Law Society of Ontario | Barreau de l'Ontario

Tab 8

Treasurer's Report under Section 54 of the Bencher Code of Conduct

For Information

May 28, 2020

Authored By:

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Treasurer's Report under section 54 of the Bencher Code of Conduct

Overview

In an email sent to over 130 people, Mr. Goldstein made factual statements about the Law Society which I have concluded were untrue and disparaging.

I have concluded that it is not advisable to refer this matter to Convocation to determine whether Mr. Goldstein failed to comply with the Bencher Code of Conduct.

Rather, I caution Mr. Goldstein to take care about the factual truth of what he publically says as a bencher including by exercising due diligence including by making appropriate inquiries of those with knowledge of the relevant facts.

Background

On December 6, 2019, Sam Goldstein sent an email to over 130 people entitled "Inclusion, Deep State, and random thoughts". A copy of the email is attached.

The email was brought to my attention by two different people.

On review of the email, there were several statements of fact that raised issues. I raised this with Mr. Goldstein. The issue regarding one statement of fact was resolved but not with respect to other statements.

On January 13, 2020, I wrote to Mr. Goldstein pursuant to sections 51 and 52 of the Bencher Code of Conduct (the "Code"). I referred to the following statements:

- The Society is facing a deficit.
- Members of the Slate have been asking Management how much actually goes out the door of Osgoode but we haven't got an answer.
- The fee reductions resulted from the fact that there were historic surpluses … .
- Since the late 90s the Society has been taking money from the compensation fund to cover increases in its expenditures and telling you that your levies have to be increased because the fund is down, instead of being transparent and just telling you that your fees have to go up because they are spending too much.

In respect of these statements, I asked Mr. Goldstein:

a) to advise on what specific basis he said these statements are true; and

b) what steps he took to ensure the truth of these statements.

After receiving a response from Mr. Goldstein, I received information from the Chair of the Audit and Finance Committee, the Chief Executive Officer and the Chief Financial Officer of the Law Society which I provided to Mr. Goldstein as well as my tentative views. Mr. Goldstein provided a further response as a result of which I contacted two benchers who Mr. Goldstein indicated were sources of information in respect of the statements. Mr. Goldstein was provided with

copies of my questions to these two benchers and their responses to me. I invited Mr. Goldstein to say anything further that he wished to say but have not received anything further from Mr. Goldstein.

With respect to the above statements, I have concluded that the statement "The fee reductions resulted from the fact that there were historic surpluses … ." was ambiguous and, depending on the meaning given to this statement, could be seen as being true.

With respect to the remaining three statements, I conclude as follows:

The Society is facing a deficit.

This statement was not true.

The Law Society has not borrowed funds in over 20 years and does not carry any debt related to a loan or other similar borrowing. In fact, the Law Society's lawyer General Fund had a fund balance of over $25 million at the end of 2018, with the paralegal General Fund balance at just over $3 million[1]. The Law Society's financial position was strong with robust fund balances.

The Law Society budgets on the basis that total expenses equal total funding, where funding is a combination of revenues and use of existing fund balances. When Convocation elects to reduce the general fund balances in accordance with Convocation's fund balance policy, the mechanism to do so is through a budget that plans for expenses to exceed revenues, with the difference coming from the general fund balances. This is common practice in not-for-profit organizations.

I conclude that the Law Society was not facing a deficit. Mr. Goldstein now accepts that he was in error.

On April 30, Mr. Goldstein advised that:

> … it is now my understanding that the Society has a $14 million surplus. I did not know this at the time I wrote my Newsletter. New information indicates my honest belief was mistaken. I maintain that at the time I wrote my Newsletter I honestly held the belief the Society was in debt because money was being taken from the Compensation Fund. In my mind, the Compensation Fund issue and deficit issue were interconnected.

A review of the publicly available audited financial statements of the Law Society shows that the Law Society has not been in debt at least 20 years. Mr. Goldstein did not provide any explanation as to why he thought otherwise other than stating that monies had been transferred from the Compensation Fund (which practice ended in 2017). The amounts of transfers from the Compensation Fund and the assets and liabilities of the Law Society are all available for the last ten years in the publicly available audited financial statements of the Law Society.

Mr. Goldstein has not indicated that he reviewed any financial statements or made any inquiry of Law Society management in respect of his stated belief that the Law Society was facing a deficit.

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[1] Since Mr. Goldstein made this statement in December 2019, the annual financial statements for 2019 have been prepared. These statements report that fund balances of the General Fund for Lawyers and for Paralegals as of December 31, 2019 were $26.1 million and $1.8 million respectively.

Members of the Slate have been asking Management how much actually goes out the door of Osgoode but we haven't got an answer

This statement was not true.

The Law Society's expenses are disclosed annually in publically available audited financial statements and are reviewed by the Audit & Finance Committee during the year through quarterly financial statements. How much "actually goes out the door" is known and disclosed in the Law Society's financial statements.

In his initial response, Mr. Goldstein stated that:

> You may remember that one of the Slate Benchers posed the exact question about how much money was going out the door and how much was coming in to staff at a meeting on the budget. The answer was that they did not know. To be fair, I admit I did not follow up with that Bencher as to whether he received his answer. I am confident, however, that if his question was answered I would know.

On my inquiry, the Chair of the Audit and Finance Committee, the Chief Executive Officer and the Chief Financial Officer advised that no such question had been asked and no such answer had been given.

On being so advised, Mr. Goldstein identified the "Slate Bencher" to whom he had referred in his initial response and stated that a second Slate member had told Mr. Goldstein that he had asked the same question. As a result, I inquired of these two benchers and asked each whether they had asked this question and, if so, what answer had been received.

The first bencher advised that he had asked management in October 2019 to explain why the Law Society's year-to-date revenues materially exceeded expenses. As he put it "why we were taking in so much more money than we were spending". This bencher went on to say that:

> .. I can see how someone who hasn't been stuck in boardrooms for a few decades reviewing operating results would conclude from the exchange that senior staff did not know 'where the money went' although my conclusion was that the variance required a detailed explanation as to what was collected but not needed and not spent and why and for that some further review was required. …

The second bencher advised that he had "expressed a concern by way of questions regarding the expenditures and revenues of the Society and whether or not the Society was, in any common understanding of the term, running a deficit".

I conclude that neither bencher asked "Management how much actually goes out the door of Osgoode". Rather, the first bencher questioned why revenues were exceeding expenses while the second bencher appeared to have been concerned that expenses might exceed revenues.

Mr. Goldstein has not indicated that he reviewed any financial statements or made any inquiry of Law Society management in respect of his statements regarding the expenses of the Law Society.

Since the late 90s the Society has been taking money from the compensation fund to cover increases in its expenditures and telling you that your levies have to be increased because the fund is down, instead of being transparent and just telling you that your fees have to go up because they are spending too much.

This statement is not true in its description of the reason that monies were taken from the Compensation Fund and in its description of what the Law Society had told members and why.

Commencing in or before 1990, a portion of Law Society investigation expenses and discipline expenses was allocated to the Compensation Fund on the basis that such expenses were costs of the administration of the Compensation Fund[2].

In 1998, the Law Society established a spot audit program, on the recommendation of the Compensation Fund Committee, intended to avoid claims against the Compensation Fund and commenced allocation of spot audit expenses to the Compensation Fund.

The amounts of expenses for investigation, discipline and spot audits that were allocated to the Compensation Fund were disclosed annually in the Law Society's audited financial statements.

The expenses for investigation, discipline and spot audits ceased being allocated to the Compensation Fund as a result of a decision of Convocation made in 2017. There have been differences of opinion as to whether including the anticipated amount of the additional expenses in the Compensation Fund Levy and allocating the additional expenses to the Compensation Fund was in strict compliance with the Law Society Act. Mr. Goldstein and others have taken the position that allocating these additional expenses was not compliant with the Law Society Act.

In his response, Mr. Goldstein has taken the position that funding expenses for investigation, discipline and spot audits through the Compensation Fund resulted in the Compensation Fund Levy being higher than it would otherwise have been and having the potential effect that some members might conclude that claims against the Compensation Fund were higher than they actually were.

However, this is not what Mr. Goldstein said in his December 6, 2019 email.

The amounts in issue were for expenses for investigation, discipline and spot audits which were thought at the time to be properly paid out of the Compensation Fund. The Law Society did not say that Compensation Fund Levies had to be increased because the Compensation Fund was "down". The amounts in issue that were funded from the Compensation Fund were specifically disclosed annually in audited financial statements.

[2] See Section 51(12) of the *Law Society Act*

The Bencher Code of Conduct and the process followed

Sections 50 to 52 of the Code are as follows:

> 50. A person who has information suggesting that a bencher has not complied or is not complying with the Code may refer the information in writing to the Treasurer.
>
> 51. The Treasurer shall notify the bencher who is the subject of the issue disclosed in the information ("the subject bencher") and provide them with the information.
>
> 52. The subject bencher shall be given an opportunity to provide a written response to the issue to the Treasurer.

In addition to his original written response pursuant to section 52 of the Code, I provided Mr. Goldstein with an opportunity to respond to the information that I had obtained as a result of his written response and to my tentative conclusions.

In his further response of April 30, Mr. Goldstein took the position that my investigation was "perfunctory". He then identified two benchers, appearing to suggest that I should have spoken with them. I do not accept this as Mr. Goldstein did not identify either of them in his original response. Once identified, I enquired of these two benchers and Mr. Goldstein had an opportunity to provide a further response.

Reasonable apprehension of bias

Mr. Goldstein asserted that he needs to know whether I am "investigating" him because the person who forwarded his December 6 email to me has complained or asked me to investigate; or if I have independently taken it upon myself to investigate because I "do not like" what Mr. Goldstein wrote in his email. Mr. Goldstein's position is that "it is impossible for you to be impartial if you are the complainant as well as the investigator and adjudicator".

Mr. Goldstein raises the issue of impartiality, the essence of which lies in the requirement that adjudication of a matter be approached with an open mind. Bias connotes a predisposition to decide a matter in a certain way that does not leave the judicial mind open and impartial (*Wewaykum Indian Band v. Canada*., 2003 SCC 45 at para. 58). A reasonable apprehension of bias exists where a reasonable person would reasonably conclude that bias exists. *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394. Disqualification does not require that actual bias be found. A reasonable apprehension of bias is sufficient.

Section 50 of the Code provides that a person with information suggesting non-compliance may refer the information in writing to the Treasurer. While this may be seen as being a "complaint", the Code does not use that word and section 50 does not contemplate an allegation of non-compliance; only the provision of information suggesting non-compliance. Indeed, section 50 does not require that there be a request for investigation.

Neither person who provided me with copies of the subject email expressly alleged non-compliance with the Code. Neither expressly said that information was being provided in accordance with section 50. Neither asked for an "investigation". However, I understood that some issue was being raised even though that was not expressly said. Accordingly, I reviewed the email and considered whether it raised any issue.

In reflecting on the Code and its purpose in a practical way and on Mr. Goldstein's position, it seems to me that the intent of the Code is to provide for effective and ethical governance. I think that the Treasurer ought to be alive to issues of non-compliance with the Code whether raised by others or not. Where the Treasurer sees a matter of concern, it seems to me that the Treasurer properly considers the circumstances and, where thought appropriate, asks for a response in accordance with sections 51 and 52 and then acts in accordance with sections 53 and 58.

For a Treasurer to act "on his or her own motion" by concluding that there is information suggesting that a bencher may not complied or is not complying with the Code does not mean that the Treasurer has concluded that there is non-compliance with the Code. I do not accept that a reasonable apprehension of bias arises because of perceived pre-judgment merely because a Treasurer proceeds without express invocation of the Code of Conduct by someone else. In any event, I conclude that the structure of the Code does not require the Treasurer to find non-compliance with the Code in order to take action under sub-section 53(a) of the Code. Initially, I thought that I ought to reach a conclusion as to compliance with the Code. I now think that I need not and should not do so. It is Convocation that is expressly empowered to make that decision under section 61 of the Code where the Treasurer refers an issue to Convocation pursuant to section 58 of the Code.

In my view, the situation here is that a review of the email of December 6, 2019 reasonably raises questions about compliance with the Code but that being of the view that questions were raised by the email and asking for a response as a result would not cause a reasonable person to reasonably conclude that I had prejudged the matter.

Implementation of the Code

My Goldstein has said that the Law Society did not properly adopt the Code by amending its By-laws as it is required to do. If Mr. Goldstein is correct then the Code has no force and effect and, therefore, I have no power to do anything. Mr. Goldstein does not explain why he says that Code must be implemented by By-Law. Convocation sometimes acts by making a Convocation policies and other decisions and sometimes passes by-laws. In this case, Convocation did not pass a by-law but it did adopt the Code. Mr. Goldstein agreed to abide by the Code after he became a bencher. While it may be that Convocation would not have the authority to suspend rights and privileges of a bencher absent By-Law authority (or consent of the bencher to be bound by the Code), I do not see any basis on which to conclude that the decision of Convocation to adopt the Code was without any effect. Given my ultimate conclusion as to the appropriate action to take, I do not agree that I "have no power to do anything" in the circumstances of this case.

The Complaint by Mr. Goldstein against me

In his April 30 response, Mr. Goldstein alleges that I breached the Code in a statement that I made in January 2019 about an unrelated matter. He does not explain why he included this complaint against me is included in his response in this matter. This allegation is unrelated to this matter and does not affect the proper disposition of this matter in my view. It should be dealt with separately.

Determining the appropriate action to be taken

Having concluded my review, I must consider section 53 and 58 of the Code which are as follows:

> 53. Upon receipt of the response from the subject bencher or if no response is provided, the Treasurer shall determine the appropriate action and may:
>
> a. Conclude his or her review of the issue and
>
> i. take no action;
>
> ii. caution the subject bencher about the issue;
>
> iii. require an apology from the subject bencher to those affected by conduct related to the issue;
>
> iv. require an undertaking from the subject bencher with respect to conduct related to the issue;
>
> v. advise the subject bencher on any other steps to be taken to remedy or resolve the issue; or
>
> b. Where he or she reasonably believes that it is in the interests of fairness and the integrity of the Law Society's governance process to do so, refer the issue to an independent third party investigator for review and investigation with appropriate terms of engagement for the investigation.
>
> 58. The Treasurer may refer an issue to Convocation for a determination of whether the Code has not been complied with.

Under sections 53 and 58 of the Code, the Treasurer has several choices that can be made. The Treasurer may refer the issue to an independent third party investigator "for review and investigation" where the Treasurer reasonably believes that it is in the interests of fairness and the integrity of the Law Society's governance process to do so. The Treasurer may take no action after a review of the issue or may take one of the actions contemplated by sub-section 53(a) of the Code.

If the Treasurer refers the issue to an independent third party investigator, there is a further choice to be made. On receipt of the written report of the investigator, the Treasurer may decide to take no action or may take one of the actions contemplated by sub-section 53(a) of the Code. The Treasurer may refer an issue to Convocation for a determination of whether the Code has not been complied with.

A determination that there has been non-compliance with the Code is not a precondition to the Treasurer taking action pursuant to subsections 53(a)(ii) to (v). In contradistinction, section 63 provides that:

> 63. Where Convocation determines that the Code has not been complied with by the subject bencher, Convocation may

a. reprimand the subject bencher, or

b. suspend for a period of time certain rights and privileges of the subject bencher.

The structure of the Code suggests that the Treasurer's jurisdiction under subsections 53(a)(ii) to (v) is more remedial in nature. This is consistent with sections 60 and 61 of the Code which provide for a formal procedure to be followed and written reasons.

I conclude that the Treasurer need not conclude that there is non-compliance with the Code in order to take one of the actions under subsections 53(a)(ii) to (v). Rather, I conclude that the Code provides the Treasurer with choices to be made in the circumstances all with a view to best ensuring effective and ethical governance of the Law Society.

Freedom of Expression

I note the application of the *Charter of Rights and Freedoms* to decisions of administrative decision-makers. Applying *Canadian Broadcasting Corporation v. Ferrier*, 2019 ONCA 1025 both to the interpretation and application of the Code, I would think that making factual public statements should not be considered to be in breach of the Bencher Code if arguably true. On the other hand, I consider that making a false statement of fact knowing the fact to be false or being reckless as to the truth may well be in breach of the Bencher Code. Whether a negligent false statement could be breach is uncertain and is likely fact-dependent. Further, the nature and significance of the factual statement should matter. So too should willingness to correct any false statements. It is important to ensure that there is public debate on factual matters and that debate not be chilled. However, making false factual statements on material matters as a bencher does little to promote, and can in fact impede, the values underlying freedom of expression and can be to the detriment of the search for truth. My decision as to the appropriate action to take is intended to respect freedom of expression and the importance of public debate. *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 at paras. 112 and 113

Conclusion

I have concluded that the three disparaging statements in question here were not true.

What is not so clear is whether the statements were known to be false, whether statements were made recklessly as to the truth or were made honestly but without reasonable inquiry.

In this regard, I note that Mr. Goldstein stated on April 30 that it was now his position that he had an honest but mistaken belief that the Law Society was in debt.

With respect to the statement, that "Members of the Slate have been asking Management how much actually goes out the door of Osgoode but we haven't got an answer", the bencher who Mr. Goldstein said asked this question did not do so but did suggest that there may have been some misunderstanding as a result of lack of experience.

With respect to the statement involving the Compensation Fund, there was a legitimate underlying issue as to compliance with the *Law Society Act* although the statement went well beyond that and would not have permitted the reader with insight into what was in issue.

I do not think it appropriate to take no action. What is said about the Law Society and its work matters to confidence in legal services regulation. This is not to suggest that criticism and discordant opinion is to be avoided. But benchers should take reasonable care as to the truth of factual statements that they publically make.

Equally, I do not think that there is value in referring this matter to Convocation for a determination as to compliance with the Code. This is a divided bench that does not need unnecessary distraction and further controversy. There is a risk that the Code may become an adversarial tool rather than a means to help Convocation do its work properly. And I think it better in the circumstances of this matter to give guidance.

Section 53 of the Code contemplates requiring an apology, requiring an undertaking or advising the subject bencher on any other steps to be taken to remedy or resolve the issue. I do not think it advisable to take any of these actions.

What appears to be most appropriate in the circumstances is to caution Mr. Goldstein which I now do. I caution Mr. Goldstein to take care about the factual truth of what he publically says as a bencher including by exercising due diligence such as making appropriate inquiries of those with knowledge of the relevant facts. Just as it is important that there be free and active debate on matters of opinion, it is important that we all strive to ensure the truth of underlying facts including by due diligence and, where appropriate, by genuine and informed debate about the facts.

There is much wisdom in the saying that everyone is entitled to their own opinion but not to their own facts – so long as we keep in mind that facts can sometimes genuinely be in dispute too.

May 20, 2020

Note: A typographical error has been corrected in this Report after it was completed.

The Email

From: Sam Goldstein <samueldgoldstein@icloud.com>

Date: December 6, 2019 at 2:49:50 PM CST

To: [recipients deleted]

Subject: Inclusion, Deep State, and random thoughts.

Merry Christmas,

I love this time of year and I especially love wishing government employees Merry Christmas. The look of relief on their faces is saddening that I am not going to report them to their superior for expressing a religious preference. If George Carlin were alive today he would substitute his old list of seven words with an entirely new list with Merry Christmas right at the top.

This year Convocation held its yearly Polishing of the Eagle Feather Ceremony. A few years ago the Society was presented with an eagle feather held to be sacred religious item with the Indigenous community. The Ceremony consisted of an exchange of vows of mutual recognition and respect between the Indigenous Elder and our Treasurer, a tobacco pouch, and the lighting of a peace pipe. You can watch in on the Society's website.

I must confess that I was a bit skeptical but I found the ritual interesting. I didn't feel it imposed upon my own religious beliefs. I've been to Church to witness religious events and non-Jews have participated in religious ceremonies at my dinning room table.

The next day, however, the Society held its yearly Festival Dinner.

You read that correctly.

I am sure a few years ago when Sir John A. MacDonald was still a respected member of Canadian History the dinner was called the Christmas Dinner, but according to the good people who brought you inclusion, celebrating paganism shows you're inclusiveness but celebrating the Birth of Jesus would be exclude the pantheists in the crowd.

Inclusion has become a bludgeon to oppress people of the Christian faith. To my non-Jewish friends, I use Christian irrespective of whether you go to Church or not. No offence. I don't care if you are Anglican, Catholic, Protestant, or Evangelical. You all look alike to me.

To my Jewish friends, don't think we've got off easy this time. Don't think inclusion doesn't apply to us. Inclusion means we are lumped in with the WASPs so strategically antisemitism doesn't exist anymore and, by the way, when Progressives tell us that Israel is a Colonial State that has to except the reality of a Palestinian State in its present borders, well that's just a legitimate political criticism of Zionism (read Racism). I think you get my drift.

DEEP STATE

When Diefenbaker became Prime Minister he didn't trust the civil service. It had only been under Liberal rule since 1935. His suspicions were well founded when the Governor of the Bank

of Canada pursued a restrictive monetary policy which worked against Diefenbaker's' Keynesian policies to get Canada out of its economic depression.

Bureaucracies, whether in government or in not-for-profits, are self-interested dragons that need, to keep the religious theme going a bit longer, a St. George to come along and subdue them. Management at the Society is no different.

I know the Slate reduced your fees but the Slate didn't reduce expenditures. The Society is facing a deficit. One would not know that from looking at the budget. Members of the Slate have been asking Management how much actually goes out the door of Osgoode but we haven't got an answer. The fee reductions resulted from the fact that there were historic surpluses that were being used to feed the beast.

In the meantime, there is a committee that is looking at cutting costs. I can't go too much into what we are looking at cutting and there is not unanimity on that either.

COMPENSATION FUND

I can tell you about one fiscal issue that was discovered and is now the subject of a row at this moment.

Many of you are aware that there is a compensation fund from which members of the public are refunded in situations where their lawyer has been found of misconduct, e.g., theft or fraud. It's what your levies (as opposed to your fees) go toward.

Since the late 90s the Society has been taking money from the compensation fund to cover increases in its expenditures and telling you that your levies have to be increased because the fund is down, instead of being transparent and just telling you that your fees have to go up because they are spending too much.

Management told the Slate that this practice stopped two years ago so there is no longer a problem. I don't want to go into details at the moment, but the Slate wants to pass a motion that says something to the effect that this practice has to stop. Indeed, ten Slate members signed a Motion to call for a Special Convocation (the By-laws require ten people to call for a Special Convocation) to do just that because we were told that if we tried to raise the problem at the November 29th Convocation, the Treasurer would remove the Compensation Fund Report from the Agenda.

I am not sure when this Special Convocation will be called. There are on-going discussions happening. I want to be clear that I, and I can speak for the Slate on this, am not interested in blaming anyone. We just want it to stop.

PLAYING BY THE RULES

In the limited time that I have been a Bencher I can see that little to nothing is going to be accomplished by playing by the rules. The Rules favour the status quo. Discussion, generally, takes place behind closed doors within committees and Convocation generally approves consent agendas. There are not enough Slate members so we do not have a majority on any particular committee.

I am in favour of bringing motions directly to Convocation. Not all my Slate members agree on this course of action. Some still see utility in the process. The theory is that the Slate can win a vote if we can convince the lay benchers to vote with us so we don't want to anger them by not playing by the rules.

I think there are many good lay benchers. But I am not for currying their favour. They will either vote with us in principle, or they will not. The reality is that many of them have been instilled with this fear that the government of the day is going to take away self-regulation. Indeed, there is one lay bencher who is always raising the specter of losing self-regulation at any suggestion such that only the status quo can be tolerated which if anything is the surest way to lose the respect of the profession.

SELF REGULATION

It seems to me the only people who continually talk about, and write about, the potential of the profession to lose self-regulation are those people who lost in the Bencher election or those people who support DIE initiatives. No one else.

I can't imagine why any government would want the headache of regulating the profession, particularly when it is so fractious right now. But common sense is never common, nor are people sensible.

That is enough of my ramblings for now.

Treasurer's Supplementary Report under section 54 of the Bencher Code of Conduct

After I had completed and signed my Report to Convocation, Mr. Goldstein raised a new issue. Specifically, he wrote on May 20, 2020 stating that:

> You cannot make a neutral unbiased decision about my matter because I have lodged a complaint against you that is still outstanding.
>
> In these circumstances, the next treasurer should also deal with your complaint against me.

For the reasons that follow, I decline to recuse myself.

The Current Context

I first wrote Mr. Goldstein pursuant to the Bencher Code of Conduct (the "Code") on January 13, 2020. After considering Mr. Goldstein's response, I provided Mr. Goldstein on April 14, 2020 with my then preliminary conclusions.

On April 30, 2020, Mr. Goldstein responded. His response included new issues and identification of two benchers as sources of information. After inquiring of these two benchers, I invited Mr. Goldstein to provide any further comment that he wished to make as a result of the information obtained from them. He did not do so.

In his response of April 30, 2020, Mr. Goldstein alleged that I had breached the Code. He did not explain why he did so as part of an exchange regarding his compliance with the Code. In any event, I advised Mr. Goldstein on May 20, 2020 that I would refer his issue regarding my conduct to the next Treasurer who will be elected approximately one month now.

Mr. Goldstein responded immediately. He repeated two other matters which I have addressed in my report and also asked that I recuse myself as set out above.

Mr. Goldstein's "outstanding complaint against me"

On April 30, Mr. Goldstein alleged that I have breached the Code. His complaint is in respect of part of what I said in January 2019 that was included in a video regarding the work of the Challenges Faced by Racialized Lawyers Working Group.

Specifically, Mr. Goldstein alleged that I breached the Code by saying that:

> What we found was that people who described themselves as racialized about 40 per cent of them plus or minus were of the opinion that racialization affected, in a challenging way, their finding of work and their finding of positions and their advancements within positions within firms within their work places

Mr. Goldstein went on to say that:

> As Murray Klippenstein showed "[w]hen the Challenges Report says that 40% of racialized respondents answered "yes" to a question, there are no grounds to say that 40% of all racialized licensees felt that way. One can say that 447 racialized licensees felt that way (being 40% of racialized respondents).

> But one can, and should, also note that 447 licensees out of 11,617 racialized licensees felt that way. And one can, and should, also note that out of 11,617 racialized licensees who were asked the question, 11,170 either chose not to answer or did not answer yes."
>
> I suggest you made the above statement in the video knowing that it was false or were reckless about its truth.

As noted, I will provide my response to this allegation to the new Treasurer after the June election.

Applicable Legal Framework

As he puts it, Mr. Goldstein's claim is that I cannot a "neutral unbiased decision" about his matter because he has lodged a complaint against me. Mr. Goldstein's claim is a bald allegation of bias in that he does not elaborate his claim nor does he refer to any jurisprudence.

As said in my Report, Canadian law requires that adjudication of a matter be approached with an open mind. Bias connotes a predisposition to decide a matter in a certain way that does not leave the judicial mind open and impartial (*Wewaykum Indian Band v. Canada*., 2003 SCC 45 at para. 58). A reasonable apprehension of bias exists where an informed person, viewing the matter realistically and practically, and having thought the matter through, would think it is more likely than that the decision-maker, whether unconsciously or consciously, would not decide the matter fairly. *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394. Recusal does not require that actual bias be found. A reasonable apprehension of bias is sufficient.

Mr. Goldstein's position is that the Treasurer cannot exercise the responsibilities of the Treasurer under the Code where the subject bencher invokes the Code and alleges that the Treasurer has breached the Code.

There are a number of cases which have addressed whether a reasonable apprehension of bias exists because a complaint has been made against an adjudicator.

In *Cosentino v. Dominaco Developments Inc.*, 2018 ONSC 4092, RSJ Daley declined to recuse himself where a complaint had been made against him, citing with approval decisions of the Nova Scotia Court of Appeal and of Justice Corbett of the Ontario Superior Court of Justice as follows:

> [44] In its decision *in Doncaster v. Chignecto – Central Regional School Board*, 2013 NSCA 59, the Nova Scotia Court of Appeal made the following observation at para 13: "Obviously the mere filing of a complaint with the Canadian Judicial Council does not pull the trigger for recusal".
>
> [45] Corbett, J. in *Peoples Trust Company v. Atas*, 2018 ONSC 58 came to similar conclusions and stated at para 172: "…a litigant does not get to select her judge or decide that a certain judge will not preside in her matter" and "the fact of the complaint to the Canadian Judicial Council [is not a basis] for recusal."

As Justice Corbett also said in *Peoples Trust* at para. 172:

> [182] … That is, no inference is drawn that a judicial officer will treat a litigant unfairly or in a biased manner because she has objected to his conduct. It cannot be otherwise, as a matter of policy; otherwise a litigant could avoid a judge simply by making complaints or objections.

In *S.B v. J.M.*, 2019 ONSC 6128, Justice Fryer said (in the context of a motion to disqualify counsel) that:

> [78] I note that a complaint to the Canadian Judicial Council is not grounds for recusal of a judge: *Cosentino v. Dominaco Developments Inc*., 2018 ONSC 4092, [2018] O.J. No. 3620 at paras. 44-45 and see also *Peoples Trust Co. v. Atas*, 2018 ONSC 58, [2018] O.J. No. 7 (SCJ). It would be setting a dangerous precedent and opening the door to mischief to find that simply filing a Law Society complaint could ground the disqualification of the opposing counsel.

The Saskatchewan Court of Appeal recently addressed this issue in *Ayers v Miller*, 2019 SKCA 2, concluding:

> [35] The logic of the Chambers judge's reasons is unassailable. A complaint to the Canadian Judicial Council cannot result in an automatic and successful recusal application. It is for the judge to determine, based on a review of all of the relevant evidence, and applying the applicable jurisprudence, whether he or she can continue to judge impartially notwithstanding the complaint to the Canadian Judicial Council.

The New Brunswick Court of Appeal considered the effect of complaints against a judge in *Murray v New Brunswick Police Commissio*n, 2012 CanLII 34210 at para. 9, stating:

> … this is not the first time this Court has seen an appeal record which discloses that one party has unsuccessfully sought the recusal of a judge of the Court of Queen's Bench and has filed a formal complaint with the Canadian Judicial Council with a view to ensuring that the judge is disqualified from sitting on all future matters in which the complainant is a party. In plain language, this tactical maneuver is called "judge shopping" and is not to be tolerated by any judge of any court in this Province.

The Quebec Court of Appeal addressed this issue in *P.S.-M v. A.J.-L.C. (1993)*, 101 D.L.R. 345 (Que. C.A.), as quoted in *Allain Sales & Services Ltd. v. Guardian Insurance Co. of Canada* (1996), 180 NBR (2d) 33), Delisle J.A. stated that:

> This court is not prepared to accredit the principle that any professional ethics complaint concerning a judge necessarily entails his withdrawal from the case; otherwise, it is not hard to imagine the dishonest manoeuvres of a party wishing to paralyse the proceedings or trying to avoid a decision that he anticipates will be unfavourable to him.
>
> …
>
> Being thus informed, I am of the opinion that the 'right-minded' person, the one who is to experience the 'reasonable' apprehension of bias, would conclude that the mere presence of complaints filed with the Canadian Judicial Council by the respondent and his psychologist expert is not sufficient to justify a request for disqualification in this case.

The Superior Courts in Manitoba and Nova Scotia have recently considered the legal framework for cases such as these. *In Littler v. Howie*, 2013 NSSC 84, Justice Forgeron said that:

> [19] Complaints to the Judicial Council do not automatically result in a finding of bias or a reasonable apprehension of bias: *Murray v. New Brunswick Police Commission*, 389 N.B.R. (2d) 372; *McElheran v. Canada*, 2006 ABCA 161; *Allain Sales & Services Ltd. v. Guardian Insurance Co. of Canada*, (1996) 1996 CanLII 12052 (NB QB), 180 N.B.R. (2d) 338; and *Suresh v. Canada (Minister of Citizenship & Immigration)*, 2000 CanLII 15604 (FCA), 2000 258 N.R. 119 F.C.A. Public policy and administration of justice concerns dictate that a litigant should not succeed in a recusal motion for reasons that he/she manufactured.

In *Kamer v. Ptashnik*, 2013 MBQB 183, Justice Yard said that:

> [58] A litigant's complaints to the Canadian Judicial Council do not without more lead to a determination of bias or reasonable apprehension of bias: *Murray v. New Brunswick Police Commission*, [2012] N.B.J. No. 211, 389 NBR (2d) 372; *McElheran v. Canada*, 2006 ABCA 161, [2006] A.J. No. 709; *Allain Sales and Services Ltd. v. Guardian Insurance Co. of Canada*, 1996 CanLII 12052 (NB QB), [1996] N.B.J. No. 346, 180 NBR (2d) 338; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1108 (2000); *Littler v. Howie*, 2013 NSSC 84, [2013] N.S.J. No. 141.

Similarly, the Human Rights Tribunal of Ontario observed in *LeClair v. Deplaedt Enterprises Limited*, 2014 HRTO 595 that:

> [10] The applicant first takes the position that I was unable to make a decision regarding his Application, as the applicant had filed a complaint about me on October 24, 2013. No authority is cited by the applicant to support this proposition. I am well aware of the legal principles relating to reasonable apprehension of bias, but the mere filing of a complaint against an adjudicator does not in and of itself create a reasonable apprehension of bias. Otherwise, any party to a proceeding could derail a potentially adverse decision simply by making a complaint about the adjudicator. There must be some reasonable and objective basis upon which to conclude that the filing of the complaint created a reasonable apprehension of bias. No such reasonable or objective basis for such a conclusion exists here.

I conclude that the fact of a complaint against the Treasurer under the Code by a subject bencher does not disqualify the Treasurer from exercising his or her responsibilities under the Code. To paraphrase Justice Corbett in *Peoples Trust*, it cannot be otherwise, as a matter of policy; otherwise a bencher could avoid a decision under the Code by the Treasurer simply by making a complaint against the Treasurer.

Nevertheless, I am required to determine, based on a review of all of the relevant evidence, and applying the applicable jurisprudence, whether I can exercise the responsibilities of the Treasurer under the Code in his matter impartially notwithstanding Mr. Goldstein's complaint.

Analysis and Conclusion

Looking at the particular facts of this matter but without the assistance of submissions in this regard, I note particularly that:

- I made the impugned remarks in January 2019 which were included in a Law Society video.

- The impugned remarks relate to a survey conducted in 2013 which was part of the work of the *Challenges for Racialized Licensees Working Group* (the "Working Group").

- Mr. Goldstein's complaint is that I ought to have qualified my description of the survey results and that failing to do so breaches the Code.

- Prior to the 2019 bencher election, Convocation adopted the recommendations of the Working Group. A slate of candidates successfully ran for election on a campaign against the Statement of Principles ("SOP") recommendation. Since the 2019 bencher election, the SOP Recommendation was revoked after lengthy debate. A new and different requirement was adopted.

- Mr. Goldstein and some others from the slate have taken the position that there were problems with the survey.

- While Mr. Goldstein is entitled to his view as to whether I should have qualified my remarks about the survey as he thinks I ought to have done, the nature of his complaint is not such that it is difficult to be dispassionate in this matter.

- The nature of Mr. Goldstein's complaint is somewhat similar to the subject matter of the matter that I am deciding in that what is in issue is publically making statements of fact. However, the nature and context of the statements are different. This does not seem to me to potentially give rise to bias against Mr. Goldstein in this matter.

- The timing of the complaint and its inclusion in response to my providing tentative conclusions to Mr. Goldstein for his comment is suggestive that the complaint was made for tactical reasons relating to this matter. Mr. Goldstein has not raised this issue in a timely manner.

- The Treasurer is elected by Convocation as the president and head of the Law Society. The role and responsibilities of the Treasurer in the Law Society and under the Code are serious matters, not to be taken lightly. The Treasurer must strive for effective and ethical governance.

The question to be considered and answered is: Would an informed person, viewing the matter realistically and practically, and having thought the matter through, think it is more likely than not that the decision-maker, whether unconsciously or consciously, would not decide the matter fairly? As Justice Kimmel recently stated in *Rogerson v. Havergal*, 2020 ONSC 2164

> [31] The "informed" person considering the bias must be an objectively reasonable person, and the apprehension of bias must be objectively reasonable. A reasonable person is one who has knowledge of all of the relevant circumstances, including knowledge of the judicial process and the nature of judging. See *Duca Financial Services Credit Union Ltd. v. Smith*, 2016 ONSC 6289, at para. 18.

> [32] The inquiry is fact specific. A judge may be recused where there is actual bias or a reasonable apprehension of bias. See *Wewaykum Indian Band v. Canada.*, 2003 SCC 45 (CanLII), [2003] 2 S.C.R. 259, at paras. 60 and 77. Bias connotes a predisposition to decide a matter in a certain way that does not leave the judicial mind open and impartial (*Wewaykum*, at para. 58). The moving party must establish that the judge suffers from "a condition or state of mind which sways judgement and renders the judicial officer unable to exercise his or her functions impartially in a particular case." See *R. v. S (R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para. 106.

If I conclude that I could not in fact fulfill my responsibilities under the Code with an open mind and impartially because of Mr. Goldstein's complaint then I should and would recuse myself for actual bias. But that is not my conclusion.

If I conclude that there is a reasonable apprehension of bias as described, I am required to recuse myself. But that is not my conclusion either. There is nothing about this complaint that makes it any different from the numerous other cases in which a complaint against a decision maker has been found not to create a reasonable apprehension of bias. In my opinion, an informed person, viewing the matter realistically and practically, and having thought the matter through, would not think it is more likely than not that I, whether unconsciously or consciously, would not decide the matter fairly as a result of Mr. Goldstein's complaint alleging I should have qualified remarks that I made in a 2019 video.

I decline to recuse myself.

May 22, 2020