Law Society of Ontario | Barreau de l'Ontario

Tab 5

Tribunal Committee

For Decision

October 26, 2023

Committee Members:

Rebecca Durcan (Chair)
Catherine Banning (Vice-Chair)
Malcolm M. Mercer (*ex officio*)
Peter Wardle (*ex officio*)
Ryan Alford
Paula Callaghan
Neha Chugh
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1. Public Access and Tribunal Openness

Motion

That Convocation approve the proposed English and French amendments to Rule 13 of the Law Society Tribunal Rules of Practice and Procedure, effective December 1, 2023, as set out at TAB 5.1 (English) and TAB 5.2 (Français) and approve the corresponding new form TAB 5.3 (English) and TAB 5.4 (Français).

Executive Summary

The Tribunal Committee unanimously asks Convocation to approve the proposed amendments Law Society Tribunal *Rules of Practice and Procedure*, to be effective December 1, 2023.

Rule 13 of the Tribunal's *Rules of Practice and Procedure* address the record of proceeding, transparency and public access. Adhering to the open court principle, open hearings are the default. But there are circumstances where another important public interest can require a limitation on openness.

Committee Process

The Committee met on October 12, 2023 and approved the proposed amendments to Rule 13.

Committee members Rebecca Durcan (Chair), Catherine Banning (Vice-Chair), Malcolm M. Mercer (*ex officio*), Peter Wardle (*ex officio*), Neha Chugh, Jasminka Kalajdzic and Murray Klippenstein attended on October 12, 2023. Staff members Celia Lieu, Cynthia Pay and Lisa Mallia also attended.

Prior to consideration by the Tribunal Committee, a draft of the proposed amendments was reviewed with the Chair's Practice Roundtable.

Background and Discussion

Attached at **Tab 5.5** is the practice direction on public access to hearings and materials. This is supplied to provide an overview of the Tribunal's approach to public access.

Tribunal proceedings, except for pre-hearing conferences, are open to the public unless a panel orders otherwise. The record of proceeding is similarly available for review by anyone, except for any documents that have been ordered not public. Rule 13 sets out what documents are available to the public as part of the record.

Rule 13 also reflects the constitutional protection of openness articulated in *Sherman Estate v. Donovan*, 2021 SCC 25 and the Tribunal's jurisprudence, predominantly from the *Xynnis* decision, 2014 ONLSAP 9. It is common that limitations on openness are sought under Rule 13.

However, there is no provision in the current rule for public notification that an order is being sought that would restrict public access in some way. In contrast, the Superior Court of Justice requires notice to the media of motions seeking publication bans in ss. 155 to 160 of the *Consolidated Civil Provincial Practice Direction* and Part D of the *Consolidated Provincial Practice Direction for Criminal Proceedings*. Similarly, notice to the media is required by s. 2.2.9 of the *Rules of Procedure* of the Ontario Physicians and Surgeons Discipline Tribunal.

Accordingly, the proposed amendment to the *Rules of Practice and Procedure* requires notice to the media, through a Notice of Request form, of motions for orders limiting openness.

However, notice to the media would not be required for orders limiting openness in order to protect solicitor-client privilege and/or client confidentiality. This limitation reflects the necessity, and routine nature, of protecting these public interests in regulatory proceedings involving lawyers and paralegals.

A further amendment is also proposed to address access to documents that have been filed with the Tribunal where an order under Rule 13.3 has been sought but a panel has not yet made a decision.

2. Failure to Co-operate Applications

Motion

That Convocation approve the proposed English and French amendment to the definition of "failure to co-operate proceeding" in Rule 2 of the Law Society Tribunal Rules of Practice and Procedure, effective immediately, as set out at TAB 5.6 (English) and TAB 5.7 (Français).

Executive Summary

The Tribunal Committee asks Convocation to approve the proposed amendments Law Society Tribunal *Rules of Practice and Procedure*, to be effective immediately.

Rule 21 of the Tribunal's Rules of Practice and Procedure was approved by Convocation in early 2022. When the Rule was introduced, it was limited in application to failures to co-operate with conduct investigations under the Act. After the first year, it has become evident that there are two other types of failures to co-operate which are much less common but for which the same procedural approach is appropriate. The proposed amendment would encompass these failures to co-operate.

Committee Process

The Committee met on October 12, 2023 and approved the proposed amendments to Rule 13.

Committee members Rebecca Durcan (Chair), Catherine Banning (Vice-Chair), Malcolm M. Mercer (*ex officio*), Peter Wardle (*ex officio*), Neha Chugh, Jasminka Kalajdzic and Murray Klippenstein attended on October 12, 2023. Staff members Celia Lieu, Cynthia Pay and Lisa Mallia also attended.

Prior to consideration by the Tribunal Committee, a draft of the proposed amendment was reviewed with the Chair's Practice Roundtable.

Background and Discussion

The *Rules of Practice and Procedure* were amended in 2022 to provide for a streamlined process for dealing with allegations of 'failure to co-operate' with Law Society investigations.

Effective professional regulation requires prompt and complete responses to investigative inquiries. As Associate Chief Justice Fairburn put it in *Law Society of Ontario v. Diamond*, 2021 ONCA 255 at para. 67:

> [the duty to co-operate] requires nothing more than prompt and complete responses when requested, which are essential to moving investigations forward. Delays in doing so can only serve to shake the public's confidence in the Law Society's self-regulatory authority…
>
> [citations omitted]

The test for failure to co-operate was articulated by the Associate Chief Justice *Diamond* at para. 50:

- all of the circumstances must be taken into account in determining whether a licensee has acted responsibly and in good faith to respond promptly and completely to the Law Society's inquiries;
- good faith requires the licensee to be honest, open, and helpful to the Law Society;
- good faith is more than an absence of bad faith;

As set out in Rule 21, the Tribunal's new procedure reflects the relatively straightforward nature of most failure to co-operate applications, the desirability of moving investigations forward and of avoiding unnecessary expense for practitioners and the professions and the need to ensure that the procedures adopted are appropriate in the circumstances.

At the same time that Rule 21 was adopted, the Tribunal and the Law Society worked together to put duty counsel assistance in place for licensees who imminently face failure to co-operate conduct applications in order to assist licensees in better understanding their professional obligations and to assist in diversion, where appropriate, for mental health and other reasons.

It appears that the adoption of this duty counsel program and the adoption of Rule 21 may have reduced the number of failure to co-operate applications and has focused resources on applications where there are actually issues to be resolved.

After the first year, it has become evident that there are two other types of failures to co-operate which are much less common but for which the same procedural approach is appropriate.

The following proposed amendment will expand the definition of "failure to co-operate application" and thereby expand the application of Rule 21:

> … means a summary hearing in which the notice of application alleges one or more failure(s) to respond promptly and completely to ~~investigative~~ requests ~~only~~ made pursuant to any of sections 42(2), 49.2(2) and 49.3(2) of the *Law Society* Act but not other misconduct;

The current definition "to investigative requests only" is linked to s. 49.3(2) of the Act:

> *Investigations*
> *Conduct*
>
> **49.3** (1) The Society may conduct an investigation into a licensee's conduct if the Society receives information suggesting that the licensee may have engaged in professional misconduct or conduct unbecoming a licensee.
>
> *Powers*
>
> (2) If an employee of the Society holding an office prescribed by the by-laws for the purpose of this section has a reasonable suspicion that a licensee being investigated under subsection (1) may have engaged in professional misconduct or conduct unbecoming a licensee, the person conducting the investigation may,
>
> (a) enter the current or former business premises of the licensee between the hours of 9 a.m. and 5 p.m. from Monday to Friday or at such other time as may be agreed to by the licensee or, in the case of a former business premises, by a person with the authority to allow entry into the premises;
>
> (b) require the production of and examine any documents that relate to the matters under investigation, including client files; and
>
> (c) require the licensee and people who work or worked with the licensee to provide information that relates to the matters under investigation.

Section 49.2(2) of the Act mirrors the above provisions but in regards to a financial audit.

Audit of financial records

49.2 (1) The Society may conduct an audit of the financial records of a licensee or group of licensees for the purpose of determining whether the financial records comply with the requirements of the by-laws.

Powers

(2) A person conducting an audit under this section may,

(a) enter the current or former business premises of the licensee or group of licensees between the hours of 9 a.m. and 5 p.m. from Monday to Friday or at such other time as may be agreed to by the licensee or by any licensee in the group of licensees or, in the case of a former business premises, by a person with the authority to allow entry into the premises;

(b) require the production of and examine the financial records maintained in connection with the professional business of the licensee or group of licensees and, for the purpose of understanding or substantiating those records, require the production of and examine any other documents in the possession or control of the licensee or group of licensees, including client files; and

(c) require the licensee or group of licensees, and people who work or worked with the licensee or group of licensees, to provide information to explain the financial records and other documents examined under clause (b) and the transactions recorded in those financial records and other documents.

Similarly, s. 42(2) makes the same provisions in the context of a professional competence review:

Review: professional competence

42 (1) The Society may conduct a review of a licensee's professional business in accordance with the by-laws for the purpose of determining if the licensee is failing or has failed to meet standards of professional competence, if,

(a) the circumstances prescribed by the by-laws exist; or

(b) the licensee is required by an order under section 35 to co-operate in a review under this section.

Powers

(2) A person conducting a review under this section may,

(a) enter the current or former business premises of the licensee between the hours of 9 a.m. and 5 p.m. from Monday to Friday or at such other time as may be agreed to by the licensee or, in the case of a former business premises, by a person with the authority to allow entry into the premises;

(b) require the production of and examine documents that relate to the matters under review, including client files, and examine systems and procedures of the licensee's professional business; and

(c) require the licensee and people who work or worked with the licensee to provide information that relates to the matters under review.

Consequently, pursuant to s. 2(1)-(1)(viii) of O. Reg. 167/07 the Tribunal Chair can assign a single adjudicator to determine the merits of an application that includes failure to co-operate "with a person conducting an audit, investigation, review, search or seizure under Part II of the Act." This proposed amendment is a natural next-step expansion following the current successful implementation of Rule 21.

Departing from openness

13.3 (1) The Tribunal may make a not public order, non-disclosure order or publication ban only if:

(a) openness poses a serious risk to an important public interest,

(b) the order is necessary to prevent this risk because reasonable alternative measure will not be effective; and

(c) the benefits of the order will outweigh its negative effects.

(2) If a not public order, non-disclosure order or publication ban is necessary, the Tribunal shall make the order that affects openness the least while achieving the objective.

(3) If there is a request for a not public order, non-disclosure order or publication ban relating to documents filed with the Tribunal, the Tribunal will hold the documents as not public until a panel has made a decision regarding the request.

(4) Unless otherwise directed by the Tribunal and subject to subsection (5) of this rule, a person requesting a not public order, non-disclosure order or publication ban shall give notice to the media of a request for a not public order, non-disclosure order or publication ban as follows:

(a) The requesting person must serve on all parties and file a completed “Notice of Request for Publication Ban or Other Departure from Openness” form available on the Tribunal’s website.
(b) This form must be filed at least seven days before the hearing of the request for a not public order, non-disclosure order or publication ban.
(c) The information on the form will be distributed electronically by the Tribunal to members of the media who have subscribed to receive notice of all not public order, non-disclosure order and publication ban motions in the Tribunal.
(d) Any member of the media who wishes to receive copies of the forms filed under this section should submit a request to tribunal@lstribunal.ca.

(5) Notice to the media is not required where a not public order, non-disclosure order or publication ban is requested only on basis that openness poses a serious risk to:

(a) solicitor-client privilege; and/or
(b) lawyer/paralegal-client confidentiality.

Dérogation au principe de publicité

13.3 (1) Le Tribunal peut rendre une ordonnance interdisant l'accès au public, une ordonnance de non-divulgation ou une interdiction de publication seulement dans les cas suivants :

a) la publicité pose un risque sérieux à un intérêt public important ;
b) l'ordonnance est nécessaire pour écarter ce risque parce que d'autres mesures raisonnables ne seront pas suffisantes ;
c) les effets bénéfiques de l'ordonnance sont plus importants que ses effets préjudiciables.

(2) Si une ordonnance interdisant l'accès au public, une ordonnance de non-divulgation ou une interdiction de publication est nécessaire, le Tribunal rend l'ordonnance qui affecte le moins le principe de publicité tout en atteignant son objectif.

(3) Si une demande d'ordonnance interdisant l'accès au public, d'ordonnance de non-divulgation ou d'interdiction de publication se rapportant à des documents déposés auprès du Tribunal est présentée, le Tribunal considèrera les documents comme confidentiels tant qu'une formation n'aura pas rendu une décision concernant la demande.

(4) À moins d'une ordonnance contraire du Tribunal et sous réserve du paragraphe (5) de cette règle, la personne qui demande une ordonnance interdisant l'accès au public, une ordonnance de non-divulgation ou une interdiction de publication avisera les médias de la demande de la manière suivante :

a) la personne qui fait la demande doit déposer un formulaire d'« Avis de demande d'interdiction de publication ou de dérogation au principe de publicité » disponible sur le site Web du Tribunal, dument rempli et signifié à toutes les parties.

b) ce formulaire doit être déposé au moins sept jours avant l'audition de la demande d'ordonnance interdisant l'accès au public, d'ordonnance de non-divulgation ou d'interdiction de publication.

c) les renseignements contenus dans le formulaire seront diffusés par voie électronique par le Tribunal aux membres des médias qui se sont inscrits pour recevoir un avis de toutes les motions visant à obtenir une ordonnance interdisant l'accès au public, une ordonnance de non-divulgation et une interdiction de publication.

d) les membres des médias qui souhaitent recevoir des copies des formulaires déposés en application du présent paragraphe devraient envoyer une demande à tribunal@lstribunal.ca.

(5) Il n'est pas nécessaire d'adresser un avis aux médias lorsqu'une ordonnance interdisant l'accès au public, une ordonnance de non-divulgation ou une interdiction de publication est demandée seulement pour le motif que la publicité pose un risque sérieux :

a) au secret professionnel de l'avocat ;
b) à la confidentialité des communications entre l'avocat(e) ou le (la) parajuriste et son (sa) client(e).

FORM 42 - NOTICE OF REQUEST FOR PUBLICATION BAN OR OTHER DEPARTURE FROM OPENNESS

LAW SOCIETY TRIBUNAL
(HEARING/APPEAL) DIVISION

(Panelist(s))

(Date)

BETWEEN:

(name)
(*Applicant / Appellant*)

and

(name)
(*Respondent / Respondent in appeal*)

NOTICE OF REQUEST FOR PUBLICATION BAN OR OTHER DEPARTURE FROM OPENNESS

This form is to be completed and submitted by any participant requesting an order restricting openness under Rule 13.3 of the Rules of Procedure.

The form will be posted on the Tribunal's website, distributed electronically to members of the media and accessible by members of the public and the media. Unless the Tribunal directs otherwise, completion and posting of this form is considered notice to the media of the pending request for an order under Rule 13.3.

Requestor: (*Insert name*)

The requestor asks that the request be:

☐ heard at the hearing on (*insert date*).
(*Please file this form at least <u>three</u> days prior to the hearing date*)

☐ decided in writing at least seven days after the date this form is filed. Written submissions are filed with this form.

Order Requested:

(Set out the exact wording of the proposed order)

Date: (*insert date*)

(Requestor or requestor's representative)
(address)

(telephone)
(e-mail)

TO:

(*Insert names of other participants and their representatives, if applicable*)

FORMULAIRE 42 – AVIS DE DEMANDE D'ORDONNANCE RESTREIGNANT LA PUBLICITÉ

TRIBUNAL DU BARREAU
SECTION (DE PREMIÈRE INSTANCE/D'APPEL)

(Membre(s) de la formation)

(Date)

ENTRE :

(nom)
(*demandeur(resse)/appelant(e)*)

et

(nom)
(*intimé(e)/intimé(e) en appel*)

AVIS DE DEMANDE D'INTERDICTION DE PUBLICATION OU DE DÉROGATION AU PRINCIPE DE PUBLICITÉ

Le présent formulaire doit être rempli et présenté par le participant qui demande une ordonnance restreignant la publicité en application de la règle 13.3 des Règles de procédure.

Le formulaire sera affiché sur le site Web du Tribunal, diffusé par voie électronique aux membres des médias et accessible aux membres du public et des médias. Sauf directive contraire du Tribunal, le présent formulaire rempli et affiché vaut avis aux médias de la demande d'ordonnance en instance au titre de la règle 13.3.

Demandeur : (*inscrire le nom*)

Le demandeur souhaite que sa demande soit :

☐ entendue à l'audience le (*inscrire la date*).
(*Veuillez déposer le présent formulaire au moins <u>trois</u> jours avant la date de l'audience*)

☐ jugée sur dossier au moins sept jours après la date de dépôt du présent formulaire. Les observations écrites sont déposées avec le formulaire.

Ordonnance demandée :

(Énoncer le libellé exact de l'ordonnance proposée)

Date : (*inscrire la date*)

(Demandeur ou représentant du demandeur)
(adresse)

(téléphone)
(courriel)

À L'INTENTION DE :

(*Inscrire les noms des autres participants et de leurs représentants, s'il y a lieu*)

Law Society Tribunal
Tribunal du Barreau

PRACTICE DIRECTION ON PUBLIC ACCESS TO HEARINGS AND TO TRIBUNAL FILES

Introduction

The Tribunal processes, hears and decides regulatory cases about Ontario lawyers and paralegals in a manner that is fair, just, and in the public interest. The Tribunal applies the open court principle and proceedings are presumed to be open and accessible to the public, including the media. Transparency is a core value of the Tribunal and decisions, rules, processes and policies are available to licensees and the public.

This practice direction refers to cases; please note that there may be other or new cases that also apply.

Open Tribunal

Tribunal proceedings, except for pre-hearing conferences, are open to the public unless there is an order otherwise. Tribunal files may be reviewed by anyone, except for documents that have been ordered to be not public: Rule 13.2.

Attending a hearing

Information about all merits hearings is posted on the Tribunal's website 90 days before the hearing, or less if the hearing is to be held within 90 days of being scheduled. The Tribunal's Communications Coordinator sends a weekly "proceeding update" by e-mail that includes a list of the next week's scheduled hearings. There is a sign-up box for this e-mail on the Tribunal's homepage.

The Tribunal has prepared a Guide to Attending a Hearing, available on the Tribunal's website at https://lawsocietytribunal.ca/wp-content/uploads/2019/12/EN-Guide-for-Attending-a-Hearing.pdf.

Most in-person hearings are held at the Tribunal's offices at 375 University Ave, Suite 402, in Toronto. Some are held at different locations across the province. Hearings also take place using videoconferencing, notably Zoom. Members of the public and the media can attend electronic hearings by contacting the Tribunal Office. Observers can connect to a Zoom hearing using a computer, mobile device or telephone.

Accessing the Tribunal file

The Tribunal keeps a copy of all documents that are filed in a proceeding or are received by the panel. Any member of the public may ask to review any of the public documents in a Tribunal file. Rule 13.1 of the *Rules of Practice and Procedure* sets out what documents are available to the public. They include:

- materials filed with the Tribunal;
- exhibits;
- other documents and correspondence from a party reviewed by a panel, except for the purpose of a pre-hearing conference;

- notices of hearing, endorsements, orders, and reasons of the Tribunal;
- transcripts filed with the Tribunal.

Information about how to request access to materials from active and closed files is on the Tribunal website: http://lsotribunal.wpengine.com/accessing-closed-tribunal-files/.

Not public orders, non-disclosure orders and publication bans

It is a basic principle of Canadian law that proceedings of courts and administrative tribunals should be open to the public, with the ability to be publicized and reported upon. The right to publish information about proceedings falls within the right to freedom of expression guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*. Tribunal proceedings must be transparent so that members of the public and of the legal professions are aware of and can have confidence in the impartial and fair resolution of issues that come before the Tribunal.

However, the Tribunal may sometimes depart from openness by making an order that an appearance, or documents that would otherwise form part of the public record, be not public, not disclosed or subject to a publication ban.

When a participant asks that there be a not public order, non-disclosure order or publication ban, the panel must determine whether three conditions have been satisfied before making an order:

- openness poses a serious risk to an important public interest
- the order is necessary to prevent this risk because reasonable alternative measures will not prevent the risk
- the benefits of the order will outweigh its negative effects

The courts have identified several important public interests that can be used to justify limits on openness, namely hearing fairness, the proper administration of justice, a general commercial interest in preserving confidential information, anonymity of young offenders to encourage rehabilitation and the protection of human dignity. *Sherman Estate v. Donovan*, 2021 SCC 25.

It is important to recognize that an important public interest must be engaged. While new important public interests may be recognized, panels will take care before doing so. Mere private interests are not enough. An order is not justified merely on the basis of a desire to avoid publicity, embarrassment, or exposure of personal information about the licensee or licence applicant.

As there is existing jurisprudence identifying the important public interests that apply, the panel will usually focus on whether the order is necessary to prevent serious risk of harm, whether other reasonable measures can avoid the serious risk of harm, and whether the benefits of the order outweigh its negative effects. In this context, the Tribunal takes seriously the importance of openness in maintaining independence and impartiality, public confidence in and understanding of its work and the legitimacy of the Tribunal's processes.

Privileged, or possibly privileged, documents are automatically not public: Rule 13.6. So are children's identities, and the identities of persons who allege sexual assault or misconduct, unless they are an adult and request otherwise: Rule 13.5.

Specific considerations are set out in Rule 13.4 regarding departures from openness in capacity proceedings recognizing that there may be special privacy considerations when an individual's health is the main issue in the proceeding.

Where the hearing or documents are subject to a not public order

When an oral appearance is not public, no one other than the licensee or licence applicant and the parties' representatives may attend or order or review the transcript. Witnesses may view the transcript of their own testimony: Rule 13.7(2). Members of the public will be asked to leave the hearing for the portion of the hearing that is being held in the absence of the public. Not public documents will not be provided to any members of the public reviewing the file.

Where the hearing or documents are subject to a publication ban

When a publication ban has been made, the hearing and Tribunal file remain open to the public. Members of the public will not be asked to leave the hearing and anyone can order the transcript. No one may publish or broadcast in any way information or documents subject to the publication ban: Rule 13.9(2). A copy of the order is provided to any members of the public reviewing the file.

Where the hearing is subject to a non-disclosure order

A non-disclosure order is made when it is determined that information should not be public after it was referred to in an open hearing. A non-disclosure order prohibits anyone who was present from disclosing what was said, and the documents are treated in the same manner as not public documents: Rule 13.8.

Recordings and transcripts

Recording

No one, other than the reporting service hired by the Tribunal for that purpose, may take photographs or make a video or audio recording in the Tribunal premises or the hearing without leave. This includes taking a screenshot or making a video or audio recording of an electronic appearance: Rule 9.9. Recordings made by the reporting service are used to prepare the transcripts and as a result are considered internal working documents and are not available to the public pursuant to the terms of the contract between the Tribunal and the reporting service.

A party acting in person, a representative or a journalist may unobtrusively make an audio recording at a hearing for the sole purpose of supplementing or replacing their notes. Any individual who wishes to do so is required to advise the Tribunal by e-mail in advance of the hearing: Rule 9:10.

Transcripts

All oral appearances are recorded by a reporting service, except pre-hearing conferences. Any person, whether a party to the proceeding or not, may order a copy of the transcript from the reporting service at their own expense. The first party to order a transcript must also pay a fee for the Tribunal's electronic and hard copies. The Tribunal's copies are provided directly to the Tribunal by the reporting service: Rule 9.8. Links to the court reporting services used by the Tribunal are on the Tribunal's website: https://lawsocietytribunal.ca/useful-links/.

Hearing transcripts, if contained in the Tribunal file, can be viewed by any person reviewing a file. Transcripts cannot be copied or photographed.

Rule 2: Application and Definitions

Definitions

2.3…

“failure to co-operate application” means a summary hearing in which the notice of application alleges one or more failure(s) to respond promptly and completely to requests made pursuant to any of sections 42(2), 49.2(2) and 49.3(2) of the *Law Society* Act but not other misconduct;

Règle 2: Champ d’application et definitions

Définitions

2.3…

« requête pour défaut de coopérer » S’entend d’une audience sommaire donnant suite à un avis de requête alléguant un ou plusieurs défauts de répondre rapidement et complètement aux demandes faites en application des paragraphes 42 (2), 49.2 (2) et 49.3 (2) de la *Loi sur le Barreau*, mais ne mentionnant aucun autre manquement;