



The Good Character Inquiry and Dispositions of Discharge

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ONTARIO
BAR ASSOCIATION
A Branch of the
Canadian Bar Association

L'ASSOCIATION DU
BARREAU DE L'ONTARIO
Une division de l'Association
du Barreau canadien



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Introduction

The Ontario Bar Association (“OBA”) is pleased to take this opportunity to comment on the good character evaluation process for applicants to the bar, and in particular that part of the inquiry relating to an applicant’s criminal history and past dispositions of discharge.

Established in 1907, the OBA is the largest voluntary legal association in Ontario and represents 16,000 lawyers, judges, law professors and law students. OBA members are on the frontlines of our justice system in no fewer than 40 different sectors and in every region of the province. In addition to providing legal education for its members, the OBA is pleased to assist government, the Law Society, and other decision-makers with dozens of policy initiatives each year – in the interests of the public, the profession, and the administration of justice.

Background

The legal profession is currently engaged in a critically important examination of barriers to entry and advancement faced by lawyers and lawyer applicants, particularly as experienced by racialized and Indigenous individuals. Some of this work – including evidence from licensees that racial and ethnic barriers rank highly among the barriers to entry and advancement in the profession – has inspired the Law Society’s renewed emphasis on the importance of equality, diversity, and inclusion initiatives, including through its Challenges Faced by Racialized Licensees Working Group.¹

At the same time, ongoing reconciliation efforts within the profession, informed by the Truth and Reconciliation Commission’s final report, seek to address unique issues faced by Indigenous peoples in Ontario, which includes their systemic estrangement from the criminal justice system.² Though the Working Group’s report did not speak to the experiences of Indigenous licensees, it did recognize that Indigenous peoples face barriers both unique to Indigenous licensees and shared by racialized and Indigenous licensees, highlighting the importance of addressing the ongoing colonial violence experienced by Indigenous communities.

At a time when the bar is actively grappling with how best to ensure that lawyers reflect and represent the diversity of the clients they serve, it is vital that the Law Society, as the regulator responsible for determining who may practice law, identify and eliminate any barriers that inherently act as disincentives to practice that are not in the public interest. This work is not only critical for the good health and future of our profession, but also for the Law Society to fulfill its duty to facilitate access to representative justice for the people of Ontario.

¹ Law Society of Upper Canada, Challenges Faced by Racialized Licensees Working Group, [Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions](#), p. 50.

² *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Ipeelee*, [2012] 1 S.C.R. 433.



The OBA has been proactive in supporting a range of equality, diversity, and inclusion initiatives to recognize and advance our profession's unique role in safeguarding the public interest. This work includes critically evaluating established mechanisms that govern the profession with a view to identifying potentially discriminatory barriers to admission.

In our view, the elements of the good character requirement require reevaluation in order to ensure that they reduce, rather than exacerbate, existing inequalities between applicants, and we would welcome a fulsome examination along these lines. In the meantime, to help facilitate this work, we have provided targeted comments below regarding the line of inquiry relating to criminal history and dispositions of discharge.

Our Comments

Public Protection and the Good Character Requirement

The requirement that every lawyer candidate be of “good character,” as set out in s. 27(2) of the *Law Society Act*, is a central component of the Law Society's statutory duty to protect the public interest. As indicated in Law Society materials on its web site:

Good character requirements form the basis of a licensing hearing and are part of the Law Society's mandate to protect the public, to maintain high ethical standards, to maintain public confidence in the legal profession and its ability to regulate itself, and to deal fairly with persons whose livelihood and reputation are affected.³

The good character evaluation provides the primary mechanism to assess whether applicants, at the time of licensing, have demonstrated behaviours judged relevant to the Regulator's inquiries and interests: respect for the rule of law and the administration of justice, honesty, governability, and financial responsibility.⁴ Some version of the good character analysis is broadly incorporated into the lawyer licensing process in every Canadian jurisdiction, as well as licensing processes for other self-regulated professions, though what constitutes “good character” varies depending on the context.

In examining the good character requirement, the Law Society has acknowledged that there is “little evidence that past misconduct is a meaningful predictor of future behavior, particularly as it relates to future professional misconduct.”⁵ Nevertheless, the assessment process is essential to the extent that it conveys to the bar and the public that the profession is held to certain standards and is,

³ Law Society of Ontario, [For the Record: The good character requirement](#).

⁴ Law Society of Upper Canada, [Submission to the Federal of Law Societies of Canada](#) (Consultation Report on Suitability to Practice Standard), Professional Regulation Committee Report to Convocation, November 21, 2013, Tab. 4.1, p. 6.

⁵ *Ibid.*, p. 3.



therefore, worthy of the public's trust.⁶ It is critical, however, that those standards are communicated and applied clearly, consistently, and transparently in order to promote predictability and fairness for applicants.

Criminal Discharges and Legislated Disclosure Limits

The good character examination includes, among other things, an inquiry into an applicant's criminal history. In particular, an applicant is asked whether he or she has "ever been found guilty of, or convicted of, any offence under any statute," excluding speeding and parking tickets. While other elements of the good character analysis could also benefit from closer scrutiny, in our view there is a need for the standard inquiry into findings of guilt to be further clarified and refined.

Absolute and conditional discharges, available under s. 730 of the *Criminal Code*, are relatively unique forms of sentence representing not a conviction but a "finding of guilt." An absolute discharge takes effect immediately and the accused is deemed not to have been convicted. A conditional discharge typically requires that the accused enter into a probation order for a period of time and becomes absolute when that time has expired.

In ordering an absolute or conditional discharge, the court must be satisfied that such a disposition is "in the best interests of the accused and not contrary to the public interest" (s. 730(1)). Therefore, in granting an absolute or conditional discharge, the judicial officer has found, as a statutory precondition, that such an order was not contrary to the public interest.

When imposed as an adult sentence, absolute and conditional discharges are caught by the Law Society's good character inquiry without temporal limitation. This approach is in contrast with the more nuanced approach taken with respect to findings of guilt and dispositions of discharges in the case of young offenders; for these matters, the Law Society has imported the legislated access timelines for youth criminal records as set out in the *Youth Criminal Justice Act*, specifically as they relate to dispositions of discharges.⁷

The approach also stands in contrast with choices of the federal and provincial governments to limit the disclosure of information regarding dispositions of discharge in the context of criminal record checks. The federal *Criminal Records Act*, for example, prohibits any record of a discharge from being disclosed

- (a) more than one year has elapsed since the offender was discharged absolutely; or

⁶ Canadian Bar Association, [Letter from CBA President](#) to the Federation of Law Societies of Canada re: National Suitability to Practice Standard Consultation Report, December 20, 2013.

⁷ [Completing the Lawyer Licensing Process Application](#).



(b) more than three years have elapsed since the offender was discharged on the conditions prescribed in a probation order (s. 6.1(1)).⁸

The *Criminal Records Act* further requires that all references to a discharge be removed from the RCMP's database when the relevant time period, as set out above, has expired (s. 6.1(2)).

The Ontario government has made the same choice with the passage of the *Police Record Checks Reform Act*, which is designed to remove unnecessary barriers to employment, education, and volunteer opportunities resulting from inappropriate disclosure of non-conviction and non-criminal records in police record checks.⁹ Per s. 2(1)(a), the Act applies to individuals who need to be screened, "including without limitation, for the purposes of determining his or her suitability for" employment, a licence, and membership in any body, among other reasons.

Upon proclamation, the *Police Record Checks Reform Act* will apply the one- and three-year disclosure timelines regarding absolute and conditional discharge records, respectively, for certain records checks, including vulnerable sector checks.¹⁰

It seems inevitable that an open-ended inquiry into discharge dispositions will have a disproportionate impact on certain groups of individuals. In particular, applicants from communities that historically have been, and currently are, overrepresented in the criminal justice system – including Indigenous and racialized communities – will be statistically more likely to answer in the affirmative to questions regarding criminal history and findings of guilt. While this harm is not exclusively visited upon any particular demographic, in our view it is important to give serious consideration to these perspectives in the current era of increased recognition of inherent barriers and subjective biases.

As the number of racialized and Indigenous lawyers practicing in Canada continues to grow to better reflect diversity within the bar and the judiciary, a more targeted inquiry into findings of guilt would help mitigate any disproportionate impact on opportunities to practice for certain groups of applicants, while also enhancing applicant understanding of their responsibilities and obligations.

⁸ A criminal record check under the *Criminal Records Act* may be sought for a variety of purposes, including employment, international travel, professional licensing, volunteer work, citizenship, name change, and student placements.

⁹ Ministry of Community Safety and Correctional Services, [News Release](#), December 1, 2015.

¹⁰ Vulnerable sector checks are performed for individuals "who would be in positions of trust or authority over persons who, because of their age, disability or other circumstances, are at a greater risk than the general population" (Ministry of Community Safety and Correctional Services, [Policing Services: Police Records Checks](#)).



First, the good character examination could explicitly adopt the same temporal limitations regarding the disclosure of findings of guilt as set out in the federal *Criminal Records Act* and provincial *Police Record Checks Reform Act* (when proclaimed) for vulnerable sector checks.

Second, prior to the start of the licensing process, additional guidance could be provided to applicants about past criminal conduct that will need to be disclosed (including clarification with respect to “findings of guilt,” a concept that may not be readily understood by applicants), as well as examples of the kinds of supporting documentation that applicants may need to provide in order to facilitate a determination about their good character. Currently, applicants are simply directed to indicate whether they have been “found guilty” of any offence, and to provide “supporting documentation” and “related documents.” Further proactive guidance from the Law Society would more clearly communicate the expectations of applicants and the benchmark that they will be required to meet, and would also facilitate the consistent treatment of applications.¹¹

Ultimately, both applicants and the Law Society have important obligations and roles to fulfill in the course of the licensing process in the interest of public protection. Proactive and clearly articulated guidance in this respect will promote greater transparency and predictability on all sides.

Summary of Recommendations

In our view, further refinement of the good character inquiry with respect to findings of guilt can be made in a way that fosters both public protection and trust in the profession, while reducing unnecessary and potentially discriminatory barriers for applicants. In particular, we propose the following:

1. Include the same temporal limitations, as set out in the federal *Criminal Records Act* and provincial *Police Record Checks Reform Act* (when proclaimed), for disclosures of findings of guilt where the disposition was an absolute or conditional discharge (see **Appendix** for proposed wording).
2. At the outset of the licensing process, in the [Completing the Lawyer Licensing Process Application](#) document or elsewhere, provide individuals with a clear explanation of the types of past criminal conduct that need to be disclosed, in particular relating to findings of

¹¹ An example from another self-regulating body is the College of Nurses of Ontario, which provides detailed public-facing information respecting disclosures of findings of guilt and the kinds of supporting information applicants may be asked to provide (College of Nurses of Ontario, [In Depth: Past Offences and Findings](#)). While this example is helpful to show how this information could be made proactively available, it may be less instructive for the Law Society regarding the kind of documentation that will be requested of applicants to the bar, particularly in light of the Law Society’s specific focus on equality, diversity, and inclusion in the legal profession. More importantly, we note that some supporting documents provide only limited factual information about a given event, rather than a complete record, and that applicants should also have an opportunity to provide a complete contextual picture, which can only occur with appropriate guidance from the Law Society.



guilt, as well as the types of supporting documentation that may need to be provided by applicants.

3. Enhance education and training for Law Society staff conducting preliminary reviews of licensing applications, as well as adjudicators, to ensure that expectations are clearly communicated to applicants, applications are treated consistently, and unique issues faced by Indigenous and racialized peoples are considered in the context of the licensing process.

In our view, adoption of these recommendations will better ensure that the central imperative of safeguarding public protection is uncompromised, while reducing to the greatest extent possible potentially discriminatory barriers to admission, inherent to the process for evaluating an individual's fitness for entry to the profession. This would also better promote transparency and consistency in the way applications are processed, which in turn will enhance certainty for candidates.

The OBA appreciates the opportunity to provide these comments and we look forward to engaging with the Law Society on this important issue.



Appendix

The inquiry into an applicant's good character with respect to criminal history (on the Application for Licence, the [Good Character Amendment Form](#), or otherwise) should include wording to the following effect:

Have you ever been found guilty of, or convicted of, any offence under any statute? Please exclude speeding and parking tickets. (If you have been found guilty or convicted of an offence under the *Young Offenders Act* or the *Youth Criminal Justice Act*, or if you have received an absolute or conditional discharge following a finding of guilt under any other statute, please refer to the section online called "Completing the Lawyer Licensing Process Application" for further details.

The "[Completing the Lawyer Licensing Process Application](#)" should be refined as follows:

With respect to Question 1 of the Good Character section of the application, answer "no" if:

(a) under the *Young Offenders Act* or *Youth Criminal Justice Act*, you were found guilty of an offence and the disposition was an absolute discharge and it has been one year since you were found guilty;

(b) under the *Young Offenders Act* or *Youth Criminal Justice Act*, you were found guilty of an offence and the disposition was a conditional discharge and it has been three years since you were found guilty;

(c) under the *Young Offenders Act* or *Youth Criminal Justice Act*, you were found guilty of a summary conviction offence and it has been three years since all dispositions in respect of the offence were made or completed, whichever is applicable; ~~or~~

(d) under the *Young Offenders Act* or *Youth Criminal Justice Act*, you were found guilty of an indictable conviction offence and it has been five years since all dispositions in respect of the offence were made or completed, whichever is applicable;

(e) under any other statute, you were found guilty of an offence and more than one year has elapsed since you were discharged absolutely; or

(f) under any other statute, you were found guilty of an offence and more than three years have elapsed since you were discharged on the conditions prescribed in a probation order.