

## Litigation between LSO, bencher continues, issue for ‘Convocation to decide,’ defence claims

By **Amanda Jerome**

Law360 Canada (September 9, 2022, 2:08 PM EDT) -- Litigation between the Law Society of Ontario (LSO) and one of its own benchers, Murray Klippenstein, continues as the regulator filed a Statement of Defence in response to Klippenstein’s claim, which seeks an order compelling the regulator to provide him with reports and data that were used to establish the LSO’s equity, diversity and inclusion (EDI) initiatives.

Klippenstein told *The Lawyer’s Daily* that he’s “never heard” of a “sitting, elected bencher” suing the law society.

“It pains me to be in this situation, but I felt I had no other options,” he added.



Murray Klippenstein, LSO bencher

As previously reported, Klippenstein’s claim, which was issued June 17, alleged that the bencher was concerned about “irregularities” in the Stratcom Report, which was used to create a consultation paper approved by Convocation. The irregularities, the claim noted, include “the failure by Stratcom to follow established, accepted, and standard statistical and other methods in gathering data, information, and background and in the presentation of such information in the Stratcom Report.”

The LSO’s Statement of Defence, issued on Aug. 5, explained that the *Law Society Act* (LSA) “sets out certain principles to which the LSO shall have regard in carrying out its functions, duties and powers...”

The regulator’s defence also noted that “[W]hether or not the *Corporations Act*” applies to the LSA “does not assist the Plaintiff.”

“Section 304 [of] that Act provides that certain specifically prescribed types of records shall be open for inspection by directors during normal business hours. None of the documents sought by the Plaintiff fall within the categories of records listed in section 304 that a director has a statutory right to inspect,” it added.

The defence stressed that “[B]eyond any statutory right a bencher may have, the right of an individual bencher to information is a function of what is required to fulfill his or her role as one of the collective of benchers meeting in Convocation for the purpose of transacting the business of the Society, or in a committee created pursuant to a By-law for the purpose of transacting the business delegated to it by Convocation.”

“That is a question for Convocation to decide within the governance structure set out in the LSA” and the bylaws, the defence added, noting that a bencher “may bring a request for information or documents which he or she believes are required either to the chair of the relevant committee (if the request relates to committee business) so that the chair may deal with the request within the context of the powers delegated to the committee by

Convocation, or directly to Convocation itself.”

“Convocation is the body which has the authority to determine whether to provide the information,” the Statement of Defence clarified.

The LSO’s defence pleaded that “it is Convocation that has the power to determine whether the documents requested by the Plaintiff are reasonably required by him in order to fulfill his role and obligations as a bencher. Thus he must either by motion raise the matter before Convocation himself, something which he has not done, or await the report of SPAC [Strategic Planning and Advisory Committee] to Convocation.”

The Statement of Defence also asked that the claim be “dismissed with costs.”

Klippenstein’s reply to the Statement of Defence, issued Aug. 15, asserted that “while Convocation may be the primary forum for benchers to govern the affairs of the LSO, a bencher’s role in governance extends beyond the confines of Convocation.”

“Discussion, deliberation, debate, and critique take place both in and outside of Convocation meetings, and are predicated upon adequate, accurate, and timely information being available to benchers on the issues before the LSO and Convocation,” the reply explained.

The reply, filed with the Ontario Superior Court of Justice, also noted that “it is *ultra vires* Convocation to deny individual director’s requests for information.”

“The Plaintiff’s request for the Information has in fact already been improperly denied by the LSO. The appropriate forum to grant the relief sought in the Statement of Claim is This Honourable Court,” Klippenstein’s reply added.

In an interview with *The Lawyer’s Daily*, Klippenstein said he’s “not suing the law society as some kind of stunt” or because he’s a “fractious individual.”

“I’m suing to get information that I thought, and I believe, I am entitled to as an elected bencher to do the job for which I was elected. I’m puzzled and sorry that I’m in a lawsuit and I would have thought it needn’t have happened,” he added.

When asked whether this action conflicts with his duties as a bencher or the Bencher Code of Conduct, Klippenstein stressed that he views his “pursuit of this information as integral to carrying out” his “duties as a bencher and as a director of the corporation.”

“I don’t see it as a conflict at all. I see it as an alignment of interests and I just find it rather bizarre that I have to be in this position to get some basic information from inside my corporation, to commence legal action,” he explained.

He also noted that “many other benchers have been interested in the general issue of the surveys that found the EDI programs.”

“I think other benchers are watching this closely and many are supportive. The interesting thing is I’ve been asking questions for a long time, and no one has been able to, or has, suggested that my questions are in any way misguided. My critiques seem to be pretty bang on. I just can’t get any responses,” he explained.

The LSO’s Statement of Defence noted that Klippenstein “chose to seek disclosure of the documents by writing letters of demand to the Treasurer of the LSO through his counsel dated April 26 and May 20, 2022.”

The Treasurer responded on May 27, reminding Klippenstein that “161 pages of supporting materials relating to the issues raised by the Plaintiff, including materials relating to the Inclusion Index, the Stratcom Report and the Challenges Report, had been made accessible to benchers dealing with these issues within the mandate of the Equity Indigenous Affairs Committee (“EIAC”), of which the Plaintiff is a member.”

“My Statement of Claim sets out in some detail the concerns behind my requests and what I found interesting was that the law society’s defence was that basically all information requests will be decided by vote of Convocation,” Klippenstein said, stressing that this “sets up a never-ending majority versus minority situation where a majority can shut out a minority, or an individual bencher, from information that would seem to be important to a bencher’s duties.”

Klippenstein believes that his lawsuit should bring about a change in process at the law society.

“I believe, and my survey of the law suggests, that a bencher’s access or a director of a corporation’s access to

information is fundamental to them doing their job. Even if that means asking uncomfortable questions that other benchers don't like. That's how good governance happens. And so, having benchers get information that is not seriously filtered by others is the starting point," he explained.

When asked what he will do with the data he seeks if he's successful in obtaining it, Klippenstein said he wants to "study it closely and dig into it."

"I've seen a lot of indications that something went awry and it's part of my duty to check if that's correct. And if it is, I suppose I may need to convince the other benchers about that," he added.

Klippenstein was elected as a bencher in 2019 as part of the StopSOP slate. The slate was organized to overturn the Statement of Principles, which was one of the EDI initiatives approved by Convocation in 2016. Since the election, the slate has also encouraged a more fiscally responsible approach at Convocation.

When asked whether suing the regulator is a fiscally responsible move, Klippenstein said he's in "disbelief" that he's had to take this route.

"I think it is fiscally irresponsible, and irresponsible in terms of basic governance, for the law society to not give benchers and directors the information they need to do their job. To ask about the cost of a lawsuit to the law society has got it backwards. The law society seems, to me any way, to be causing the problems of the lawsuit by not following what I thought were good governance and clear legal principles," he stressed.

"In terms of possible mediation or resolution, I have been putting my questions and stating my rationale repeatedly in different fora at the law society for several years with what seems to be a desire to look the other way or sweep things under the rug. And I hope I'm not speaking out of line there, but that's what it seems like after several years. I don't see how it can be resolved other than a court decision, which I think, would simply repeat the existing law," he added.

*The Lawyer's Daily* reached out to the LSO for comment, asking whether Klippenstein would have to recuse himself from any Convocation debate on the matter and if he has a conflict of interest as a party involved in the litigation. However, the LSO declined to comment.

---