



Law Society of Alberta
Policy Statement:
Implementation of
Amendments

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Purpose

The purpose of this policy statement is to provide clarity regarding the timing of the implementation of amendments to the *Rules of the Law Society of Alberta* (Rules) and amendments or changes to policy documents that impact work processes of the Law Society of Alberta (Law Society), such as Guidelines and Protocols.

Background

The Law Society makes frequent amendments to the Rules in order to improve, clarify or change processes, as well as implement new programs. These amendments may also appear in Law Society policy documents, such as Guidelines and Protocols that set out Law Society processes with respect to programs, applications, complaints, hearings and similar Law Society work.

The lack of a policy statement around the implementation of amendments to documents was brought to light as a result of a question raised regarding an application under section 37(4) of the *Legal Profession Act*. As there are amendments, currently proposed, for the process for section 37(4) applications, Policy Counsel was asked about the potential retroactivity of these amendments.

Currently, the Law Society does not have a Policy Statement regarding the implementation of amendments. Such a statement is necessary to provide clarity to Law Society staff, lawyers and the public regarding the impact of amendments to Law Society Rules and policy documents.

Coming into Force: Prospectivity and Retroactivity at Law

The Supreme Court of Canada, in its unanimous decision in *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 SCR 473, 2005 SCC 49, at paragraph 69, cites Professor P.W. Hogg in *Constitutional Law of Canada* (loose-leaf ed.), vol.2, at p. 48-29, as stating that “there is a presumption of statutory interpretation that a statute should not be given retroactive effect”.

This is the starting point for statutory interpretation: legislation is presumptively prospective. The Court goes on, in citing Professor Hogg, to note that “Apart from s. 11(g) [which addresses criminal law], Canadian constitutional law contains no prohibition of retroactive (or ex post facto) laws. ... if the retroactive effect is clearly expressed, then there is room for interpretation and the statute is effective according to its terms.”

The Court continues, at paragraph 71, to state:

The absence of a general requirement of legislative prospectivity exists despite the fact that retrospective and retroactive legislation can overturn settled expectations and is sometimes perceived as unjust: see E. Edinger, “Retrospectivity in Law” (1995), 29 *U.B.C. L. Rev.* 5, at p. 13. Those who perceive it as such can perhaps take comfort in the rules of statutory interpretation that require the legislature to indicate clearly any desired retroactive or retrospective effects. Such rules ensure that the legislature has turned its mind to such effects and “determined that the benefits of retroactivity [or retrospectivity] outweigh the potential for disruption or unfairness”: *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), at p. 268.

It is important for those who are impacted by legislation and regulation to have certainty and predictability in the expectations that surround their behavior. This is beneficial but can be overridden by specific language to do so.

There are two common-law principles to keep in mind:

1. It is presumed that legislation is not intended to have retroactive application.
2. It is presumed that legislation is not intended to interfere with vested or accrued rights. (Thang, Simon. (2010). *Canadian Tax Journal*. Vol. 58, No. 3, 609-30 at p. 619).

As noted above, these principles can be overcome with clearly expressed, explicit language. Negative impacts should be considered when retroactivity is to be applied, though prospectivity should be the initial position in drafting legislation.

Impact of Law Society Amendments

The Law Society has a number of processes, including applications for membership, amendments to requirements and reinstatement; the complaints process; adjudication processes; and appeals. An amendment to a Law Society Rule or other policy document can occur following the start of such a process, whether after an application has been submitted but prior to the start of processing the application, during the processing of the application, after a decision has been made but prior to an appeal or after an appeal has been filed but prior to the appeal hearing.

An amendment mid-process can positively or negatively impact an individual. In many cases, the amendments are made to improve, clarify, or simplify a process and will positively impact the individual in mid-process. There will be times where the amendment may increase or change requirements, lengthen a process or result in other impacts that may negatively impact an individual. Some of these impacts will be clearly identified prior to any amendment or change, while other impacts may not be identified until raised by an impacted individual or noted by an LSA staff member while a process is ongoing.

Given Canadian law's general avoidance of retroactivity, it is important for the Law Society to have a clear position on the impact and timing of amendments where a process has begun but is not yet complete. Since the Law Society operates in an Administrative Law context and it can be argued that the *Rules of the Law Society of Alberta* operate in a quasi-legislative manner, as there are no Regulations to the *Legal Profession Act* but instead the Act permits the Benchers to make Rules, it is important to have a clear position regarding how amendments will be implemented.

This will provide clarity for Law Society staff and impacted individuals, as well as proactively address this issue in advance of any potential concerns that could be raised in the future.

Policy Statement

Rule Amendments, Guidelines and Other Policy Documents that Require Bencher Approval

A decision of the Benchers regarding amendment(s) to the *Rules of the Law Society of Alberta*, a Guideline or other policy document will come into effect immediately upon the conclusion of the meeting at which the amendment(s) is approved. The amendment(s) will then apply to all processes under way which are impacted by the amendment(s).

Where a negative impact results, an impacted person may elect to proceed under the process in place immediately prior to the amendment(s) unless the Benchers specifically state as part of the motion put forward and carried that the amendment(s) applies retroactively to all impacted processes underway.

Impacted individuals must be notified of a change in process and the option for an election where a negative impact results.

A negative impact is one where an amendment results in additional requirements, extended timelines, the removal of an option, a change to procedure in a hearing or appeal, or similar result.

Protocols and Other Policy Documents that Do Not Require Bencher Approval

Operational amendment(s) to a protocol or other policy document that does not require Bencher approval must be clearly dated with the implementation date for the amendment or change. The amendment(s) will then apply to all processes under way which are impacted by the amendment(s) as of that date.

The implementation date may be the date upon which operational approval of the amendment occurs or a date in the future but may not be a date in the past.

Where a negative impact results, an impacted person may elect to proceed under the process in place immediately prior to the amendment(s) unless there is clear wording that the amendment(s) applies retroactively to all impacted processes underway and justification, approved by the Executive Director or Deputy Executive Director, is provided within the document for the retroactive application of the amendment(s).

Impacted individuals must be notified of a change in process and the option for an election where a negative impact results.

A negative impact is one where an amendment results in additional requirements, extended timelines, the removal of an option, a change to procedure in a hearing or appeal, or similar result.