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Convocation must decide whether to release internal EDI documents requested by bencher: LSO

Bencher suing regulator for information related to equality, diversity, and inclusion initiatives

Murray Klippenstein

A bencher suing the Law Society of Ontario (LSO) for survey data which helped inform major equality, diversity, and inclusion (EDI) policies argues that, under common law, he has a right to the information as an officer of the corporation. The LSO says the issue is for Convocation to decide.

The bencher, Murray Klippenstein, who is represented by Edmonton's Kenny Law, filed a reply to the LSO's statement of defence on Aug. 15, ten days after the LSO submitted their pleadings. Among the information Klippenstein is after is data from a survey he says fell below standard statistical methods, was not shared with LSO benchers, and formed the basis of significant LSO policies.

In his original statement of claim, Klippenstein said that, as directors of the LSO corporation, benchers have a right to access and obtain "any and all documents, records, and information of the corporation that are necessary or useful to them in fulfilling their duties to govern the LSO and manage the affairs of the corporation."

According to the LSO's statement of defence, while s. 304 of the Corporations Act provides that directors may inspect certain types of records during normal business hours, none of the documents Klippenstein seeks fall under the categories s. 304 specifically prescribes. Beyond any statutory rights, a bencher's right to information is "a question for Convocation to decide within the governance structure set out in the [Law Society Act]… Convocation is the body which has the authority to determine whether to provide the information."

When Klippenstein requested the information from the LSO's treasurer, she responded that she had "no unilateral authority" to decide whether to fulfill the requests and referred the requests to the Strategic Planning and Advisory Committee (SPAC) which would consider them and make a recommendation to Convocation. The LSO's position is that Klippenstein can either bring a motion to raise the issue with Convocation – which he has not done – or wait for the SPAC report.

"The Law Society is saying in its statement of defence that such internal information requests from a bencher require a majority vote of approval from convocation," Klippenstein told Law Times. "To me, that position seems to negate the role of diligent and independent minded benchers and raises significant governance issues, which I, reluctantly, am going to have to ask the court to clarify."

The LSO declined Law Times' request for an interview or statement because the proceedings are ongoing.

In his reply to the statement of defence, Klippenstein says that the activities of Convocation do not encompass a bencher's entire governance role. "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 states that while the LSO is incorrect in its view that the documents sought all fall outside the categories of records listed under s. 304, the categories identified by statute "in no way derogate from a director's common law right to information, which is more extensive." That a director of the LSO corporation has an individual right to information is a "long-standing and foundational principle of common law." As a director Klippenstein said he is "presumptively entitled" to information he considers necessary to fulfil his role and duties.

"My understanding of the common law of corporate governance and also what seems to me to make sense, from a governance perspective, is that the presumption should be that a director should get the information," says Klippenstein. "Whether it's the treasurer or staff or convocation who are allegedly the gatekeepers – that seems, to me, to have it backwards."

In 2013, the LSO organized a working group to study the challenges faced by racialized licensees. It hired consulting firm Stratcom Communications to execute a study on lawyers and paralegals, which included a survey of those professions.

In 2014, Stratcom delivered its final report to the working group, which then produced a consultation paper that was distributed to the LSO membership. The consultation paper was based on the Stratcom report and referred to Stratcom's survey more than 40 times, but did not link to the report itself, said Klippenstein's statement of claim.

Once responses to the consultation came in, the LSO developed a policy paper called Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions, Working Group Final Report, which included 13 recommendations that Convocation voted to adopt in December, 2016. The recommendations included requiring every licensee to "adopt and abide by a statement

of principles acknowledging their obligation to promote equality, diversity and inclusion generally, and in their behaviour towards colleagues, employees, clients and the public," which Convocation repealed in 2019. Klippenstein was among the 22 lawyers who were elected to Convocation on a platform to eliminate the statement of principles – known as the StopSOP slate.

The recommendations included requiring all legal workplaces of at least 10 licensees to have a diversity policy and to complete an equality, diversity, and inclusion (EDI) self-assessment every two years. The Working Group also recommended that the LSO measure EDI progress by asking all licensees to answer questions about EDI in their workplace every four years, and that the LSO develop and publish a publicly available inclusion index every four years.

Since 2016, the LSO has "embarked on an extensive and far-reaching long-term process to implement the various recommendations throughout the legal profession," said the statement of claim. But these efforts, argues Klippenstein, are based on data from the Stratcom report, the validity of which is questionable because of Stratcom's alleged failure to "follow established, accepted, and standard statistical and other methods in gathering data, information, and background."

The Statcom survey's alleged deficiencies include its "extremely low" response rate of six percent, that the report did not indicate the number of people surveyed, and that survey respondents did not comprise a random sample but were entirely self-selected. The report did not differentiate between lawyers and paralegals and neither mentioned nor assessed the significance of non-response and the possibility that those who chose not to respond may have had differing views from those who did. The LSO also never distributed the report to benchers between the report's receipt and the adoption of the Working Together recommendations, which deprived benchers the opportunity for a due diligence review. In his statement of claim, Klippenstein said his concerns were later validated by three outside consultants the LSO hired to review statistical and survey work contained in past reports.

In April of this year, Klippenstein wrote to the LSO treasurer and demanded the full Stratcom survey dataset and various other material informing the process which led to the Working Together for Change report, as well as other information. That is when the treasurer responded that she

had no unilateral authority to decide whether to fulfill a request for confidential information, and that Klippenstein needed to engage Convocation on the issue.