seem to add anything to the commentary. It is hard to say that a lawyer would have the trust and respect of an entire group of people.

The community is referring to the public and as such already includes the Indigenous population within that reference, with the proposed wording it seems to single out Indigenous peoples.

Commentary [1f] The membership commented on the scoping of the wording of "Indigenous peoples" and "lawyer's community." Similar to the above comment regarding Indigenous peoples, the membership is concerned about the phrasing of an entire group. Additionally, the membership questioned what is meant by "lawyer's community" and believes the commentary should be fleshed out.

3.1 Competence

The proposed amendments for competency are likely to get pushback from some lawyers as previously this has happened in other jurisdictions.

The Call to Action is asking the FLSC to provide training required to meet the requirements of the proposed amendments. The majority of members believe the changes look promising, however there are concerns regarding resources, obtaining the training and determining/assessing the competency requirements. The membership has voiced the opinion that the FLSC should provide the necessary training/resources to meet the requirements.

3.1-1 Definition of a Competent Lawyer

Comments/ Discussion:

The proposed amendments for a competent lawyer were discussed at length.

Questions raised include:

1. How are lawyers supposed to obtain the training / develop the competency?
2. Who will be responsible for delivering the training?
3. How will resources be allocated to ensure the training is available?
4. Who determines the competency and how will this be evaluated?
5. How will this competency be assessed fairly with regards to discipline?
6. How do we adjudicate when there is a complaint related to this competency requirement?
7. How will each law society manage updating the knowledge and ensuring that there are relevant updates to the competency training?
8. Will lawyers be required to obtain the training only through education or will community visits be an adequate way of obtaining the competency?
9. Will the training be specific to each jurisdiction as there are differences in Indigenous makeup in each of the jurisdictions, and how would training obtained in one jurisdiction transfer to another jurisdiction?

Members also raised comments about the uniqueness of Nunavut lawyers. Particularly, many members of the Nunavut bar are also members of other jurisdictions, and as such will receive training provided by the other jurisdictions. How will law societies manage the competency requirements specific to their jurisdiction and the Indigenous make-up of that jurisdiction to ensure that the members of the bar have obtained the specific appropriate training?

Additionally, if community visits will count towards obtaining the competency requirement, how will lawyers who do not have the same opportunities to attend other communities on circuit obtain the competency training? This should be determined and discussed related to the Nunavut context.

The membership emphasized the need for more information on how the requirement is to be obtained as it appears to be more than a CPD requirement.

Additionally, a member identified that as Nunavut has recently become part of the Canadian Fair-Trade Agreement and due to the nature of the requirements outlined in the FTA, the proposed amendments may be in conflict if there are additional requirements placed on training requirements for members who work for multiple jurisdictions, which is the nature of the bar membership in Nunavut. As such, the FLSC should consider clarifying the guidelines for obtaining the competency requirements while recognizing the unique nature of various jurisdictions.

Trauma-informed Commentary:

The rules and commentary seem to be broad and vague. It is recommended that the Federation should clearly establish what trauma-informed practice and training includes to clarify how to obtain the training. The majority of the participating membership also requested additional clarity regarding the verbiage in commentary [1] related to “Strategies” including defining the strategies, how to develop these strategies and how to quantify them. The current commentary is a high-level requirement that needs to be fleshed out.

Additionally, the membership questioned how the requirement will change as more trauma principles are identified. This should be clarified.

The membership discussed how some courtroom proceedings result in an individual being revictimized, which is contrary to trauma informed practice. Can the Federation provide more guidance to lawyers as to what a trauma informed practice looks like in this context?

How will disciplinary committees manage complaints related to lawyers not following trauma-informed practices?

The membership questioned commentary [2] with regards to putting the onus on the lawyers, as there are not clear guidelines to determine an adequate approach to obtaining the competency requirements. The membership urges the FLSC to develop clear guidelines regarding the competency requirements including what constitutes appropriate knowledge, understanding and competency.

Additionally, the membership is concerned that the rule change will require disciplinary committee to have more Indigenous representation and there may not be the resources in each jurisdiction to meet this requirement.

3.1-2: Performing Legal Services to the Standard of a Competent Lawyer

Comments/ Discussion:

The commentary [2] does not seem to add anything of value, the membership believes this is a drafting problem and it needs to be reviewed and revised. The view is that this commentary only adds fluff instead of any real substance.

The membership suggested the commentary [2A] should come before commentary [2] which will help with the understanding of the requirements and provide more context to the commentary.

Additionally, the commentary should be expanded to include how to apply the principles and ethics into practices. Currently, the verbiage is too vague.

Commentary [3f] What does effectively mean? What classification is being used to define effectively?

The membership requests that FLSC quantifies the meaning of effectively.

Additionally, the membership was of the view that this commentary does not add any real value since if a lawyer is meeting all other requirements as outlined in the Code, then this commentary is superfluous?

Commentary [4c] Similarly to the comments made regarding [3f]; this commentary provides no additional value as if a lawyer is meeting all the other requirements, then this requirement will also be met.

The membership also raised the question of how this requirement would be assessed with regards to a complaint and how it would be disciplined as it is not measurable against any standard.

Commentary [5A] The membership highlighted that the terminology used is “through” rather than “directly from”, which seems to imply that the expertise should be directly from an Indigenous-led source. It is unclear as to what the expectations are, and what obligations it confers on lawyers, and as such clarification is required.

The discussion revolved around how lawyers are able to ensure they are gaining expertise from Indigenous led sources and ensuring that there are enough resources in place for the law societies to offer this type of expertise and training.

Will the FLSC provide a verification reference for sources to ensure that they meet the requirements? Will sources be vetted? Can the knowledge be obtained through mentorship?

Most of the membership raised questions regarding the assessment and evaluation of this criterion, especially when a complaint is made against a lawyer.

New Rule 3.1-3 Competence Informed by Indigenous Perspectives

Commentary [2] The commentary is missing a catch all phrase.

The membership discussed that this commentary reads better at the beginning of the competency Rules as it emphasizes the measurable requirements that lawyers are required to obtain.

New Rule 3.1-4 Competence – Relationship with Indigenous Clients and Parties

Many of the membership has concerns with the wording regarding a “working knowledge of Indigenous worldviews”, as there is no measurable means to determine if someone has these views and many members felt uncomfortable expressing this view as they are not Indigenous.

Many members are concerned with the use of such strong language, it is setting up the potential for issues related to access to justice as members may not take certain cases in fear of a potential complaint if they cannot meet these requirements; especially if they cannot obtain the appropriate knowledge from Indigenous sources. The membership was concerned with the use of such strong language – “must”. The FLSC should review.

Commentary [2] The membership is also concerned that throughout the commentary there is an emphasis on reducing the harm inflicted on Indigenous peoples; however, practicing colonial law is in fact inflicting harm by the nature of the laws. The membership would love the idea of having experts to consult with to provide advice, however, again there is a resource concern, especially with the size and funding of the Law Society of Nunavut.

An ongoing question is: How does the FLSC and Law Societies decide who is an expert in the Indigenous community?

3.2-1 Quality of Service

A member brought up the need for interpreters to support clients and the need for an on call fee for service that would allow lawyers access to translators on a short-term basis to support the needs of Indigenous clients.

How will the FLSC and Law Societies support their membership with ensuring they have access to the right resources when dealing with Indigenous clients to ensure quality of service?

5.1 The Lawyer as Advocate

Comments/ Discussion:

The conversation continued regarding how to balance zealously representing your client and the potential exploitative nature of doing so. In some cases, there is a potential to be exploitative in order to represent your client and how this would give rise to the adjudication of complaints if lawyers were unable to balance these competing requirements.

The question was posed as to whether this is restrictive against lawyers for potential complaints versus defending clients. This amendment poses a potential conflict for lawyers and poses limitations on lawyers who need to defend their clients.

There were examples discussed including having to bring particular evidence into court and how this evidence could be exploitative against a victim, and due to this amendment, a potential complaint could be raised with the law society.

How will the Federation adjudicate these potential complaints? How will lawyers be able to defend themselves against these types of complaints?

A member also mentioned that the wording of this commentary makes the assumption that all clients are Indigenous, and all lawyers are Southern. The membership would like to see the verbiage be more representative of the fact that there are also Indigenous lawyers and their experience of trauma and cultural differences.

6.2 Duties of Principals

The membership noticed that there is a lack of consideration for the requirements when dealing with Indigenous students-at-law. The FLSC should consider reviewing this section to be more inclusive of Indigenous lawyers, principals and students-at-law.