The Law Society of British Columbia

Agenda

Benchers

Date:	Friday, September 24, 2021
Time:	**9:00 am - Call to order** ***Please join the meeting anytime from 8:30 am to allow enough time to resolve any video/audio issues before the meeting commences.***
Location:	Virtual meeting
Recording:	***Benchers, staff and guests should be aware that a digital audio and video recording will be made at this Benchers meeting to ensure an accurate record of the proceedings. Any private chat messages sent will be visible in the transcript that is produced following the meeting.***

VIRTUAL MEETING DETAILS

The Bencher Meeting is taking place via a virtual meeting. If you would like to attend the meeting, please email BencherRelations@lsbc.org.

OATH OF OFFICE

President Lawton will administer the oath of office (in the form set out in Rule 1-3) to new elected Bencher, Gaynor C. Yeung.

CONSENT AGENDA:

Any Bencher may request that a consent agenda item be moved to the regular agenda by notifying the President or the Manager, Governance & Board Relations prior to the meeting.

1	Minutes of July 9, 2021 meeting (regular session)
2	Minutes of July 9, 2021 meeting (*in camera* session)
3	Rule 1-41: Election of Executive Committee
4	Rule 2-84: Presentation to Court on Call and Admission
5	Law Society Awards: Recognition, Selection, and Approval Process
6	BC Superior Courts Clerkship Program

The Law Society of British Columbia

Agenda

REPORTS		
7	President's Report	Dean Lawton, QC
8	CEO's Report • *Progress Report on Strategic Plan*	Don Avison, QC
GUEST PRESENTATION		
9	Update on the Federation of Law Societies of Canada	Stephen Raby, QC Jonathan G. Herman
DECISION		
10	2022 Initiatives, Finances, and Fees	Lisa Hamilton, QC Don Avison, QC Jeanette McPhee
11	Indigenous Engagement in Regulatory Matters Task Force: Terms of Reference and Work Plan	Pinder Cheema, QC
DISCUSSION		
12	Mental Health Task Force: Recommendation on the Development of an Alternative Discipline Process	Brook Greenberg, QC
13	Lawyer Development Task Force: Recommendations Concerning Remuneration and Hours of Work for Articled Students	Steve McKoen, QC
14	Access to Justice Advisory Committee: Increasing Access to Non-Adversarial Resolution of Family Law Matters	Lisa Hamilton, QC
UPDATES		
15	Bencher and Committee Mid-Year Evaluation Results	Jeevyn Dhaliwal, QC
16	2020 National Discipline Standards Report	Natasha Dookie
17	Report on Outstanding Hearing & Review Decisions (*Materials to be circulated at the meeting*)	Dean Lawton, QC

The Law Society of British Columbia

Agenda

FOR INFORMATION	
18	Minutes of September 9, 2021 Executive Committee Meeting (regular session)
19	2021 Annual General Meeting: Second Notice to the Profession
20	Three Month Bencher Calendar – October to December 2021
IN CAMERA	
21	Other Business

The Law Society of British Columbia

Minutes

Benchers

Date:	Friday, July 09, 2021	
Present:	Dean P.J. Lawton, QC, President	Sasha Hobbs
	Lisa Hamilton, QC, 1st Vice-President	Dr. Jan Lindsay
	Christopher McPherson, QC, 2nd Vice-President	Geoffrey McDonald
	Paul Barnett	Steven McKoen, QC
	Kim Carter	Jacqueline McQueen, QC
	Pinder K. Cheema, QC	Elizabeth J. Rowbotham
	Jennifer Chow, QC	Mark Rushton
	Barbara Cromarty	Karen Snowshoe
	Cheryl S. D'Sa	Michael Welsh, QC
	Jeevyn Dhaliwal, QC	Kevin B. Westell
	Lisa Dumbrell	Chelsea D. Wilson
	Lisa Feinberg	Guangbin Yan
	Martin Finch, QC	Heidi Zetzsche
	Brook Greenberg, QC	
Unable to Attend:	Jamie Maclaren, QC	
	Thomas L. Spraggs	
Staff:	Don Avison, QC	Michael Lucas, QC
	Avalon Bourne	Alison Luke
	Barbara Buchanan, QC	Claire Marchant
	Jennifer Chan	Jeanette McPhee
	Lance Cooke	Cary Ann Moore
	Natasha Dookie	Doug Munro
	Su Forbes, QC	Lesley Small
	Andrea Hilland	Adam Whitcombe, QC
	Jeffrey Hoskins, QC	Vinnie Yuen
	Jason Kuzminski	

Guests:	Dom Bautista	Executive Director and Managing Editor, Law Courts Center
	Janine Benedet, QC	Dean pro tem, Peter A. Allard School of Law
	Mark Benton, QC	CEO, Legal Services Society
	Harry Cayton	Advisor, Professional Regulation and Governance
	Christina Cook	Member, Aboriginal Lawyers Forum
	Richard Fyfe, QC	Deputy Attorney General of BC, Ministry of Justice, representing the Attorney General
	Clare Jennings	First Vice-President, Canadian Bar Association, BC Branch
	Derek LaCroix, QC	Executive Director, Lawyers Assistance Program
	Mark Meredith	Treasurer and Board Member, Mediate BC Society
	Caroline Nevin	CEO, Courthouse Libraries BC
	Josh Paterson	Executive Director, Law Foundation of BC
	Michèle Ross	President, BC Paralegal Association
	Susan Ross	Member, Law Society of BC
	Linda Russell	CEO, Continuing Legal Education Society of BC
	Kerry Simmons, QC	Executive Director, Canadian Bar Association, BC Branch

OATH OF OFFICE

Administer Oath of Office

President Lawton administered the Oath of Office to new elected Bencher, Kim Carter.

CONSENT AGENDA

1. Minutes of May 28, 2021, meeting (regular session)

The minutes of the meeting held on May 28, 2021 were approved unanimously and by consent as circulated

2. Minutes of May 28, 2021, meeting (*in camera* session)

The minutes of the *In Camera* meeting held on May 28, 2021 were approved unanimously and by consent as circulated.

3. Law Society Scholarship for Graduate Studies

The following resolution was passed unanimously and by consent.

BE IT RESOLVED that the Benchers ratify the recommendation of the Credentials Committee to award the 2021 Law Society Scholarship for Graduate Studies to Summer Somtochukwu Okibe.

4. Law Society Indigenous Scholarship

The following resolution was passed unanimously and by consent.

BE IT RESOLVED that the Benchers ratify the recommendation of the Credentials Committee to award the 2021 Law Society Indigenous Scholarship equally between Julia Hutlet and Madelaine Desaulniers.

5. External Appointment: Legal Aid BC

The following resolution was passed unanimously and by consent.

BE IT RESOLVED that the Benchers appoint Phil Riddell, QC to the Legal Aid BC Board of Directors for a term commencing July 12, 2021 and concluding December 31, 2023, and appoint Brad Daisley for a three-year term commencing September 7, 2021.

6. Abeyance Policy

The following resolution was passed unanimously and by consent.

BE IT RESOLVED that:

1. The Abeyance Policy be rescinded, such that the Executive Director's authority to grant or deny an abeyance will no longer be restricted by the requirements set out in that policy, and

2. Staff be directed to develop Guidelines for Abeyance Requests for consideration by the Executive Committee that can guide the Executive Director's exercise of discretion as to whether to grant or deny an abeyance and that permit a lawyer to request a referral to the Discipline Committee in circumstances where the Executive Director has denied the lawyer's abeyance request.

7. Revisions to Bencher Code of Conduct

The following resolution was passed unanimously and by consent.

BE IT RESOLVED that the Bencher Code of Conduct section *Appearing as Counsel* be rescinded and replaced with the following:

Appearing as Counsel

1. A current Bencher must not appear as counsel for the Law Society or any member in any proceeding.

2. A former Bencher must not appear as counsel:

(a) for the Law Society in any proceeding;

(b) any member in any Law Society proceeding until three years after ceasing to be a Bencher; and

(c) for a member in a Law Society proceeding if the member was the subject of a hearing in which the Bencher was a member of the panel until 3 years after the completion of the hearing.

3. A committee member must not appear as counsel for the Law Society or any member in any proceeding that relates to the work of the committee while a member of that committee and for a period of three years after the member ceases to be a member of the committee.

8. Code of Professional Conduct Rules 3.4-26.2: Amendments to Commentaries 1 and 2 regarding Insurance References and Gendered Language

The following resolution was passed unanimously and by consent.

BE IT RESOLVED that the Benchers adopt the amendments to the rule 3.4-26.2 commentaries as follows:

[1] Generally speaking, a lawyer may act as legal advisor or as business associate, but not both. These principles are not intended to preclude lawyers from performing legal services on their own behalf. Lawyers should be aware, however, that acting in certain circumstances may cause them to lose coverage as a result of Exclusion 6 in the B.C. Lawyers Compulsory Professional Liability Indemnity Policy and similar provisions in other insurance policies.

[2] Whether or not coverage under the Compulsory Policy is lost is determined separate and apart from the ethical obligations addressed in this chapter. Review the current policy for the exact wording of Exclusion 6 or contact the Lawyers Indemnity Fund regarding the application of the Exclusion to a particular set of circumstances.

9. Rule 1-7(2): Bencher Resignation Rule

The following resolution was passed unanimously and by consent.

BE IT RESOLVED to amend the Law Society Rules as follows:

Rule 1-7 is rescinded and the following substituted:

Bencher ceasing to hold office

1-7 (1) A Bencher, other than an appointed Bencher, must be a member of the Society in good standing to take or hold office as a Bencher.

(2) A Bencher may resign by submitting a written resignation to the President stating the effective date of the resignation, and the resignation becomes effective on that date.

10. Rule 1-41(11): Executive Committee Elections

The following recommendations were approved, in principle, unanimously and by consent.

That Rule 1-41(11) be amended to provide that if the Benchers fail to elect four members to the Executive Committee for any reason or if there is a vacancy before September 1st during the term of any elected member of the Executive Committee, there will be an election to fill the

position at the earliest opportunity. If the reason for the election is a tie vote, then the election will only be among those candidates with tied votes.

The amendments have been referred to the Act and Rules Committee to develop rules to implement the recommendations, and to return the matter to the Benchers to approve the rule changes.

11. Rule 2-84: Call Ceremony Attendance

The following recommendations were approved, in principle, unanimously and by consent.

(a) Rule 2-84 be amended to provide that transfers from other jurisdictions have the option whether to be called in accordance with Rule 2-84;

(b) For a period of time to be determined by the Executive Director, that articled students awaiting their first call and admission have the option whether to be called in accordance with Rule 2-84; and

(c) The time for an articled student or transfer lawyer to be presented in open court be extended to the end of 2022.

The amendments have been referred to the Act and Rules Committee to develop rules to implement the recommendations, and to return the matter to the Benchers to approve the rule changes.

12. Rule 3-58.1: Exception for Mediators, Arbitrators, and Parenting Coordinators

The following resolution was passed unanimously and by consent.

BE IT RESOLVED to amend the Law Society Rules as follows:

1. ***Rule 3-58.1 is rescinded and the following substituted:***

3-58.1 (1) Except as permitted by the Act or these rules or otherwise required by law, a lawyer or law firm must not permit funds to be deposited to or withdrawn from a trust account unless the funds are directly related to legal services provided by the lawyer or law firm.

(2) A lawyer or law firm must take reasonable steps to obtain appropriate instructions and pay out funds held in a trust account as soon as practicable on completion of the services to which the funds relate.

(3) Despite subrule (1), a lawyer or law firm may deposit to and withdraw from a trust account funds that are received as a retainer for services as a mediator, arbitrator or parenting coordinator.

(4) Funds deposited to a trust account by a lawyer or law firm under subrule (3) are subject to all the rules pertaining to trust funds as if the funds were received from a client in relation to legal services provided by the lawyer or law firm.

2. ***Rule 3-60 (4) is rescinded and the following substituted:***

(4) Subject to subrule (5) and Rule 3-74 *[Trust shortage]*, a lawyer must not deposit to a pooled trust account any funds other than

(a) trust funds,

(b) funds that are fiduciary property, or

(c) funds the lawyer is permitted to deposit to a trust account under Rule 3-58.1 (3) *[Trust account only for legal services]*.

13. Rule 3-64.3: Withdrawal from Trust by Bank Draft

The following resolution was passed unanimously and by consent.

BE IT RESOLVED to amend the Law Society Rules as follows:

1. In Rule 3-64 the following paragraph is added:

(b.1) by bank draft as permitted by Rule 3-64.3 *[Withdrawal from trust by bank draft]*,

2. Rule 3-64.1 (2) (g) (i) is rescinded and the following substituted:

(i) the requisition, and

3. The following rule is added:

Withdrawal from trust by bank draft

3-64.3 A lawyer may withdraw funds from a pooled or separate trust account by bank draft, provided all of the following conditions are met:

(a) the recipient of the funds must provide the following in writing:

(i) consent in advance to receive the funds in the form of a bank draft;

(ii) acknowledgement of receipt of the funds;

(b) the lawyer using a bank draft to withdraw trust funds must

(i) document the transaction on the client's file using the prescribed form,

(ii) obtain the bank draft at a financial institution where the lawyer's law firm has a trust account, and

(iii) maintain in the lawyer's records

(A) the documents obtained from the recipient under paragraph (a),

(B) the completed form required under subparagraph (i), and

(C) a copy of the bank draft.

REPORTS

14. President's Report

Mr. Lawton began his report by providing Benchers with a summary of recent events and engagements he had attended, such as virtually presenting the Gold Medal Awards to the top graduate at each of BC's law schools. Mr. Lawton congratulated Scott Garoupa (University of British Columbia), Amy Wong (University of Victoria), and Paige Mueller (Thompson Rivers University) for their significant accomplishments. Other engagements included virtually connecting with the Presidents of Canada's Law Societies, which he hoped would become a more common occurrence, and the Law Society of Alberta's annual retreat, which took place virtually on June 3 and 4. Mr. Lawton noted that the theme of the retreat focused on alternate paths to call and admission.

Mr. Lawton then spoke about his involvement as an adjudicator in the Law Society's Tribunal process and the importance of this work.

Other recent meetings Mr. Lawton attended, which he updated Benchers on, included the CBABC Provincial Council meeting, a meeting of the Council of Canadian Law Deans and the Federation joint working group regarding collaboration between the faculties of law and the law societies of Canada to advance the Truth and Reconciliation Commission's calls to action, and an Anti-Asian Racism roundtable hosted by the University of British Columbia.

Mr. Lawton then updated Benchers on his recent meeting with Chief Justice Hinkson regarding work around the Innovation Sandbox, particularly regarding applicants who may propose to appear before the BC Supreme Court.

Mr. Lawton concluded his report by informing Benchers of his participation in the Indigenous Legal Order Symposium, which was organized by the CLEBC. Mr. Lawton noted that a recording of the event would be available to review.

15. CEO's Report

Mr. Avison began his report with an update on COVID-19 and implications for Law Society operations. Mr. Avison noted that the province was currently within Step 3 of BC's Restart Plan

and the provincial state of emergency had been lifted. He indicated that the Law Society offices would reopen on July 19 with a staggered reopening plan in recognition of a continuing need for caution. Mr. Avison noted that it was likely some meetings, events and hearings would begin to resume in-person. Mr. Avison spoke about the role of technology in allowing the Law Society to continue with its operations throughout the pandemic, as well as the importance of considering continued opportunities to incorporate technology into Law Society processes. Mr. Avison informed Benchers that the fall session of PLTC would proceed virtually, as it would be too disruptive to return to an in-person format at this juncture. Additional information would be provided regarding PLTC at a future Bencher meeting, particularly around the possible continued use of technology in delivering the program.

Mr. Avison then spoke about call ceremonies, noting that the approval of Item 11 on the Consent Agenda will give the Law Society some latitude in how to address the considerable backlog of students waiting to attend a call ceremony by providing an element of optionality for transfer lawyers and new calls. Mr. Avison noted that the preference would be to keep call ceremonies substantially consistent, so the recommendation would be to have an increase in the number of ceremonies as opposed to an increase in the size of the ceremonies.

Mr. Avison updated Benchers on the Law Society's plans regarding a hybrid workspace, noting that discussions have been ongoing with consultants as to how best to utilize the Law Society office space and how the Law Society can be a leading employer in the post-COVID environment in terms of flexibility. Mr. Avison also updated Benchers on a hybrid meeting pilot program being conducted in Room 914 over the summer and fall, which would help inform decisions regarding the set-up for the Bencher Room.

Mr. Avison informed Benchers that the Cullen Commission hearings had reconvened to hear from additional witnesses. The submission deadline had been extended to the day of the Bencher meeting, and Mr. Avison noted a copy of the Law Society's submissions would be provided to Benchers.

Mr. Avison then provided an update regarding the Indigenous Inter-Cultural Awareness program. Mr. Avison commented on the extraordinary amount of work, which had gone into the program, resulting in a six hour long course. Mr. Avison indicated that further editing of the materials would need to be done, and he encouraged all Benchers to review the program materials and provide feedback. Mr. Avison informed Benchers that a soft launch of the program would occur over the summer with edits and revisions being made as appropriate, then the final program would be ready for Bencher consideration, at which time Benchers would be asked to establish the date by which the profession would need to complete the program.

Mr. Avison spoke about the Law Society's third-party review of its governance structures, noting that Harry Cayton was the successful proponent selected to conduct the review following an RFP

process, and was attending today's Bencher meeting to observe proceedings. Mr. Avison encouraged all Benchers to reach out to Mr. Cayton to provide their perspectives.

Mr. Avison updated Benchers on the fall Federation conference, which would be focused on challenges faced by new entrants to the profession.

Mr. Avison then spoke about the 2022 budget development process, noting that the proposed budget would be on the agenda for approval at the September Bencher meeting. Mr. Avison informed Benchers that a budget briefing would take place the day before the September Bencher meeting, and he encouraged all Benchers to attend.

Mr. Avison provided an overview of the updated review process for Innovation Sandbox proposals, noting that a staff review takes place as a first step, then the Advisory Group reviews the proposals and makes recommendations to the Executive Committee to approve. Mr. Avison reviewed with Benchers the composition of the Advisory Group and also provided an overview of his recent discussions with Chief Justice Hinkson and with Chief Judge Gillespie regarding potential elements of protocol with those proponents who have received no action letters.

Mr. Avison then updated Benchers on the Saskatchewan Court of Appeal decision in Abrametz, noting that there have been a number of applications for intervention status before the Supreme Court of Canada. Mr. Avison indicated that the case would be heard in the coming months.

Mr. Avison then spoke about the Federation's National Wellbeing Survey, which has been launched with a reasonable degree of responsiveness received thus far. Mr. Avison noted that a report of the results was anticipated once the results had been analyzed.

Mr. Avison updated Benchers on the Law Society of Alberta's recent retreat, which had focused on the future of articles. Mr. Avison noted that of particular interest was the operation of a teaching law firm within Nottingham Law School.

Mr. Avison concluded his report with an update regarding the situation at Thompson Rivers University regarding recent enrollment issues. Mr. Avison indicated that he'd had a number of conversations with the Dean of Law and that the university was working hard to find solutions.

16. Briefing by the Law Society's Member of the Federation Council

Ms. Cheema began her report with an overview of the Law Society of Alberta's retreat, which took place virtually on June 3 and 4. The theme of the retreat focused on the future of articles moderated by Jordan Furlong. Presentations focused on three different approaches to articling, including the integrated practice curriculum being conducted by Lakehead and Ryerson universities, the law practice program in Ontario, and the teaching law firm at Nottingham Law School. Ms. Cheema also spoke about a panel of deans from the western Canadian law schools.

Ms. Cheema then provided an overview of the June Federation Council meeting, which occurred shortly after the announcement of the findings at the Kamloops residential school. Ms. Cheema thanked Andrea Hilland for helping to prepare a land acknowledgement. The Council meeting agenda included a presentation from Drew Lafond, President of the Indigenous Bar Association, and Ms. Cheema indicated that he spoke about the placement of Indigenous persons across the justice spectrum. Ms. Cheema noted that Mr. Lafond also spoke about systemic barriers in the profession and how the Federation can support the Indigenous Bar Association. Ms. Cheema then reviewed the Federation Council's priorities, which include reconciliation and engagement with the Indigenous bar, as well as the National Wellbeing Survey. Ms. Cheema encouraged all Benchers to complete the survey. Ms. Cheema informed Benchers that the Law Society of Ontario had now approved the anti-money laundering provisions, and by January 2022 all law societies across Canada would have the provisions in force.

Ms. Cheema then spoke about the National Requirement Review for 2021, noting that the National Requirement is the standard that applies to the competencies that every Canadian law student must possess prior to commencing articles. A review of the National requirement occurs every three to five years, and Ms. Cheema indicated that 2021 would be a review year.

Ms. Cheema spoke about the Federation's intervention in the Abrametz decision and the selection process for litigation counsel.

Ms. Cheema concluded her report with an update regarding the Federation conference in October, which would focus on deconstructing barriers on the road to practice.

UPDATES

18. 2021 May Financial Report

Ms. McPhee provided an update on the financial results and highlights to the end of May 2021, noting that the General Fund operations resulted in a positive variance to budget, which was primarily due to a combination of timing differences and permanent variances. Ms. McPhee, indicated that revenue was ahead of budget due to higher than expected practice fees and

electronic filing revenue for the period, and operating expenses were below budget due to a combination of permanent variances and timing differences, mainly in the areas of compensation, meeting and travel costs, and external counsel fees.

Ms. Hamilton thanked Ms. McPhee and staff for all their efforts, particularly with the implementation of the fee relief program.

Benchers discussed the savings incurred with not having in-person Bencher or Committee meetings.

DISCUSSION/DECISION

17. Regulatory Review: Terms of Reference

Mr. Lawton reviewed with Benchers the proposed terms of reference for the Indigenous Engagement in Regulatory Matters Task Force, noting that the intention would be to have the Task Force provide a workplan for the September Bencher meeting.

Benchers discussed the formation of the Task Force and the proposed terms of reference, and agreed that the Truth and Reconciliation Advisory Committee should be consulted on the terms of reference. Specifically, Benchers discussed suggested revisions to the Duties and Responsibilities section of the terms of reference, notably the inclusion of the Truth and Reconciliation Advisory Committee as a key stakeholder with whom the Task Force would conduct interviews, as well as any others that the Task Force would consider necessary for the purpose of preparing its report.

Benchers discussed the need for Task Force members to have a recognizable level of experience regarding the challenges faced by Indigenous people. Benchers also discussed the importance of removing bias when creating bodies and allowing the body to have the option to make amendments to its own mandate. Benchers suggested that the input of the Truth and Reconciliation Advisory Committee be sought as part of the Task Force's review of its mandate, and that the Task Force could come back to Benchers with any proposed amendments to the terms of reference.

A motion was made and seconded to establish an Indigenous Engagement in Regulatory Matters Task Force with a mandate to examine the Law Society's regulatory processes specifically its complaints, investigation, prosecution and adjudication processes, as they relate to vulnerable and marginalized complainants and witnesses, particularly Indigenous persons, and make recommendations to the Benchers to ensure that the Law Society's regulatory processes accommodate the full participation of vulnerable and marginalized complainants and witnesses.

The resolution was passed unanimously.

A motion was made and seconded to refer the draft Terms of Reference to the Truth and Reconciliation Advisory Committee for consultation with the following amended Duties and Responsibilities:

- Add "The workplan would also include any proposed changes or additions the Task Force after consultation with the Truth and Reconciliation Advisory Committee would recommend with respect to their mandate." to the end of paragraph 1
- Add "members of the Truth and Reconciliation Advisory Committee" to paragraph 2.

The resolution was passed unanimously.

FOR INFORMATION

19. Mid-Year Advisory Committee Reports

There was no discussion on this item.

20. Rule of Law Secondary School Essay Contest

There was no discussion on this item.

21. External Appointment: Continuing Legal Education Society of BC

There was no discussion on this item.

22. External Appointment: Supreme Court of BC Rules Committee

There was no discussion on this item.

23. Minutes of June 24, 2021 Executive Committee Meeting (regular session)

There was no discussion on this item.

24. Three Month Bencher Calendar – July to September 2021

There was no discussion on this item.

The Benchers then commenced the *In Camera* portion of the meeting.

AB
2021-07-09

The Law Society of British Columbia

Memo

To: Benchers
From: Jeffrey G. Hoskins, QC for Act and Rules Committee
Date: September 14, 2021
Subject: **Rule 1-41 Election of Executive Committee**

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1. At the July meeting the Benchers considered a report from the Governance Committee (copy attached for your reference) concerning the holding of elections to the Executive Committee to fill a vacancy in that body. This is the resolution that the Benchers adopted at that time calling for changes to the rules:

   > BE IT RESOLVED that Rule 1-41(11) be amended to provide that if the Benchers fail to elect four members to the Executive Committee for any reason or if there is a vacancy before September 1st during the term of any elected member of the Executive Committee, there will be an election to fill the position at the earliest opportunity. If the reason for the election is a tie vote, then the election will only be among those candidates with tied votes.

2. As is the practice, the Benchers referred the matter to the Act and Rules Committee for implementation through recommended amendments to give effect to the policy decision. I attach a draft amendment, which is recommended by the Committee for adoption by the Benchers. I also attach a suggested resolution to give effect to the policy decision.

Drafting notes

3. Subrule (11) is amended to change the required by-election to be held "promptly" rather than at the next Bencher meeting and to allow a vacancy to go unfilled in the last four months of the year.

4. A new subrule (11.1) is added to govern a tie-breaking by-election. Since subrule (3) allows any qualified Bencher to be a candidate in an election under the rule by notifying the

Executive Director, it is advisable to specifically exempt (11.1) to limit the candidates to those who had tied in the original vote.

Attachments: report to the Benchers
drafts
resolution

JGH

The Law Society of British Columbia

Proposed Amendments to Executive Committee Election Rules

Governance Committee

Jeevyn Dhaliwal, QC (Chair)
Christopher A. McPherson, QC (Vice-Chair)
Pinder K. Cheema, QC
Dr. Jan Lindsay
Linda I. Parsons, QC
Michael F. Welsh, QC
Guangbin Yan

Date: July 9, 2021

Prepared for: Benchers

Prepared by: Staff

Purpose: Decision

Document Number: 3154287

Background

At the July 2019 Bencher meeting, the Benchers considered a report from the Governance Committee recommending changes to Law Society Rule 1-41 relating to the procedure for the election of Benchers to the Executive Committee. The Governance Committee recommended the Benchers resolve several issues with the implementation of Rule 1-41 and proposed the following resolution at the July 2019 Bencher meeting:

Be it resolved that the Benchers approve amending Rule 1-41:

1. To recognize that there are four Benchers to be elected under the Rule;

2. To reconcile the voting methods described in the Rule such that the voting for both the elected and appointed Bencher positions, if necessary, occurs in the manner provided for the elected Bencher positions; and

3. To clarify the processes provided for in the Rule for nominating elected and appointed Benchers such that they are consistent.

The resolution passed. Since those amendments were approved and implemented, we encountered another difficulty with the Executive election rules. When Roland Kruger, who had been elected to the 2020 Executive Committee, was not re-appointed as an appointed Bencher, it was necessary to replace him on the Executive Committee with another appointed Bencher.

As there were two candidates for the appointed Bencher position, an election was held at *the next Bencher meeting* on January in accordance with Rule 1-41(11). As that election resulted in a tie, the appointed Benchers were required to wait until the next regular meeting of the Benchers on March 6th to hold a second election to fill the vacancy. This created a significant delay in the appointment of the appointed Bencher to the 2020 Executive Committee, as well as confusion about the process. In an environment where elections can easily be conducted electronically and do not need to be in person, it is difficult to justify retaining the requirement to hold the election *at the next regular meeting of the Benchers*.

Discussion

At its April 2021 Governance Committee meeting, the Committee considered this matter, and agreed that Rule 1-41(11) should be amended in order to prevent a significant delay in the election of a new member of the Executive Committee should there be a vacancy. The Committee also agreed that an election of the Executive Committee to fill a vacancy should only be held when there is a meaningful amount of time remaining in the term.

The Committee also considered the existing process to address a tie vote in an Executive Committee election. The Rules relating to the procedure for the election of Benchers to the Executive Committee require that another election be held at the next regular meeting of the Benchers, regardless of final vote count. For example, should four elected Benchers put forth their names for consideration for the three elected Bencher positions on the Executive Committee, and the result is a tie between the two Benchers with the fewest votes, the current Rule requires that an election must be held again in its entirety, as opposed to considering the two Benchers with the most votes elected, and then holding a second election solely for the remaining vacancy on the Executive Committee. The Committee agreed that a revised process was needed in order to address both the potential for delay with holding a new election and the requirement to hold the election again in its entirety.

The Committee recommends that the Benchers approve the following resolution and refer the matter to the Act and Rules Committee.

BE IT RESOLVED that Rule 1-41(11) be amended to provide that if the Benchers fail to elect four members to the Executive Committee for any reason or if there is a vacancy before September 1st during the term of any elected member of the Executive Committee, there will be an election to fill the position at the earliest opportunity. If the reason for the election is a tie vote, then the election will only be among those candidates with tied votes.

LAW SOCIETY RULES

PART 1 – ORGANIZATION

Division 1 – Law Society

Elections

Election of Executive Committee

1-41 (1) The Benchers must elect 4 Benchers to serve as members of the Executive Committee for each calendar year as follows:

(a) 3 elected Benchers;

(b) 1 appointed Bencher.

(3) A Bencher who is eligible for election under subrule (1) may become a candidate by notifying the Executive Director in writing by November 22.

(11) If, because of a tie vote or for any other reason, the Benchers fail to elect 4 members of the Executive Committee under subrule (1), or if a vacancy occurs on or before August 31 of any year ~~in any position elected under this rule~~, the Benchers or the appointed Benchers, as the case may be, must promptly hold an election to fill the vacancy ~~at the next regular meeting of the Benchers~~.

(11.1) Despite subrule (3), when a tie vote causes an election under subrule (11) the candidates who were tied are the only candidates.

LAW SOCIETY RULES

PART 1 – ORGANIZATION

Division 1 – Law Society

Elections

Election of Executive Committee

1-41 (1) The Benchers must elect 4 Benchers to serve as members of the Executive Committee for each calendar year as follows:

(a) 3 elected Benchers;

(b) 1 appointed Bencher.

(3) A Bencher who is eligible for election under subrule (1) may become a candidate by notifying the Executive Director in writing by November 22.

(11) If, because of a tie vote or for any other reason, the Benchers fail to elect 4 members of the Executive Committee under subrule (1), or if a vacancy occurs on or before August 31 of any year, the Benchers or the appointed Benchers, as the case may be, must promptly hold an election to fill the vacancy.

(11.1) Despite subrule (3), when a tie vote causes an election under subrule (11) the candidates who were tied are the only candidates.

EXECUTIVE COMMITTEE ELECTIONS

SUGGESTED RESOLUTION:

BE IT RESOLVED to amend the Law Society Rules as follows:

1. Rule 1-41 (11) is rescinded and the following substituted:

(11) If, because of a tie vote or for any other reason, the Benchers fail to elect 4 members of the Executive Committee under subrule (1), or if a vacancy occurs on or before August 31 of any year, the Benchers or the appointed Benchers, as the case may be, must promptly hold an election to fill the vacancy.

(11.1) Despite subrule (3), when a tie vote causes an election under subrule (11) the candidates who were tied are the only candidates.

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

The Law Society of British Columbia

Memo

To:	Benchers
From:	Jeffrey G. Hoskins, QC for Act and Rules Committee
Date:	September 14, 2021
Subject:	**Rule 2-84 – presentation to court on call and admission**

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1. At the July meeting the benchers considered a memo from the Executive Committee recommending changes to the requirement that newly called lawyers be presented to the Supreme Court in open court in their first few months of practice.

2. This resolution was adopted by the Benchers:

   BE IT RESOLVED THAT:

   (a) Rule 2-84 be amended to provide that transfers from other jurisdictions have the option whether to be called in accordance with Rule 2-84;

   (b) For a period of time to be determined by the Executive Director, that articled students awaiting their first call and admission have the option whether to be called in accordance with Rule 2-84; and

   (c) The time for an articled student or transfer lawyer to be presented in open court be extended to the end of 2022.

3. Paragraphs (a) and (b) of the resolution require rule amendments for implementation, and were therefore referred to the Act and Rules Committee for recommendation to the Benchers of changes to the Rules for implementation of the policy decisions.

4. I attach draft amendments that the Act and Rules Committee recommends to the Benchers for adoption. I also attach a suggested resolution for that purpose.

Drafting notes

5. Although it is not part of the rule, the heading could be more relevant to what new lawyers will consider important in the call and admission process: the oath and the presentation in court. The draft includes the revised heading "Barristers and solicitors' roll and oath and presentation in court," which will be added editorially if the Benchers adopt the proposed amendments.

6. Since transfers who are members of another Canadian law society no longer have to be presented in court, subrule (5) no longer applies to Canadian Legal Advisors who must be members of la Chambre des Notaires du Québec.

7. Subrule (6) is amended for clarity. Apparently people who are new to the Law Society do not necessarily know that September 1 is the date four months before every practising certificate expires.

Attachments: memo from Executive Committee
drafts
resolution

JGH

The Law Society of British Columbia

Memo

To: Benchers
From: Executive Committee
Date: June 30, 2021
Subject: Mandatory Call Ceremonies

The purpose of this memorandum is to recommend to the Benchers an amendment to Rule 2-84 to make presentation in open court optional.

Since the Pandemic…

As a result of the COVID pandemic-related restriction on public gatherings in British Columbia, the last in-person call and admission ceremony in Vancouver was held on March 13, 2020.

The result of the postponement of call and admission ceremonies since that date is that preliminary reports indicate that there will be approximately 1,700 - 1,900 candidates through to the end of 2021 who will be required to be presented in open court under the current rule. Even with our former practice of calling roughly 200 lawyers in two ceremonies a day in Vancouver, the current backlog would require roughly eight to nine ceremonies of this size, assuming everyone was to be called in Vancouver. As some of the calls ceremonies will be regional and much smaller than the ones in Vancouver, the number of actual ceremonies would likely be much greater than eight or nine.

Discussion

With the impending implementation of Phase 3 of the province's Restart Plan, we anticipate resuming in-person call ceremonies. Based on discussions with Chief Justice Hinkson, it seems likely that we may be able to hold in-person call ceremonies as early as this fall. However, given the sheer number of candidates to be called, the Executive Committee recommends that an amendment to Rule 2-84 be made to provide that transfers from other jurisdictions may choose to be called in accordance with Rule 2-84 and, for the period of time necessary to eliminate the backlog of those waiting to be called, that articled students seeking first call and admission may also choose whether to be called in accordance with Rule 2-84.

Even if Rule 2-84 is amended as proposed, it remains highly unlikely that everyone who would choose to attend a ceremony will be able to do so by the end of 2021. It is therefore also recommended that the Benchers be asked to pass a resolution in accordance with Rule 2-84(6)(b) extending the time for a lawyer, or category or lawyers, to be presented in open court in order that they are able to receive a practising certificate in 2022.

BE IT RESOLVED THAT:

(a) Rule 2-84 be amended to provide that transfers from other jurisdictions have the option whether to be called in accordance with Rule 2-84;

(b) For a period of time to be determined by the Executive Director, that articled students awaiting their first call and admission have the option whether to be called in accordance with Rule 2-84; and

(c) The time for an articled student or transfer lawyer to be presented in open court be extended to the end of 2022.

LAW SOCIETY RULES

PART 2 – MEMBERSHIP AND AUTHORITY TO PRACTISE LAW

Division 2 – Admission and Reinstatement

Call and admission

Barristers and solicitors' ~~roll and~~ oath and presentation in court

2-84 (1) The Executive Director must maintain the barristers and solicitors' roll in paper or electronic form, or a combination of both.

(2) Every lawyer who is called to the Bar of British Columbia and admitted as a solicitor of the Supreme Court must,

(a) before beginning the practice of law, take the barristers and solicitors' oath in a form approved by the Benchers before a judge of the Provincial Court or a superior court in British Columbia or before a practising lawyer, and

(b) be presented in open court before one or more of the judges of the Supreme Court.

(2.1) Despite subrule (2)

(a) a lawyer who has been called and admitted in another Canadian jurisdiction before taking the barristers' and solicitors' oath under subrule (2) (a) is permitted but not required to be presented in open court under subrule (2) (b), and

(b) the Executive Director may exempt a lawyer or a category of lawyers from the requirement to be presented in open court under subrule (2) (b).

(3) The Executive Director must enter in the barristers and solicitors' roll the full names of all persons who are called as barristers and admitted as solicitors.

(4) On proof that an applicant who has otherwise qualified for call and admission has taken the oath required under subrule (2) (a), the Executive Director must issue to the applicant a practising certificate, a non-practising certificate or a Canadian legal advisor certificate, as the case may be.

(5) The Executive Director must not renew a practising certificate ~~or a Canadian legal advisor certificate~~ issued under subrule (4) unless the lawyer has been presented in open court ~~as~~ if required under ~~subrule (2) (b)~~this rule.

(6) Despite subrule (5)

(a) the Executive Director may renew a certificate issued under subrule (4) on or after September 1 of the same year as ~~within four months of~~ its expiry ~~date~~, and

LAW SOCIETY RULES

(b) the Benchers may, by resolution, extend the time for a lawyer or a category of lawyers to be presented in open court.

LAW SOCIETY RULES

PART 2 – MEMBERSHIP AND AUTHORITY TO PRACTISE LAW

Division 2 – Admission and Reinstatement

Call and admission

Barristers and solicitors' oath and presentation in court

2-84 (1) The Executive Director must maintain the barristers and solicitors' roll in paper or electronic form, or a combination of both.

(2) Every lawyer who is called to the Bar of British Columbia and admitted as a solicitor of the Supreme Court must,

(a) before beginning the practice of law, take the barristers and solicitors' oath in a form approved by the Benchers before a judge of the Provincial Court or a superior court in British Columbia or before a practising lawyer, and

(b) be presented in open court before one or more of the judges of the Supreme Court.

(2.1) Despite subrule (2)

(a) a lawyer who has been called and admitted in another Canadian jurisdiction before taking the barristers' and solicitors' oath under subrule (2) (a) is permitted but not required to be presented in open court under subrule (2) (b), and

(b) the Executive Director may exempt a lawyer or a category of lawyers from the requirement to be presented in open court under subrule (2) (b).

(3) The Executive Director must enter in the barristers and solicitors' roll the full names of all persons who are called as barristers and admitted as solicitors.

(4) On proof that an applicant who has otherwise qualified for call and admission has taken the oath required under subrule (2) (a), the Executive Director must issue to the applicant a practising certificate, a non-practising certificate or a Canadian legal advisor certificate, as the case may be.

(5) The Executive Director must not renew a practising certificate issued under subrule (4) unless the lawyer has been presented in open court if required under this rule.

(6) Despite subrule (5)

(a) the Executive Director may renew a certificate issued under subrule (4) on or after September 1 of the same year as its expiry , and

LAW SOCIETY RULES

(b) the Benchers may, by resolution, extend the time for a lawyer or a category of lawyers to be presented in open court.

CALL CEREMONY

SUGGESTED RESOLUTION:

BE IT RESOLVED to amend the Law Society Rules as follows:

1. Rule 3-84 is amended as follows:

(a) by adding the following subrule:

(2.1) Despite subrule (2)

(a) a lawyer who has been called and admitted in another Canadian jurisdiction before taking the barristers' and solicitors' oath under subrule (2) (a) is permitted but not required to be presented in open court under subrule (2) (b), and

(b) the Executive Director may exempt a lawyer or a category of lawyers from the requirement to be presented in open court under subrule (2) (b).***;***

(b) by rescinding subrules (5) and (6) and substituting the following:

(5) The Executive Director must not renew a practising certificate issued under subrule (4) unless the lawyer has been presented in open court if required under this rule.

(6) Despite subrule (5)

(a) the Executive Director may renew a certificate issued under subrule (4) on or after September 1 of the same year as its expiry , and

(b) the Benchers may, by resolution, extend the time for a lawyer or a category of lawyers to be presented in open court.

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

The Law Society of British Columbia

Memo

To:	Benchers
From:	Executive Committee
Date:	September 24, 2021
Subject:	Law Society Awards: Recognition, Selection, and Approval Process

Background

The purpose of this memorandum is to review and propose changes to the current recognition, selection, and approval process for law society awards.

Background

Since October 2015 the Benchers have approved the creation of the following five Law Society awards each recognizing significant achievements in their respective fields:

- **Equity, Diversity and Inclusion Award ("EDI")** – approved at the September 25, 2015 Bencher meeting and first awarded in 2017. A change to the name of the award to add "equity" was approved at the June 8, 2019 Bencher meeting.

- **Excellence in Family Law Award ("Family Law")** – approved at the September 30, 2016 Bencher meeting and first awarded in 2017.

- **Award for Leadership in Legal Aid ("Legal Aid")** – approved at the June 9, 2017 Bencher meeting and first awarded in 2017.

- **Pro Bono Award ("Pro Bono")** – approved at the May 3, 2019 Bencher meeting and authority to edit the award criteria was delegated to the Executive Committee. The criteria were approved by the Executive Committee at its June 27, 2019 meeting. The award was first awarded in 2019.

- **Mark Andrews Excellence in Litigation Award ("Litigation")** – approved at the March 6, 2020 Bencher meeting. Has not been awarded.

Recognition

Benchers will recall at the meeting of April 23, 2021, the Executive Committee put forward a draft Recognition of Law Society Members Policy for review, which put forth that the Law Society should not create any new awards. Some Benchers expressed concerns about developing policies that could bind future Benchers from being able to recognize members, or commemorate other areas of law, and thought that these decisions should be made on a case-by-case basis. Benchers also discussed the usefulness of having a general policy that could help guide decision making for staff and the Ladder when these sorts of requests are received.

To alleviate Bencher concerns about binding future Benchers from being able to recognize members or commemorate other areas of law, the Executive Committee will continue its practice of reviewing proposals for new awards or other forms of recognition to determine whether or not they have merit, and if so, refer the matter to Benchers.

Selection and Approval Process

Since the EDI, Family Law, Legal Aid, and Pro Bono awards have been awarded in 2017 and 2019, the practice, and in some cases the approval process determined by Benchers, has been for the President of the Law Society to appoint a panel of Benchers to review nominations and make a recommendation as to the individual who should receive the award. The recommendations are then reviewed and approved by the Executive Committee and then reviewed and approved by Benchers. However, having a selection committee of Benchers, the Executive Committee, and the Benchers as a whole all involved in the selection process seems to duplicate effort, particularly as the selection committees are populated by Benchers. In addition, requiring a three stage selection process places restrictions on the overall timeline for these awards, limiting either the time available to solicit nominations or to inform award recipients.

The Litigation award has not yet been awarded to a recipient. The award criteria approved by Benchers indicated that the selection committee would consist of the President of the Law Society, the Chief Justice of the BC Court of Appeal, and Chief Justice of the Supreme Court of BC. It is not clear if the recommendation of the selection committee would need to be reviewed and approved by either the Executive Committee or Benchers; however, the selection and approval process for this award should be consistent with the Law Society's other awards.

In order to ensure consistency and to avoid duplication in the process by which award recipients are selected and approved, and to allow for flexibility in the award timeline, the Executive Committee recommends that Benchers approve the delegation of the approval of all award recipients to the Executive Committee and puts forward the following resolution for Bencher consideration.

Recommendation

BE IT RESOLVED THAT:

a. the approval of award recipients for the Equity, Diversity, and Inclusion Award; Excellence in Family Law Award; Award for Leadership in Legal Aid; the Pro Bono Award, and the Mark Andrews Excellence in Litigation Award be delegated from the Benchers to the Executive Committee.

The Law Society of British Columbia

Memo

To: Benchers
From: Executive Committee
Date: September 16, 2021
Subject: BC Superior Courts Clerkship Program

Background

1. At its September 9, 2021 meeting, the Executive Committee considered an observation raised by Chief Justice Bauman relating to the different treatment of superior court clerkships between Canadian law societies.

2. In particular, Chief Justice Bauman had noted that some BC trained law clerks were choosing to be called in Ontario as the Law Society of Ontario accepted their completion of the clerkship as fully satisfying its eight month articling requirement.

Discussion

3. The Law Society's 2021 – 2025 Strategic Plan includes as a strategic objective that the Law Society introduce alternative pathways for entry into the legal profession. This strategic objective was a result of the recommendation by the Lawyer Development Task Force in 2020, that the Law Society engage in a process of exploring the potential development of new pathways to licensing, in addition to articling, that will satisfy the Law Society's pre-call experiential training requirements.

4. The terms of reference of the Lawyer Development Task Force included an examination of BC's pre-call educational requirements, particularly in light of developments in other Canadian jurisdictions.

5. The Law Society currently requires articling students to complete a nine month articling period, which can be reduced by a maximum of 5 months through completion of a judicial clerkship.

6. While the Benchers have previously decided that clerking alone does not provide sufficient experience in the broader range of articling skills and have only permitted partial credit of up to five months toward the nine months of articles, other law societies consider the completion of a judicial clerkship as fully satisfying the articling requirement.

7. Under the terms of the National Mobility Agreement, once a student has been called and is entitled to practice in any Canadian jurisdiction, they are eligible to apply for call and admission to any other jurisdiction upon successful completion of a reading requirement. As a result, a BC trained law clerk may choose to be called in that other jurisdiction and then transfer back to BC almost immediately, pursuant to Law Society Rules 2-79, 2-81 and the National Mobility Agreement.

8. This has resulted in an unintended consequence of creating an incentive for BC judicial law clerks to be called in another jurisdiction to avoid delaying being called in BC.

Recommendation

9. Given this unintended consequence and the Law Society's commitment to introducing alternative pathways for entry into the legal profession, the Executive Committee agreed to recommend to the Benchers a change to the current requirements for call and admission for those who have completed a clerkship, so that the completion of a clerkship is the equivalent of articling for the purpose of call and admission to the bar.

10. The Executive Committee therefore recommends that the Benchers approve the following resolution:

    BE IT RESOLVED that the Law Society Rules be amended to recognize that the completion of a judicial law clerkship fully satisfies the articling requirement for the purpose of admission to the bar.

The Law Society of British Columbia

CEO's Report to the Benchers

September 24, 2021

Prepared for: Benchers

Prepared by: Don Avison

1. COVID-19 Update

As a result of the recent increase in COVID-19 cases, and following the decision of the provincial Public Health Officer to reintroduce a number of restrictions that had briefly been relaxed, we have extended our current LSBC office attendance policies to October 31, 2021. The Law Society Building remains open with access available to the 8th floor reception area.

Our "Return to the New Normal" (RTN^2) Committee continues to do a considerable amount of work on the development of proposed hybrid workplace strategies. I plan to brief Benchers at the September meeting regarding the direction of that work, together with an update on how we continue to manage the challenges of the pandemic.

2. Federation Fall Conference

The Federation's annual conference was to have taken place in-person in Saskatoon, Saskatchewan from October 13 to 15, 2021 but continuing concerns about COVID-19 rates in that province, and a number of others, has resulted in a decision to shift to a virtual program.

The conference theme this year will focus on the challenges facing new entrants to the profession. I will be moderating a session on "Lifting the Hood on Entry to Practice: A Closer Look at Bar Admission, Articling and Alternative Pathways".

Federation President Steve Raby, Q.C., will be attending our September 24 Bencher Meeting and, in addition to providing an overview of various Federation activities, I anticipate he will provide more information about the conference. Given the virtual delivery model, I expect any interested Benchers will be able to attend.

3. LSBC Retreat Planning

We remain optimistic that we will be able to hold an in-person retreat and Bencher Meeting from October 14 to 16, 2021.

For reasons that will be obvious, we will be keeping participation levels at lower numbers than normal. You can expect more information on program plans and logistics at the September meeting.

4. Cullen Commission – Closing Submissions

After reconvening to hear from two additional witnesses, the evidence component of the Cullen Commission regarding Money Laundering in British Columbia is now complete. Closing submissions are scheduled to take place from October 15 to 19, 2021.

5. LSBC Offices Closed September 30 in Recognition of the National Day of Truth and Reconciliation

September 30 provides an opportunity for all of us to reflect upon both the history and the continuing consequences of residential schools.

At the Law Society, we have encouraged staff to make use of educational materials developed by the Canadian Centre for Diversity and Inclusion. In the lead up to September 30 we will also be taking some further steps with respect to our Indigenous Intercultural Competency Course and I will provide an update on this at the Bencher meeting.

I want to thank all Benchers who took the time to take part in the Phase One review of the Indigenous Intercultural Competency Course and I again acknowledge the work of the Truth and Reconciliation Advisory Committee (TRAC) who, in addition to contributing to the development of the course, have also been busy with moving ahead with other elements of the Committee's work plan. I believe Benchers are aware that a sub-committee of TRAC looking at options for the development, or acquisition, of new symbols or artwork for the lobby of the Law Society building have deferred that work for the moment given the importance of other priorities.

6. Status of Strategic Plan Initiatives

At the September 24 meeting I plan to provide Benchers with a status report on the implementation of the Strategic Plan approved by Benchers at the December 4, 2020 meeting.

While we are only in month nine of the five year plan, I believe it would be fair to say that progress is being made on a number of fronts. We are currently developing a progress chart that I hope to be able to share with Benchers. Our plan is to use that format to provide strategic plan updates a couple of times per year.

7. September 23 Bencher Budget Briefing

Once again this year we will provide an *In Camera* budget information session with Benchers. These meetings have been very useful in the past for providing an overview of the budget for the upcoming year and an opportunity for Benchers to ask questions before the budget proposal is placed before the Benchers for decision on September 24.

Don Avison, QC
Chief Executive Officer

The Law Society of British Columbia

Memo

To:	Benchers
From:	Finance and Audit Committee
Date:	September 13, 2021
Subject:	2022 Fees & Budgets - Review and Approval

Please find attached the Law Society of British Columbia - 2022 Fees and Budgets Report.

The 2022 Fees and Budgets were reviewed in depth by the Finance and Audit Committee, and the committee is recommending adoption of the following Bencher resolutions, as included in the report:

Be it resolved that:

- Effective January 1, 2022, the practice fee be set at $2,289.00, pursuant to section 23(1)(a) of the Legal Profession Act.

Be it resolved that:

- the indemnity fee for 2022 pursuant to section 30(3) of the Legal Profession Act be set at $1,800;
- the part-time indemnity fee for 2022 pursuant to Rule 3-40(2) be set at $900; and
- the indemnity surcharge for 2022 pursuant to Rule 3-44(2) be set at $1,000.

The Law Society of British Columbia

2022 Fees and Budgets Report

Prepared for: Benchers

Prepared by: The Finance Department

Date: September 24, 2021

THE LAW SOCIETY OF BRITISH COLUMBIA
2022 Fees and Budgets Report

Contents

Law Society Overview

General Fund - Law Society Operations

Overview

This report provides an overview of the recommendations for the 2022 annual practice and indemnity fees, and related budgets.

The objective of the 2022 budget is to ensure that the Law Society is able to fulfill its statutory mandate to protect the public interest in the administration of justice and to follow through on goals set out in its strategic plan. This will be achieved by having the resources required to carry-out these plans and continuing to hold the fees steady for the third year in a row.

As a result of the COVID-19 pandemic the Law Society successfully adapted to working remotely very quickly. After operating that way for the last year, this budget contemplates another shift in how the day to day operations are carried out and looks forward to a new normal.

The Benchers set the 2022 fees pursuant to the Legal Profession Act at the September 24th Bencher meeting, following their review of the Finance and Audit Committee's recommendations.

Financial Considerations

1. **2021 forecast avoids projected deficit**

   The 2021 budget projected a deficit of $650,000 but it is now expected to end the year with a surplus of $1 million. This is primarily related to an increase in practice fee revenue. At the time the budget was prepared it was difficult to project the impact that a global pandemic may have on the legal profession so it was assumed that the level of lawyers would stay the same from April 2020 through the 2021 fiscal year. Although this was a challenging time, there has not been a reduction in the number of practicing lawyers in BC. Increases in lawyer numbers have been on track with historical averages and that is projected to continue into 2022.

2. **No increase in the 2022 practice fee**

   The practice fee will remain the same as 2021, and is the same fee that has been in place since 2020. This will result in a deficit budget of $825,000.

3. **No increase in the 2022 indemnity fee**

   The indemnity fee will remain the same as 2021, and is the same fee that has been in place since 2018.

4. **A shift to the new normal**

   After an expense reduction of 0.6% in 2021, the 2022 budget contemplates a shift to the new normal following the pandemic and looks to ensure the appropriate level of resources are in place after a long period of cautious financial management.

Key Operational Goals for 2022

The Benchers have adopted a new Strategic Plan for 2021-2025 that will guide the Law Society over the next five years. The plan has five main objectives: leading as an innovative regulator of legal service providers; working toward reconciliation; taking action to improve access to justice; promoting a profession that reflects the diversity of the public it serves; and increasing confidence in the Law Society, the administration of justice and the rule of law.

In support of the strategic plan, some of the key operational goals that the 2022 budget and fees support are noted below:

1. **Continued Implementation of the Professional Conduct Process Review**

   In recognition of the increasing demand on our regulatory resources, the Professional Conduct group will continue to review processes and implement a number of initiatives to improve the efficiency and effectiveness of our regulatory operations. In addition, staff will work on implementing the recommendations of the Mental Health Task Force. This will include developing operational process flows as well as the Rules framework that will be required to implement the Alternative to Discipline (“ADP”) program.

2. Improvement in technology and services to the public and lawyers

There will be a continued focus on services to the public and lawyers with an emphasis on using information technology to increase the efficiency and effectiveness of our operations, including the intake process, member services and practice advice. We will also be making greater use of data analytics and artificial intelligence in our work, implementing needed updates to the Law Society Information System (LSIS), as well as to increased support for online lawyer services through the member portal.

3. Continued focus on anti-money laundering initiatives

The Cullen Commission is expected to deliver its report in 2021 and anti-money laundering will remain a focus of our regulatory efforts. We continue to enhance our rules and regulatory processes and education to improve our efforts to fight money laundering in the province.

4. Enhanced practice support and online courses

We will be offering new and existing online courses through a new online learning platform, Brightspace from D2L. Through this platform, we will be providing access to Law Society courses including the new Indigenous Intercultural course to be taken by all lawyers over a two year period, updated versions of the courses previously offered through learnlsbc.ca including the Practice Management and Practice Refresher courses, and other online course offerings. In addition, the Professional Legal Training Course (PLTC) is supported on this platform.

5. Innovation sandbox initiatives to improve access to legal services

The Law Society has established the innovation sandbox to pilot the provision of legal advice and assistance by individuals, businesses and organizations that are, for the most part, not lawyers or law firms. The Law Society's innovation sandbox will provide a structured environment that permits lawyers and other individuals and organizations to pilot their proposals for providing effective legal advice and assistance to address the public's unmet legal needs.

6. Diversity action plan

The Benchers have adopted the Diversity Action Plan, which includes 30 action items to foster diversity within the Law Society, support diversity in the legal profession, identify and remove discriminatory barriers, enhance intercultural competence education, improve outreach and collaboration, and track and report progress. The advisory committee has identified tracking demographics, increasing inclusivity in Law Society governance and conducting outreach as its top three priorities for this year.

7. Alternative pathways to licensing

Based on the Lawyer Development Task Force recommendation, the Law Society continues to review the current licensing program and exploration of new pathways for licensing lawyers – including ways to enhance the role of technology, remote learning and mentorship.

Key Budget Assumptions

Revenues

- Projecting a 2.5% increase in net lawyer growth in 2022 from forecasted 2021 levels, budgeting 13,545 lawyers
- PLTC revenues are projected to be similar to 2021 with 610 students
- Credentials and member services fees are set at historical averages
- Interest income is expected to be similar to 2021
- Investment income is expected to increase over the 2021 budget due to recovering markets and increased returns related to further diversification into infrastructure investments
- Electronic filing and TAF revenues are projected to increase 5% over 2020 actuals based on increased real estate market activity and real estate forecasts
- No D&O insurance recovery income for legal fees is budgeted
- Stable 845 Cambie building lease revenues expected, subject to any pandemic related rent relief

Expenses

- Salaries include contracted and non-union wage increases
- Other staffing costs set at historical levels
- Selective addition of staff resources to deliver core functions
- At least 50% of Bencher and committee meetings continue to be conducted fully virtually, reducing costs

- With the digitization of the workplace and technology upgrades, computer software costs increase to support effective operations
- An increase in external counsel fees in legal defence and investigations due to more files and special expertise needs
- With the call ceremonies deferred during the pandemic, additional costs of $200,000 have been budgeted in 2022 for call ceremonies that could not be held in 2020 and 2021. These costs will be funded from the net assets reserve as there were related savings in 2020 and 2021.

Budget Risks

Continued Uncertainty Related to Global Pandemic – Due to the COVID-19 global pandemic, there is still some uncertainty whether its effects could continue into 2022. Although the 2022 budget looks forward to a shift to the new normal, new strains of COVID-19 and prolonged economic uncertainty could still affect the number of lawyers and operations overall.

Number of Lawyers – The revenue received from the practice fee and other credentials and membership fees serves to cover over 80% of the budgeted costs. As such, any variation in the actual number of lawyers from the budget projection could result in a need to draw further on net assets reserves.

Inflation – Staff salaries and benefits comprise approximately 75% of the total expenses, so changes in inflation and salary market levels may cause unpredictability in costs.

External Counsel Fees – External counsel fees represent a significant portion of the overall budget. While these costs are analyzed, managed and tracked rigorously, they can also be unpredictable in nature. These costs are typically driven by three factors, conflicts, work load and the requirement of special skills. The complexity of new cases cannot be anticipated, which can have an impact on costs and demand.

Anti-Money Laundering Efforts – The additional costs relating to AML efforts, identifying misuse of trust accounts, and file costs related to investigations and discipline are unknown. The actual costs incurred could vary from what has been estimated.

Staff Vacancy Savings – In any given year, there are staff vacancies due to staff turnover. The time to recruit, and other factors, result in vacancy savings and we develop an estimate of the vacancy savings each year based on past experience. The amount of staff vacancy savings depends on the actual amount of staff vacancies in any

given year. If there are lower or higher vacancies than estimated, operating costs will be different than budgeted.

Electronic Filing Revenues and Trust Administration Fees – These revenues correlate very closely with real estate unit sales in BC. Expected revenue from these sources has been set based on any available forecasts of the Real Estate Associations and actual results could vary from these forecasts.

2022 Operating Revenue Summary

General Fund revenues are projected to be $30.4 million, $1.9 million (6.5%) higher than the 2021 budget, due primarily to an increase in the number of lawyers year over year. The 2021 budget assumed no net increase in the number of lawyers, year over year, but the actual increase has been consistent with historical averages and this trend is now expected to continue. PLTC student numbers and interest and investment revenue are expected to be similar to 2021. Credentials and member services revenue is expected to be in line with historical averages. The budgeted revenue is based on estimates of 13,545 full-time equivalent practicing lawyers and 610 PLTC students.

2022 Operating Expense Summary

General Fund operational expenses, before reserve spending, are projected to be $31.0 million, a 6.3% increase in expenses over 2021. Additionally, $200,000 is planned to be spent on call ceremonies that could not be held in 2020 or 2021 due to the global pandemic. This amount will be funded from net asset reserves as there were corresponding cost savings to offset this. With this funding for call ceremonies included, the total operational expenses are projected to be $31.2 million, a 7% increase in expenses over 2021.

General Fund Net Assets

The 2022 budget proposes a General Fund deficit of $625,000 related to normal operations to be funded from current reserves. Additionally, $200,000 will be spent on call ceremonies that could not be held in 2020 or 2021 due to the pandemic, which will be funded from reserves. The overall projected net asset position, factoring in the expected 2021 favourable variance, is shown below.

2021	
Opening Balance - per 2020 audited financial statements	$ 11,282,000
Forecasted 2021 Surplus	$ 1,000,000
Estimated reserve used for one-time fee reductions	$ (487,000)
Projected 2021 Reserve Closing Balance	**$11,795,000**
2022	
2020 and 2021 Call Ceremonies Costs	$ (200,000)
Budgeted Deficit	$ (625,000)
Projected 2021 Reserve Closing Balance	**$10,970,000**
Number of months of expenses	4.2

Appendix A and B contain the General Fund operating budgets.

2022 Practice Fee

Taking all factors into account, the practice fee will be as noted below:

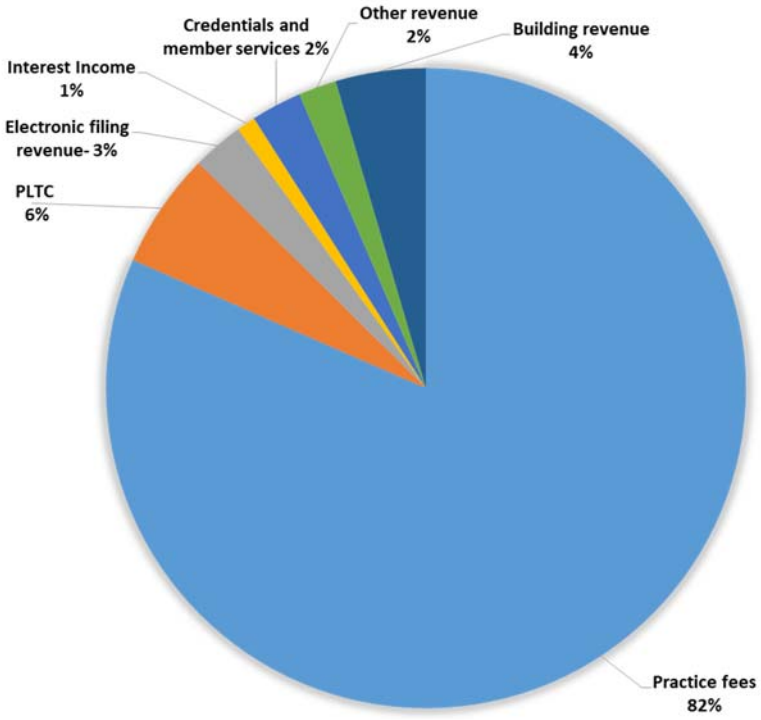
The Law Society of BC
2022 Fee Recommendation

	Funding (in 000's)				Per Lawyer			
	2022	2021	Change ($)	Change (%)	2022	2021	Change ($)	Change (%)
Law Society Operating Expenses	$ 31,184	$ 29,156	2,028	7.0%	$ 1,904.00	$ 1,903.99	$ 0.01	0.0%
Federation of Law Societies	324	364	(40)	-11.0%	24.00	28.12	(4.12)	-14.7%
CanLII	547	547	-	0.0%	42.00	41.94	0.06	0.1%
CLBC*	2,759	2,694	65	2.4%	204.00	203.57	0.43	0.2%
The Advocate**	411	347	64	18.5%	25.00	22.26	2.74	12.3%
LAP*	850	792	58	7.3%	63.00	61.69	1.31	2.1%
Pro bono/Access*	365	363	2	0.6%	27.00	27.56	(0.56)	-2.0%
Annual Practice Fee					$ 2,289.00	$ 2,289.12	$ (0.12)	0.0%

**2022 full fee paying equivalent members projected at 13,545*
***2022 practicing, non-practicing and retired members projected at 16,663*

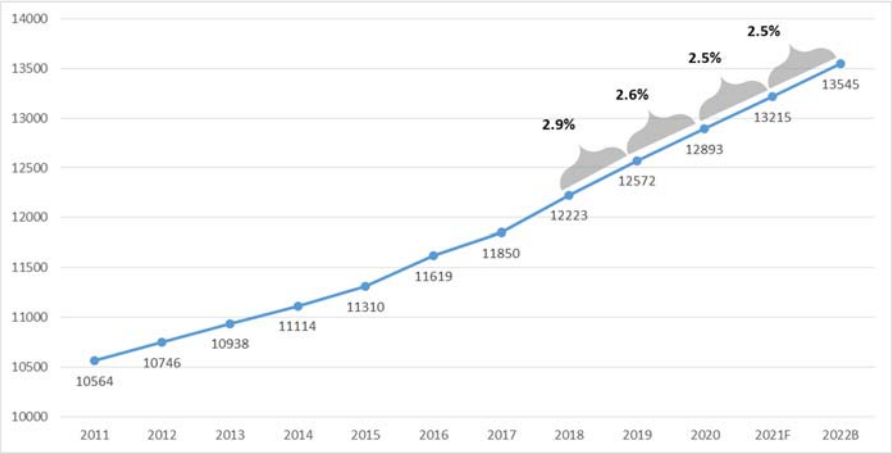
2022 Operating Revenues

The chart below provides details by type of operating revenue for the General Fund.



Practice fee revenues are budgeted at $24.8 million, a 6.8% increase over the 2021 budget. The 2021 budget assumed no net increase in the number of lawyers, year over year, but the actual increase has been consistent with historical averages of a 2.5% increase in lawyers each year. This trend is projected to continue into 2022. Given this, the 2022 budget uses an estimate of 13,545 full-time equivalent lawyers.

Practicing Lawyer History



PLTC revenues are budgeted at $1.8 million, based on 610 students, similar to the number of students projected in 2021.

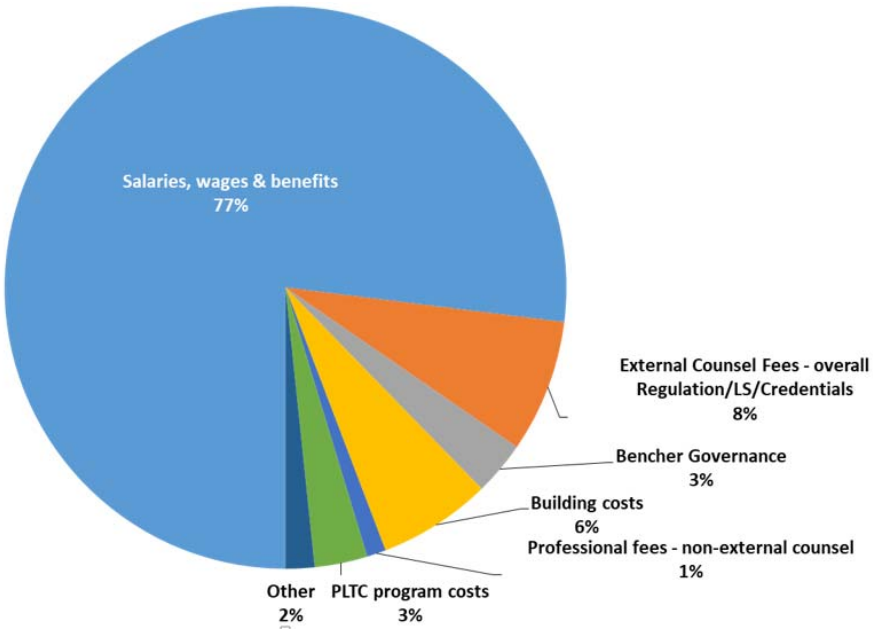
Electronic filing revenues are budgeted at $785,000, an increase of $85,000 over 2021, which is consistent with the real estate projections at the time of budgeting.

Other revenues, which include credentials and incorporation fees, fines, penalties and cost recoveries, and interest income are budgeted at $1.6 million, about $166,000 more than 2021, in line with historical averages.

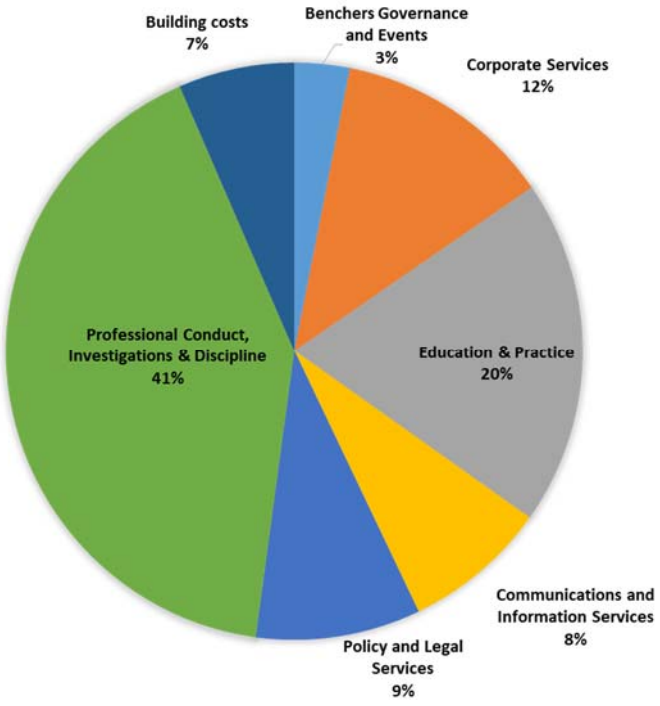
Building revenue and recoveries are budgeted at $1.4 million in 2022. The Law Society owns the 839/845 Cambie building, and occupies the majority of space, and the space that is not occupied by the Law Society is leased out to external tenants. In 2021, external lease revenues are budgeted at $849,000. Also included in lease revenues is an inter-fund market rent allocation of $526,000 charged by the General Fund for space occupied at 845 Cambie by the Lawyers Indemnity Fund and the Trust Assurance Program.

2022 Operating Expenses

The majority of operating expenses (77%) are related to staffing costs to provide the programs and services to both the public and lawyers. External counsel fees are 8% of overall spending, which is consistent with external counsel fee spending levels in 2021. The chart below provides information on type of operating expenses for General Fund.



The operating costs by program area as a percentage of the 2022 budget are:



Departmental Summaries

Bencher Governance and Board Relations

Bencher Governance and Board Relations includes the costs of the Bencher and committee meetings, the associated travel and meeting costs, Law Society meetings and events and the costs of new initiatives related to the Bencher Strategic Plan. This also includes the Board Relations and Events department that coordinates and organizes the Bencher and Executive meetings, coordinates external appointments, and plans and provides administrative and logistical support for Law Society events, the annual general meeting and Bencher elections.

The 2022 Bencher Governance and Board Relations operating expense budget is $966,000, an increase of $33,000 (3.5%) from the 2021 budget. This increase is related to market based salary adjustments in Bencher Relations and Events and increased costs related to advanced voting and real-time voting at the Annual General Meeting, offset by other cost decreases. It is planned that Bencher and committee meetings will continue to be held 50% fully in-person and 50% fully virtual during 2022 which will keep travel and meeting costs in line with expectations in the 2021 budget.

Corporate Services

Corporate Services includes General Administration, Office of the CEO, Finance, Human Resources, and Records Management.

General Administration includes the Office of the CEO and the Operations department which provides general administrative services, such as reception, office services, office renovation services and building management oversight.

Finance provides oversight over all the financial affairs of the Law Society, including financial reporting, operating and capital budgeting, audit, payroll and benefits administration, cash and investment management, and internal controls.

Human Resources develops and maintains the human resource policies and procedures, and provides services related to recruiting, compensation, performance management, employee and labor relations, and training.

Records Management is responsible for the records management, library and archives program, including the oversight of the electronic document management system.

The 2022 Corporate Services operating expense budget is $3.8 million, $149,000 (4.1%) higher than the 2021 budget, with increases primarily related to market based salary adjustments and increased recruiting costs .

Education & Practice

Education and Practice includes Member Services, Credentials, PLTC, Practice Support, Practice Standards and Practice Advice.

Member Services provides services to lawyers, including lawyer status changes, fee billings, unclaimed trust funds, and Juricert registration. This department also administers the annual continuing professional development program for all lawyers and the law student admission program.

Credentials ensures new and transferring lawyers are properly qualified to practice law in BC by preparing and assessing applicants for call and admission to the Law Society, licensing them to practice, and Call Ceremonies.

PLTC & Education includes PLTC and Practice Support. PLTC helps articled students make the transition from law school to legal practice. Practice Support provides lawyer resources and online courses for the profession. A chart showing the historical levels of PLTC students is shown in Appendix G.

Practice Standards is a remedial program that assists lawyers who have difficulty in meeting core competencies and who exhibit practice concerns, which may include issues of client management, office management, personal matters, and substantive law. The Practice Standards department conducts practice reviews of lawyers whose competence is in question, and recommends and monitors remedial programs.

Practice Advice helps lawyers serve the public effectively by providing advice and assistance on ethical, practice and office management issues. The majority of the costs of this department are allocated to LIF.

The total 2022 Education & Practice operating expense budget is $6.1 million, an increase of $547,000 (10.3%) from the 2021 budget related to current operations. Additionally $200,000 is also budgeted in 2022 in this area as the result of the deferral of call ceremonies from 2020 and 2021, due to the global pandemic. This amount will be funded from reserve.

Increases in this area are related to market based salary increases and the addition of needed staff resources in credentials, member services, practice support and PLTC.

Communications and Information Services

Communications is responsible for all lawyer, government and public relations and provides strategic communication advice to all areas of the Law Society. The department also manages and maintains the Law Society website, electronic communications and produces our regular publications such as the Bencher Bulletin, E-Brief and Annual Review.

Information Services is responsible for all technical services relating to computer business systems and databases, networks, websites and data storage and communication technology.

The 2022 Communications and Information Services operating expense budget is $2.5 million, an increase of $261,000 (11.5%). This increase is related market based salary increases and communications staff resources, along with computer technology needs. With the digitization of the workplace, new software and services are required including cyber security, virtual meeting software, case management software, and data analytics. Additionally, increased software costs are related to the need to move some software to an annual subscription based service, which then decreases capital costs.

Policy & Legal Services

Policy & Legal Services includes policy, legal services, external litigation and interventions, ethics, tribunal and legislation, information and privacy, and unauthorized practice.

Policy and Legal Services develops policy advice, legal research and Rules drafting, and monitors developments involving professional regulation, independence of the Bar and Judiciary, access to justice, and equity and diversity in the legal profession, and supports the Ethics Committee. In addition, includes external counsel fees providing services for legal defence cases and interventions on behalf of the Law Society.

Tribunals and Legislation supports the work of Law Society hearing and review tribunals and drafts new rules and proposed amendments to the *Legal Profession Act*.

Information & Privacy handles requests made of the Law Society and maintains compliance of the Law Society data and training under the Freedom of Information and Protection of Privacy Act (FOIPPA).

Unauthorized Practice (UAP) investigates complaints of unauthorized practice of law.

The 2022 Policy and Legal Services operating expense budget is $2.9 million, an increase of $410,000 (16.6%) from the 2021 budget. This is primarily related to market based salary increases, plus staff resources related to the enhancement of our privacy, records and information management functions, along with tribunal counsel and support resources. Additionally there has been an increase in the Legal Defence costs due to an increase in files.

Professional Conduct, Investigations & Discipline

The main program areas included in this area are: CLO Department, Professional Conduct, Discipline, Forensic Accounting and Custodianships.

The CLO department is responsible for providing oversight of all of the programs in Professional Regulation, which include: intake, early resolution, investigation, discipline, monitoring and enforcement, custodianships, litigation management, unauthorized practice and practice standards. Additionally the CLO department provides support to the Discipline Committee and conducts reviews of the professional regulation programs in order to ensure the effective utilization of Law Society resources.

Professional Conduct includes the Intake and Early Resolution and the Investigations, Monitoring and Enforcement groups, which receive and investigate complaints about lawyers' conduct and recommend disciplinary action where appropriate.

Discipline manages the conduct meeting and conduct review processes, represents the Law Society at discipline hearings and provides legal advice on investigations.

Forensic Accounting provides forensic investigation services to support the regulatory process.

Custodianships provides for the arrangement of locum agreements or custodians to manage and, where appropriate, wind-up legal practices when lawyers cannot continue to practice due to illness, death, or disciplinary actions.

The 2022 Professional Conduct, Investigations and Discipline operating expense budget is $12.9 million, an increase of $371,000 (3.0%) from the 2021 budget. This is primarily related to market based salary increases and additional staff resources related to managing file levels, and an increase in external counsel fees with a number of files requiring external expertise.

Building Costs

The Law Society owns the 839/845 Cambie Street building and occupies 80% of the available space. The cost of occupying and maintaining the building is partially offset by lease revenues from tenants, which are recorded in the revenue section.

The property management department provides services in relation to tenant relations, leasing, building maintenance and preservation, fire and safety, energy management, and minor and major capital project management.

The 2022 building operating expense budget is $2.0 million, an increase of $57,000 (3%) over the 2021 budget. This is the result of planning to return to more regular operations and increased amortization related to building improvements.

Capital Plan

The Law Society maintains a rolling 10 year capital plan to ensure that capital funding is available for capital projects required to maintain the 839/845 Cambie building and to provide capital for operational requirements, including computer hardware and software, furniture and workspace improvements. In addition, the capital plan funds the annual $500,000 debt service payment on the 839/845 Cambie building loan from LIF which will be fully repaid in early 2022. The amount of the practice fee allocated to capital projects is set at $126 per lawyer.

In the 2022 capital plan, $2.3 million is budgeted for capital projects. Projects include base building maintenance, including future window and cladding repairs, and the replacement of the electrical distribution equipment for 845 Cambie Street. In addition, the operational capital includes replacing computer hardware and software, furniture, and office renovations.

External Organization Funding

The Law Society collects a number of fees for external programs, which are included in the annual practice fee.

Federation of Law Societies – The Federation is expected to reduce to $24 per lawyer in 2022 ($28.12 in 2021) as the Federation will use some of their net asset reserves to fund their operations. The Federation of Law Societies of Canada provides a national voice for provincial and territorial law societies on important national and international issues.

CanLII – The CanLII fee is expected to remain at $42 per lawyer (rounded). CanLII is a not-for-profit organization initiated by the Federation of Law Societies of Canada. CanLII's goal is to make primary sources of Canadian Law accessible for free on its website at www.canlii.org. All provincial and territorial law societies have committed to provide funding to CanLII.

Courthouse Libraries of B.C. (CLBC) – With the support from the Law Society of British Columbia, the Law Foundation of British Columbia, and the Ministry of Attorney General, CLBC provides lawyers and the public in BC with access to legal information, as well as training and support in accessing and using legal information. Through its information services, curation of print and digital collections, website content and training, the library provides practice support for lawyers and access to justice support to the public across the province, through its 31 physical locations. CLBC will be provided funding of $2,759,000 in 2022. The contribution per lawyer will remain at $204 (rounded).

The Advocate – The Advocate per lawyer funding will slightly increase to $25 per lawyer to provide funding for the operating budget to keep net asset reserves at the current level. The Advocate publication is distributed bi-monthly to all BC lawyers.

Lawyer's Assistance Program (LAP) – LAP provides confidential outreach, education, support and referrals to lawyers and other members of British Columbia's legal community. LAP has requested funding of $850,000. The contribution per lawyer will be $63.

Pro bono and access to justice funding – The Finance and Audit Committee recommended the contribution to pro bono and access to legal services funding be set at $365,000 for 2022. This funding is sent to the Law Foundation for distribution.

Trust Assurance Program and Fee

The goal of the Trust Assurance program is to ensure that law firms comply with the rules regarding proper handling of clients' trust funds and trust accounting records. This is achieved by conducting trust accounting compliance audits at law firms, reviewing annual trust reports, and providing lawyer advice and resources.

The Trust Administration Fee (TAF) is currently set at $15 per transaction, and no change is proposed for 2022. The 2022 TAF revenue is budgeted at $4.1 million, with an increase in the real estate market over 2020 levels expected for 2021 and 2022.

The Trust Assurance operating expense budget is $3.6 million, an increase of $195,000 (5.7%) from 2021. Increases are primarily related to market based salary adjustments and staff resources, offset by reduced travel costs.

The compliance audit program ensures that all firms are audited at least once within a six year cycle. In addition, real estate and wills & estate firms are audited every four years, along with more frequent audits in higher risk practices. In addition, the program develops and delivers webinars and trust accounting courses, and uses data analytics to improve effectiveness and efficiencies.

The TAF reserve at December 31, 2020 was $2.1 million. The Benchers recommend the TAF reserve be set at 6 months of operating expenses, with any excess transferred to Part B indemnity funding. During 2021, it is expected that $1.6 million may be transferred to Part B indemnity funding, if market projections are on track, but the actual amount will not be known until the end of the fiscal year. Previous transfers from TAF to LIF have totaled $6.8 million.

Trust Assurance Program Projections

	TAF		Total	Total	Net	Transfer to	
	Matters	Rate	Revenue	Expense	Income/ (Deficit)	LIF	Net Asset Balance
2020 Actuals	257,435	$ 15	$ 3,861,523	$ 3,078,990	$ 782,533	$ (700,000)	$2,072,034
2021 Projections*	321,794	$ 15	$ 4,826,904	$ 3,432,737	$ 1,394,167	$(1,600,000)	$1,866,201
2022 Budget	270,333	$ 15	$ 4,055,000	$ 3,627,751	$ 427,249	$ (450,000)	$1,843,450

Lawyers Indemnity Fund

Overview and Recommendation

The goal of the Lawyers Indemnity Fund (LIF) is to maintain a professional liability indemnification program for BC lawyers that provides reasonable limits of coverage for the protection of both lawyers and their clients and exceptional service, at a reasonable cost to lawyers. This is within an overarching objective of maintaining a financially stable program over the long term, in the interest of the public and the profession.

A number of factors influence the financial performance of our indemnification program, and we will review each below. Overall, 2020 was a year of uncertainty on a number of fronts arising from the pandemic and its effects. The significant "knowns" are that the number of claims declined, ending the year 5% below average, and the equity markets returned to bull status, climbing to new highs within weeks of March's plunge. We expect both to return to more normal levels throughout 2021-2022, and the longer term impact of the pandemic, while less certain, is not expected to be a significant cause of future risk for the program.

Taking all factors into account, the indemnity fee will remain at $1,800 for 2022.

Frequency and Severity of Claims

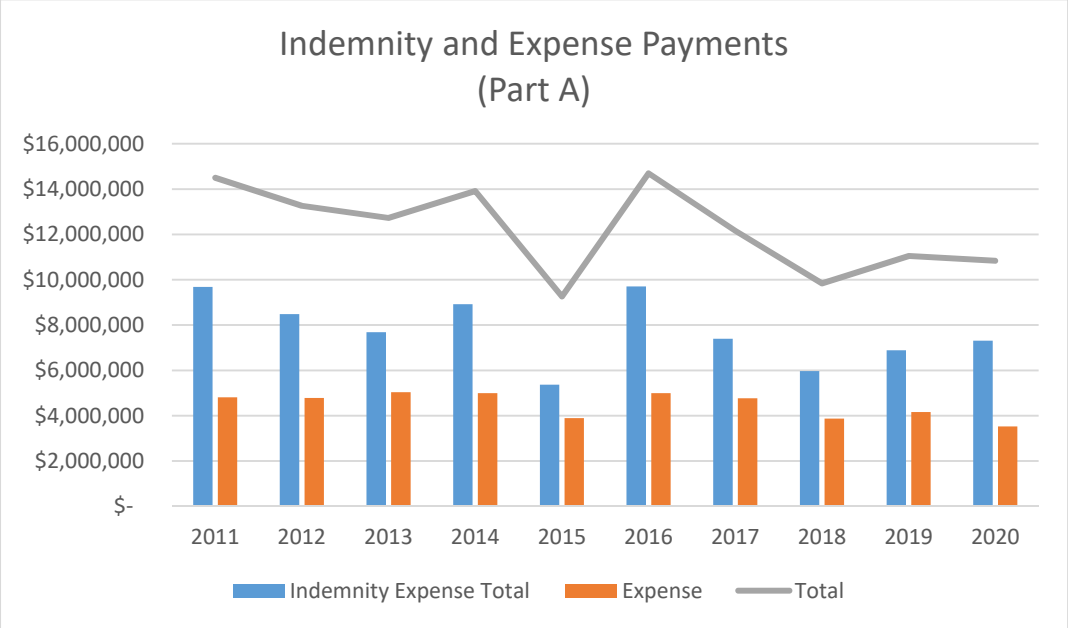
Part A:

The first and a key factor is the total incidence of claims and potential claims, or "reports" under Part A. Both the number of reports and frequency (number of reports divided by the number of lawyers) declined last year. We received a total of 1086 reports. Projecting to year-end 2021, we expect the number of reports to be 1,133, consistent with the 5-year average.

Report frequencies (rounded) for 2021 and the previous 11 years are:

2010	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**	**2020**	**2021 (projected)**
13%	14%	13%	12%	12%	13%	13%	13%	13%	13%	11%	12%

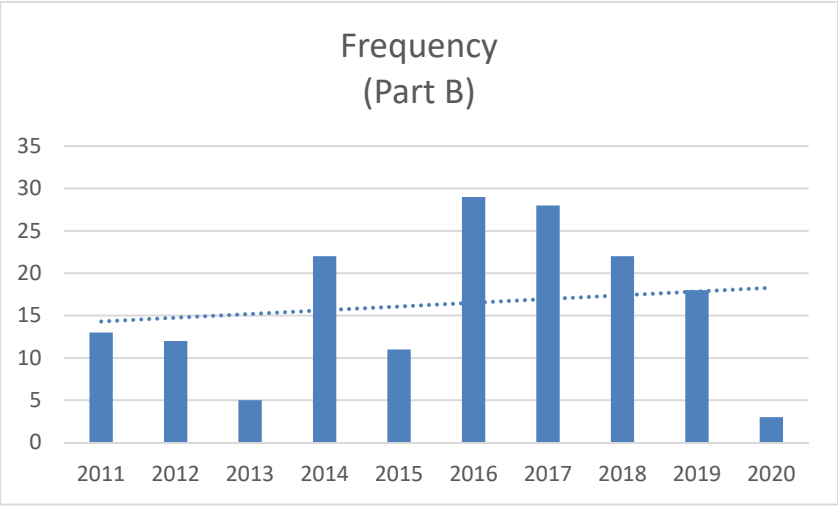
Another key factor is the amount paid to defend and resolve claims. As demonstrated in the graph below, the severity (the dollar value) of claim payments on a *calendar* year basis has varied between $10M and almost $15M. 2020 closed out at $12M. Projected to year-end 2021, we expect total payments to increase to $13M, 14% higher than in 2020 but within normal range.



That said, on a *claim year* basis, the total incurred (total reserves and payments) as at year-end 2020 for the claims reported in 2018 ($32M), and 2019 and 2020 (both, $34M) exceeds any previous year. In fact, the 2019 incurred has increased from $31M to $34M in a single year. Primarily due to conservative reserving practices, the higher incurreds may also signal increased severity. We expect it is both, and time will tell what proportion of each is at play as the claims develop.

Part B:

Because of the small number of trust protection claims under Part B of the policy, the year-over-year experience is more volatile. The graph below depicts this volatility. 2020 closed out the year with only 3 reports, and we've received 4 reports in the first half of 2021, well below the annual average of 18.



As to severity, total payments in 2020 were $263,000. This is consistent with the 10-year annual average (including $1.4M paid in 2018) of $284,400. We estimate paying approximately $400,000 on claims in 2021, exceeding the average by 41%.

Future Practice Risks

The third factor is the risk of increased future claims.

The Pandemic

The most significant event to potentially impact LIF is no surprise: the Covid-19 pandemic and resulting lockdown. Our experience in 2020 and, to date, in 2021 bears little cause for concern.

Revenue

On the revenue side, we are cautiously optimistic that 2021 and 2022 results will be favourable. Last year, we had predicted a reduction in covered lawyers and a proportionate reduction in indemnity fee revenues this year, as a result of more lawyers working part-time, due to Covid-19. That has not come to pass and our full-time covered lawyer cohort actually increased over 2020 and again in 2021. As a result, for 2022 we have budgeted an increase in fee revenues of 8.1%, or $1.3M, from the 2021 budget. We project investment returns of 5% based on advice from our investment advisors, George & Bell.

Payments

On the payment side, we have received 30 reports of claims caused by the pandemic and expect more to come. To date, these claims have resulted in few payments, however, we anticipate that one claim in particular will result in a payment of a full policy limit. In order to manage the expected increase and reduce the key risk caused by the pandemic (missed limitation periods), we provided lawyers with a steady stream of information about court closures, and developed guidelines with the BC Ministry of Attorney General on the calculation of limitation periods in light of the suspension.

On other fronts, our experience is that following a recession, claims against commercial solicitors increase in both number and value as development projects falter and loan defaults occur, causing borrowers, guarantors, investors, and creditors to search for documentation loopholes to avoid paying debts, recoup losses, and assert priority over assets, all while assets have diminished in value. Such circumstances usually lead to claims against both lawyers on either side of the deal as well as the lawyers for other parties. However, perhaps due to a quickly rebounding economy, we have not experienced a significant increase in commercial lending, borrowing, or real estate claims as a result of the recession. At least not yet. There was also a possibility that financial difficulties could cause some lawyers to misappropriate trust funds, leading to an increase in trust protection claims under Part B. Similar to recession-based claims, this has not been borne out – yet.

Offsetting this slightly is a reduction in reports we experienced last year. This likely reflects the effect of the early stages of the lockdown when lawyers were performing less work, making fewer errors, and reporting fewer claims.

Social engineering frauds

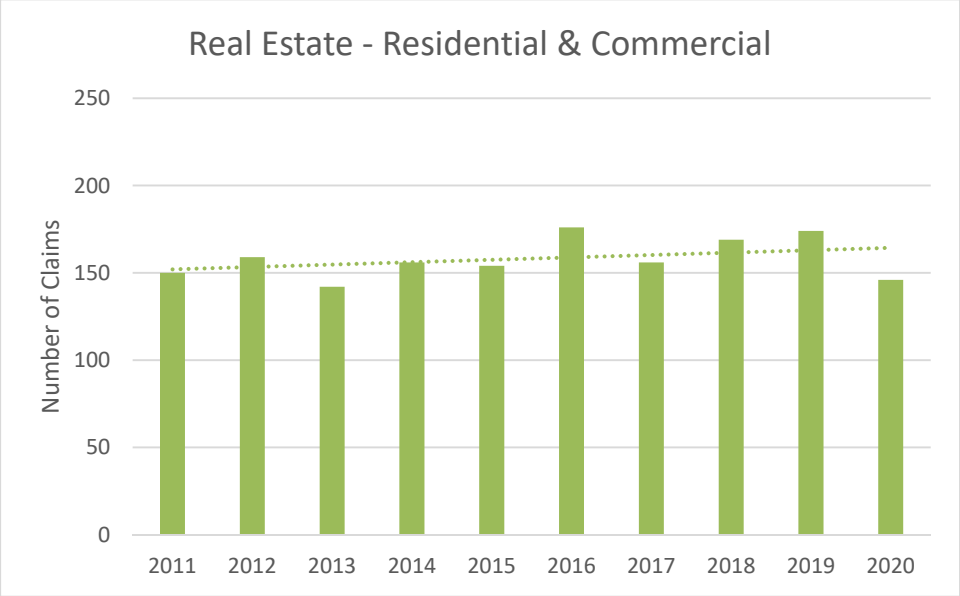
The expanded coverage under Part C for trust shortages caused by certain social engineering scams came into effect in 2017. Our experience with claims is in line with projections of an annual average of two, and we have received one claim so far in 2021. To date, payments from the fund have slightly exceeded $1M. With the advent of the cyber insurance program, it is possible that we may see fewer payments under Part C, although they will be larger as we reduced the percentage deductible payable by lawyers from 35% to 15%.

Real estate

In the real estate arena, claims arising from the *Real Estate Development Marketing Act* now account for $5.5M of payments and a projected further exposure of $1.1M. The number of reports and payments had been decreasing until we received five REDMA reports in 2020, two with total reserves of almost $1M. Fortunately, with the strong real estate market, we have only received one report to date in 2021.

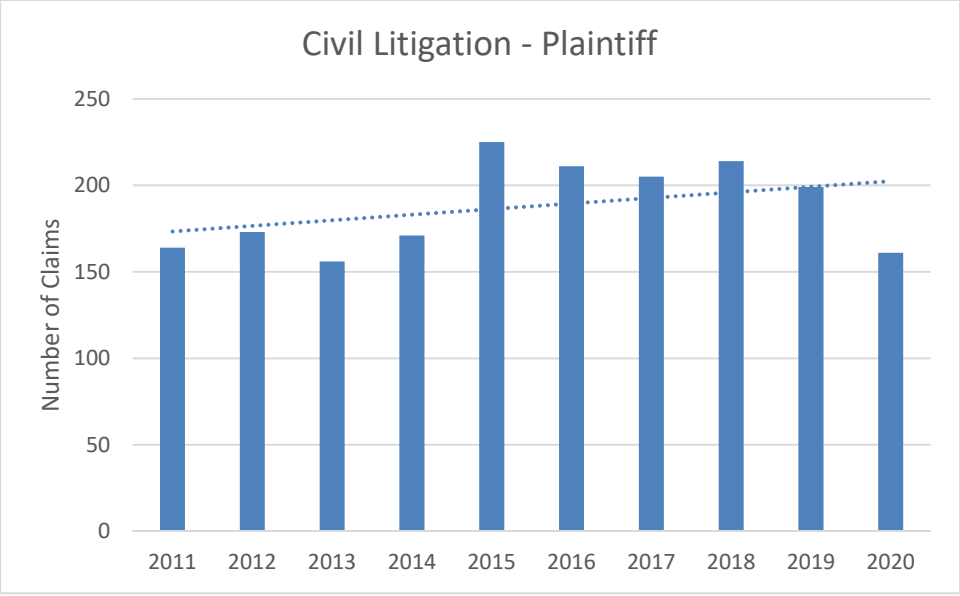
On other fronts, the BC government's tax on foreign purchases of Vancouver real estate has given rise to 36 claims against lawyers, with a total incurred (total reserves and payments) of $6M. We continue to focus risk management attention on this area. In addition, the government's new PPT form and land ownership registry, which imposed heightened obligations for lawyers acting for purchasers to disclose beneficial interests, was expected to result in additional claims, and we received our first one last month. The new disclosure requirements will expand in the fall for every reporting body holding any interest in land. This development may also generate claims. Finally, real estate identity frauds have returned to Metro Vancouver, heightening the risk of claims. We are cautiously optimistic, however, that our extensive risk management efforts on all of these fronts will moderate their impact on claims.

More broadly, as illustrated in the graph below, the overall frequency of reports arising from commercial and residential real estate practice, combined, has remained relatively consistent since the end of the impact of the 2008-9 recession. The hot residential market of late is expected to lead to more claims against conveyancers in the next year. This will likely result from oversights due to volume as well as purchasers entering into risky contracts to compete for homes in a frothy market. However, we don't anticipate a sharp increase in claims.



Other practice areas

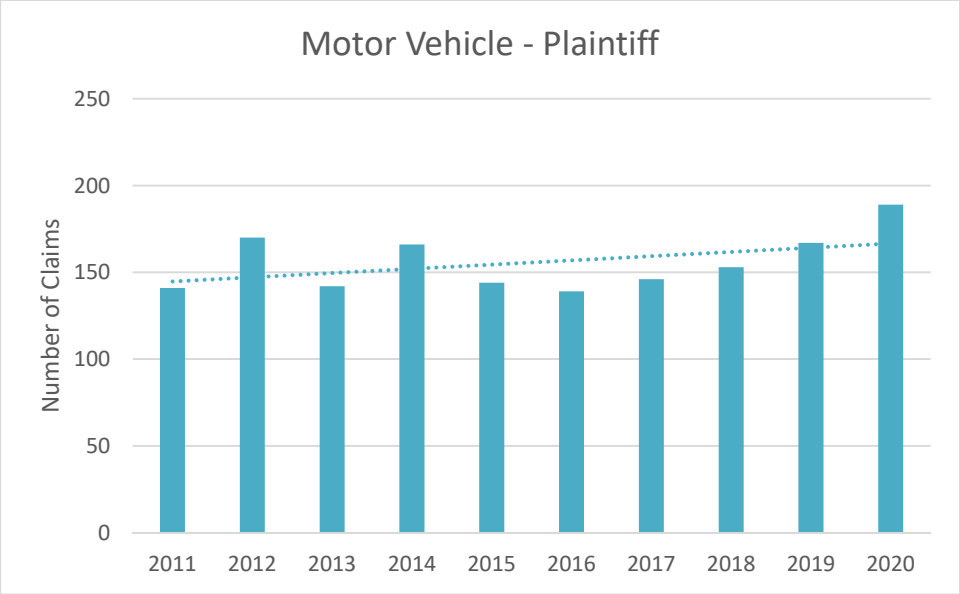
On the other hand, civil litigation on the plaintiff side continues to be a significant cause of claims and potential claims – as demonstrated by the graph below. Although claims declined last year due to the closing of the courts relative to Covid-19, these claims comprise almost 20% of reports across all practice areas.



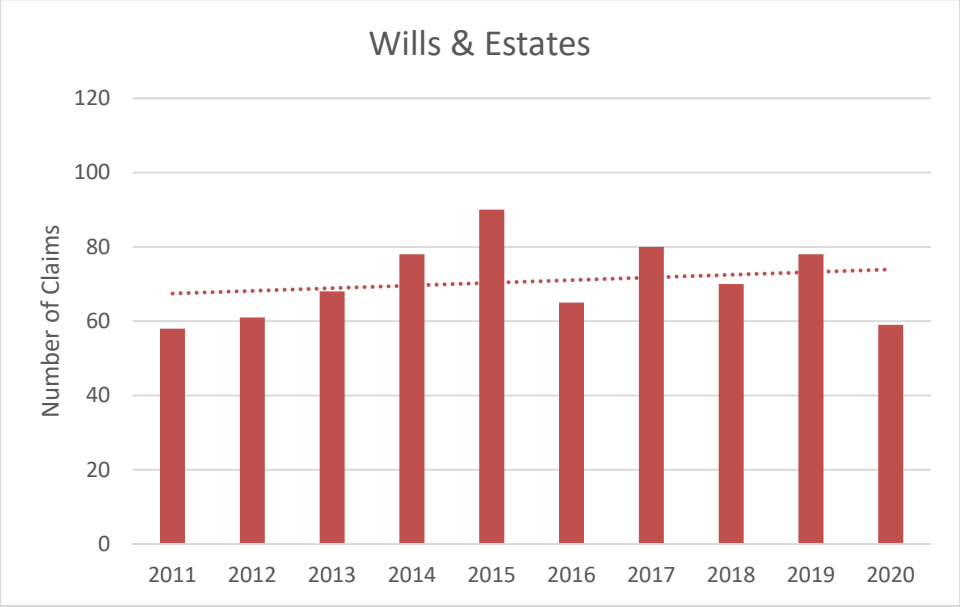
Motor Vehicle practice on the plaintiff's side is an area where we may see increased risk in the near-term, but a decrease over the long-term. Although other practice areas saw fewer reports in 2020, plaintiff MVA claims increased due to missed limitations arising from a lack of attention to the new Covid-19 rules. This is demonstrated in the graph

below. On the other hand, the government's initiative to fold all "minor injury" claims and personal injury actions up to $50,000 into the jurisdiction of the Civil Resolution Tribunal faced a successful challenge by the TLABC, and the claims that we expected to arise from that change have been delayed. We have yet to see how the government will respond; however, if new legislation is enacted, we expect the change to catch some lawyers off-guard, with claims arising. These should be limited in number – as our risk management efforts have been extensive and will continue.

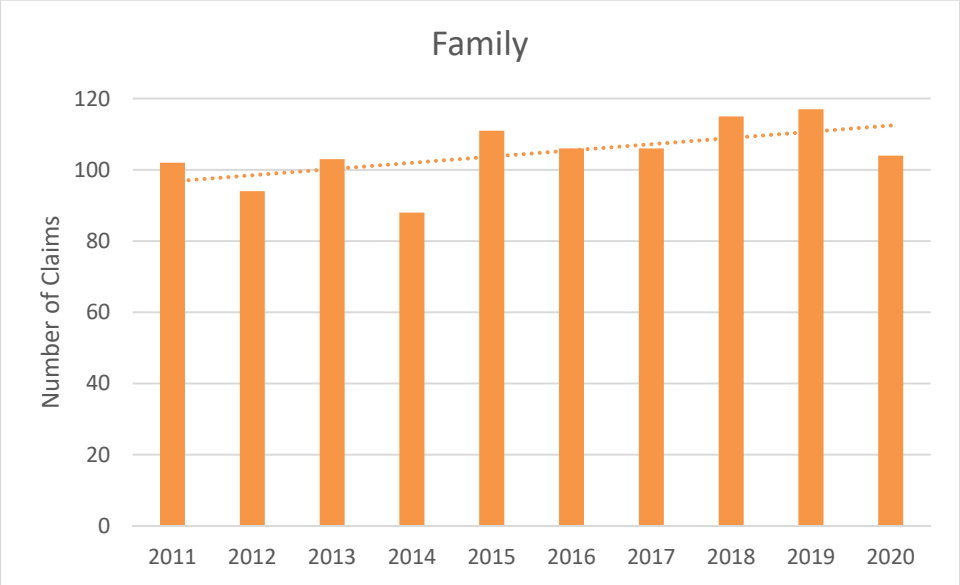
More significantly, over the longer horizon, given that no-fault insurance has now become a reality in BC, we expect that MVA claims will drop substantially in the next few years. We will also be watching for an increase in claims elsewhere due to lawyers moving from MVA personal injury practices to other areas where they lack experience. We anticipate that over the next few years, a large number of personal injury lawyers will pivot to family, wills & estates, class actions, medical malpractice, employment law, general insurance defence, and general litigation.

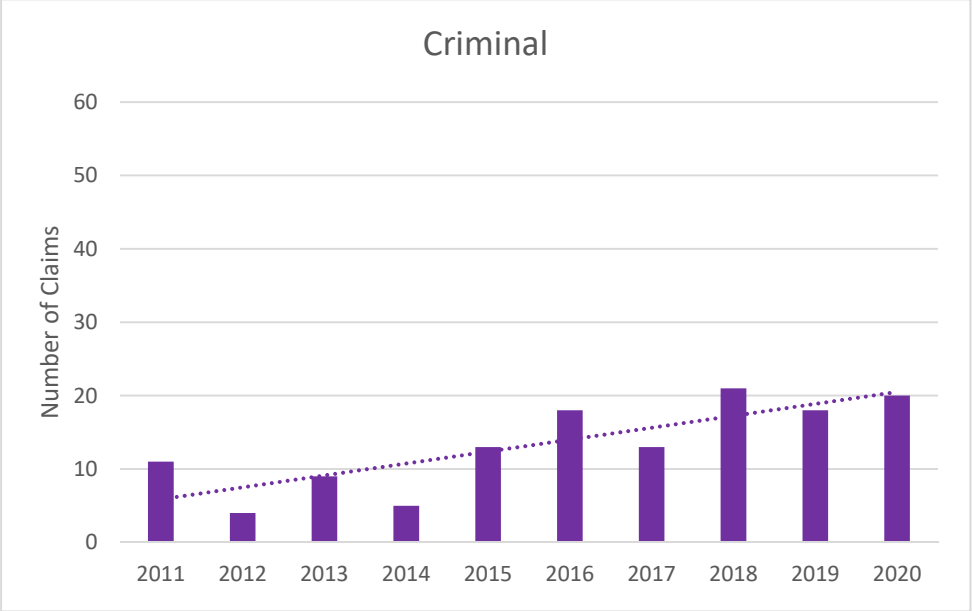


The *Wills, Estates and Succession Act* and rules that came into effect in March, 2014 was a net positive for claims reduction in the wills and estates area of practice, due to the expanded opportunity to repair faulty wills leading to fewer claims against lawyers for drafting and execution errors. The trend line in the graph below illustrates that claims have increased very slightly over the last 10 years, which, given our aging demographic, is better than expected. Nonetheless, we foresee the wills and estates practice area generating increasing numbers of future claims as the population ages and passes on substantial wealth to beneficiaries.



Two practice areas whose numbers have grown over the last 10 years are family, and criminal (for “ineffective assistance of counsel” claims). See graphs below. Overall, however, criminal generates relatively few reports and family, for the most part, relatively modest indemnity payments.





Apart from the risks noted above, and potential increases in franchise and family pension claims, which we are monitoring, we are not aware of significant new covered areas of exposure for lawyers.

Investment Returns

The fourth factor is the return on investments available to fund the program. The 2020 return on LIF long-term investments – at 7.6% – while lower than the benchmark of 9.6%, is higher than the 5% return we have budgeted for 2021 and 2022

Minimum Capital (Net Asset) Requirements

In addition to the investment return, we must maintain a certain amount of the fund for contingencies and adverse developments. Applying the Minimum Capital Test (MCT) – an industry-wide solvency benchmark for insurers – the Fund's actuary analyzed LIF's future risks relative to its net assets and advised on an appropriate level of capital funding. His opinion was that as of year-end 2020, LIF's MCT ratio was 274%. In his view, the program was appropriately funded based on an internal *minimum* target capital ratio of 198%.

The actuary also states that LIF might benefit from using an internal target MCT *range*, and suggests that a reasonable range for LIF is 220 – 275%. As long as we are using the MCT as a gauge for our capital requirements, this is a useful factor to consider, and the fee recommendation is consistent with the range.

Net Assets

The LIF net assets as at December 31, 2020 were $111M, including $17.5M set aside for trust protection claims under Part B. The *unrestricted* net asset position of the fund was therefore $94M, higher than the $80M of the previous year.

Revenue

Looking ahead to 2022, the total LIF assessment revenues are budgeted at $17M. As mentioned above, this is 8.1% more than the 2021 budgeted fee revenue of $16M. Investment income for 2022 is budgeted at $11M, based on an estimated return of 5% (see Appendix D).

Expenses

Operating expenses for 2022, excluding the provision for claim payments, are budgeted at $10.8M, an increase of $2.3M, 28% more than the 2021 budget (Appendix D). The increase is largely attributed to higher investment management expenses related to infrastructure investments and increased contributions to general fund programs, as well as the cyber insurance premium payable to Coalition, Inc.

Fee Recommendation

The indemnity fee increased to $1,800 in 2018 after having been set at $1,750 for the previous seven years. It has remained at $1,800 for the last four years. Taking all factors into account, the indemnity fee will remain at $1,800 (full-time) and $900 (part-time) for 2022.

Annual Practice Fee and Indemnity Fee

The 2022 annual practice fee will be set at $2,289.00 and the indemnity fee set at $1,800.00. This results in the annual mandatory fees remaining the same for the third year in a row. A comparison to other Canadian law societies is provided in Appendix F.

The 2022 mandatory fees for practicing, covered lawyers consists of the following:

The Law Society of BC
2022 Fee Recommendation

	Funding (in 000's)				Per Lawyer			
	2022	2021	Change ($)	Change (%)	2022	2021	Change ($)	Change (%)
Law Society Operating Expenses	$ 31,184	$ 29,156	2,028	7.0%	$ 1,904.00	$ 1,903.99	$ 0.01	0.0%
Federation of Law Societies	324	364	(40)	-11.0%	24.00	28.12	(4.12)	-14.7%
CanLII	547	547	-	0.0%	42.00	41.94	0.06	0.1%
CLBC*	2,759	2,694	65	2.4%	204.00	203.57	0.43	0.2%
The Advocate**	411	347	64	18.5%	25.00	22.26	2.74	12.3%
LAP*	850	792	58	7.3%	63.00	61.69	1.31	2.1%
Pro bono/Access*	365	363	2	0.6%	27.00	27.56	(0.56)	-2.0%
Annual Practice Fee					$ 2,289.00	$ 2,289.12	$ (0.12)	0.0%
Indemnity Fee					$ 1,800.00	$ 1,800.00	-	-
Total Mandatory Fee					$ 4,089.00	$ 4,089.12	$ (0.12)	0.0%

**2022 full fee paying equivalent members projected at 13,545*
***2022 practicing, non-practicing and retired members projected at 16,663*

Resolutions for Practice Fee and Indemnity Fee

The following Bencher resolutions are adopted:

Be it resolved that:

- Effective January 1, 2022, the practice fee be set at $2,289.00, pursuant to section 23(1)(a) of the Legal Profession Act.

Be it resolved that:

- the indemnity fee for 2022 pursuant to section 30(3) of the *Legal Profession Act* be set at $1,800;
- the part-time indemnity fee for 2022 pursuant to Rule 3-40(2) be set at $900; and
- the indemnity surcharge for 2022 pursuant to Rule 3-44(2) be set at $1,000.

APPENDIX A – GENERAL FUND – Operating Budget

THE LAW SOCIETY OF BRITISH COLUMBIA
OPERATING BUDGET (excluding capital/depreciation)
For the Year ended December 31, 2022
GENERAL FUND SUMMARY

	2022 Budget	2021 Budget	2020 Actual	2022B vs 2021B Variance	%	2022B vs 2020A Variance	%
GENERAL FUND REVENUES							
Practice fees	24,761,537	23,187,887	22,976,801				
PLTC and enrolment fees	1,779,375	1,752,750	1,819,350				
Electronic filing revenue	785,000	700,000	745,535				
Interest income	290,000	255,000	456,601				
Credentials and membership services	775,570	634,745	752,780				
Fines & penalties	275,000	275,000	355,967				
Program cost recoveries	122,300	122,300	49,853				
Subscriptions	-	-	2,924				
Insurance recoveries	-	-	-				
Other cost recoveries	-	10,000	58,533				
Other revenue	186,600	186,600	248,520				
Building revenue and recoveries	1,384,086	1,382,214	1,296,044				
TOTAL GENERAL FUND REVENUES	**30,359,468**	**28,506,496**	**28,762,908**	**1,852,971**	**6.5%**	**1,596,560**	**5.6%**
GENERAL FUND EXPENSES							
Benchers Governance and Events	965,536	932,745	608,906				
Corporate Services	3,835,028	3,685,575	3,210,784				
Education & Practice	6,051,675	5,304,692	4,778,982				
Communications and Information Services	2,526,888	2,266,344	2,009,429				
Policy and Legal Services	2,881,889	2,471,673	2,370,926				
Regulation	12,893,736	12,523,200	11,677,680				
Building costs	2,029,716	1,972,267	1,650,222				
TOTAL GENERAL FUND EXPENSES	**31,184,468**	**29,156,496**	**26,306,929**	**2,027,972**	**7.0%**	**4,877,539**	**18.5%**
GENERAL FUND NET CONTRIBUTION	**(825,000)**	**(650,000)**	**2,455,979**	**(175,000)**		**(3,280,979)**	
Trust Assurance Program							
Trust Administration Fee Revenue	4,055,000	3,300,000	3,861,523	755,000	**22.88%**		
Trust Administration Department	3,627,751	3,432,737	3,078,990	195,014	**5.68%**		
Net Trust Assurance Program	**427,249**	**(132,737)**	**782,533**	**559,986**		**(355,284)**	
TOTAL NET GENERAL FUND & TAP CONTRIBUTION	**(397,751)**	**(782,737)**	**3,238,512**	**384,985**		**(3,636,263)**	

APPENDIX B – GENERAL FUND – Revenues and Expenses

THE LAW SOCIETY OF BRITISH COLUMBIA
OPERATING BUDGET (excluding capital/depreciation)
For the Year ended December 31, 2022
GENERAL FUND SUMMARY

	2022 Budget	2021 Budget	2020 Actual	2022 vs 2021 Budget Var	2022 v 2020 Actual Var
REVENUES					
Practice fees	24,761,537	23,187,887	22,976,801	1,573,650	1,784,736
PLTC and enrolment fees	1,779,375	1,752,750	1,819,350	26,625	(39,975)
Electronic filing revenue	785,000	700,000	745,535	85,000	39,465
Interest income	290,000	255,000	456,601	35,000	(166,601)
Credentials and membership services	775,570	634,745	752,780	140,825	22,790
Fines & penalties	275,000	275,000	355,967	-	(80,967)
Program cost recoveries	122,300	122,300	49,853	-	72,447
Subscriptions	-	-	2,924	-	(2,924)
Insurance recoveries	-	-	-	-	-
Other cost recoveries	-	10,000	58,533	(10,000)	(58,533)
Other revenue	186,600	186,600	248,520	-	(61,920)
Building revenue and recoveries	1,384,086	1,382,214	1,296,044	1,872	88,042
TOTAL GENERAL FUND REVENUES	**30,359,468**	**28,506,496**	**28,762,908**	**1,852,971**	**1,596,560**
EXPENSES					
Benchers Governance and Events					
Benchers Meetings	169,160	179,038	106,558	(9,878)	62,602
Office of the President	237,350	277,000	189,605	(39,650)	47,745
Benchers Retreat	139,950	132,200	791	7,750	139,159
Life Benchers Dinner	36,950	36,750	34,740	200	2,210
Certificate Luncheon	23,300	10,000	4,184	13,300	19,116
LS Award/Bench & Bar Dinner	4,350	2,800	5,322	1,550	(972)
Federation of Law Societies Mtgs	30,000	30,000	20,227	-	9,773
General Meetings	76,550	28,550	30,341	48,000	46,209
QC Reception	16,700	16,000	1,410	700	15,290
Welcome / Farewell Dinner	25,150	22,150	22,676	3,000	2,474
Volunteer Recognition	15,500	14,500	6,619	1,000	8,881
Gold Medal Award	6,900	6,700	2,459	200	4,441
Executive Committee	12,950	12,700	5,002	250	7,948
Finance & Audit Committee	1,750	1,750	862	-	888
Equity & Diversity Advisory Committee	2,500	2,500	361	-	2,139
Access to Justice Advisory Committee (formerly Access to Legal S	2,500	2,500	3,789	-	(1,289)
Rule of Law & Lawyer Independence Advisory Committee	5,500	2,500	4,489	3,000	1,011
Acts and Rules Committee	1,800	1,800	-	-	1,800
Governance Committee	2,500	2,500	1,670	-	830
Legal Aid Task Force	-	-	1,435	-	(1,435)
Truth and Reconciliation Advisory Committee	2,500	5,000	2,958	(2,500)	(458)
Mental Health Task Force	-	-	1,841	-	(1,841)
Rule of Law and Lawyer Independence Lecture	-	-	151	-	(151)
Futures Task Force	-	-	2,599	-	(2,599)
Licensed Paralegal Task Force	-	3,000	420	(3,000)	(420)
Lawyer Development Task Force	3,000	3,000	-	-	3,000
Anti Money Laundering Working Group	-	3,000	-	(3,000)	-
Executive Support	403,357	391,743	316,833	11,614	86,523
Elections	5,500	4,000	4,117	1,500	1,383
Bencher Governance allocated funds recovery	(163,499)	(160,776)	(89,927)	(2,723)	(73,572)
Board relations and events funds recovery	(96,682)	(98,160)	(72,626)	1,478	(24,056)
	965,536	**932,745**	**608,906**	**32,791**	**356,630**

	2022 Budget	2021 Budget	2020 Actual	2022 vs 2021 Budget Var	2022 v 2020 Actual Var
Corporate Services					
General Office	748,238	776,872	589,813	(28,634)	158,425
Office of the CEO	821,044	807,914	784,329	13,130	36,715
Finance	1,189,222	1,134,020	1,064,208	55,202	125,014
Human Resources	801,663	695,325	532,472	106,338	269,191
Records Management	274,861	271,444	239,962	3,417	34,899
	3,835,028	**3,685,575**	**3,210,784**	**149,453**	**624,243**
Education & Practice					
Licencing and Admissions	2,211,386	1,803,523	1,601,286	407,862	610,099
PLTC and Education	3,309,759	2,949,350	2,586,170	360,409	723,589
Practice Standards	530,530	479,833	384,526	50,697	146,004
Practice Support	-	71,986	207,000	(71,986)	(207,000)
	6,051,675	**5,304,692**	**4,778,982**	**746,983**	**1,272,693**
Communications and Information Services					
Communications	588,258	536,684	385,059	51,574	203,200
Information Services	1,938,630	1,729,660	1,624,370	208,970	314,259
	2,526,888	**2,266,344**	**2,009,429**	**260,544**	**517,459**
Policy and Legal Services					
Policy and Legal Services	1,784,292	1,475,519	1,480,322	308,773	303,970
Tribunal & Legislative Counsel	734,629	613,300	527,918	121,330	206,711
External litigation & Interventions	24,537	48,645	61,588	(24,108)	(37,051)
Unauthorized Practice	338,431	334,210	301,098	4,221	37,332
	2,881,889	**2,471,673**	**2,370,926**	**410,215**	**510,963**
Regulation					
CLO Department	929,214	872,806	974,231	56,408	(45,017)
Intake & Early Assessment	2,278,949	2,129,989	2,107,407	148,961	171,543
Discipline	2,809,004	2,814,495	2,764,687	(5,490)	44,317
Forensic Accounting	1,184,879	1,209,466	869,320	(24,587)	315,559
Investigations, Monitoring & Enforcement	3,920,150	3,654,529	3,316,419	265,621	603,731
Custodianships	1,771,540	1,841,915	1,645,616	(70,376)	125,924
	12,893,736	**12,523,200**	**11,677,680**	**370,536**	**1,216,057**
Building Occupancy Costs	**2,029,716**	**1,972,267**	**1,650,222**	**57,449**	**379,494**
TOTAL GENERAL FUND EXPENSES	**31,184,468**	**29,156,496**	**26,306,929**	**2,027,972**	**4,877,539**
GENERAL FUND INCOME/(LOSS)	**(825,000)**	**(650,000)**	**2,455,979**	**(175,000)**	**(3,280,979)**
TAF Revenue	4,055,000	3,300,000	3,861,523	755,000	193,477
Trust Administration Department	3,627,751	3,432,737	3,078,990	195,014	548,761
Net Trust Assurance Program	**427,249**	**(132,737)**	**782,533**	**559,986**	**(355,284)**
TOTAL GENERAL FUND & TAP INCOME (LOSS)	**(397,751)**	**(782,737)**	**3,238,512**	**384,986**	**(3,636,263)**

APPENDIX C – CAPITAL PLAN

	2022	2021
Computer hardware – Laptops, Server replacments, storage array	386,990	$169,000
Computer software – Adobe licensing, MS-SQL Licensing	206,800	$224,000
Computer upgrades – DM Sysytem, Website development	208,000	$88,000
Equipment, furniture and fixtures replacement	139,000	$214,000
Building projects – Building cladding and window repairs, Substation upgrade	$1,400,000	$1,036,000
Total	$2,340,790	$1,731,000

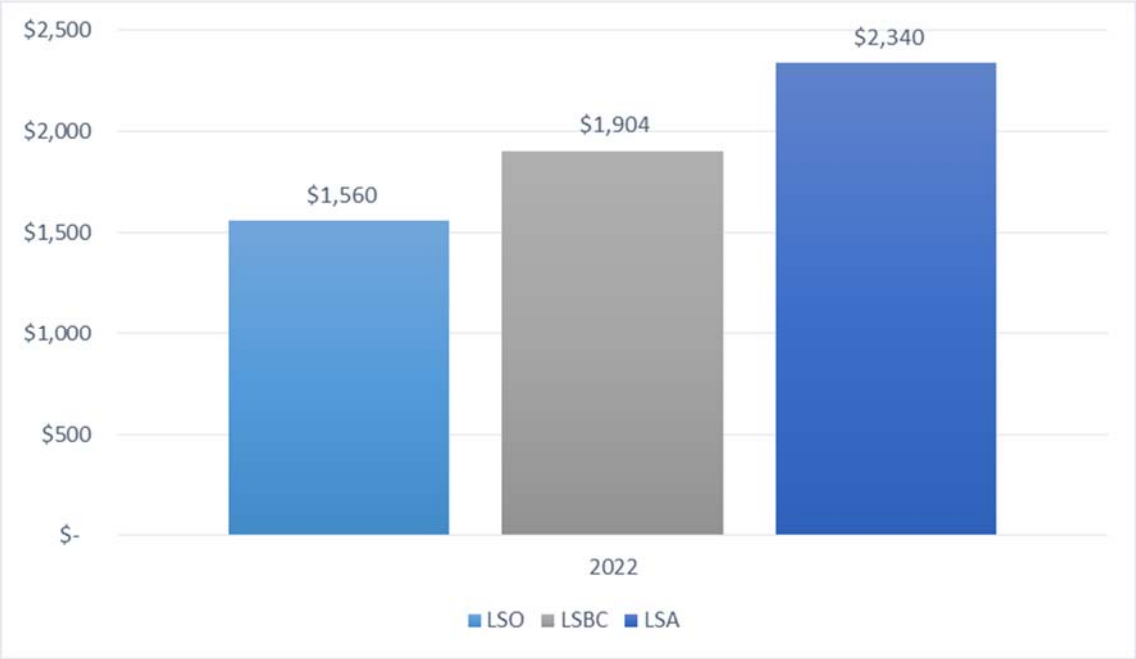
APPENDIX D – LAWYERS INDEMNITY FUND

THE LAW SOCIETY OF BRITISH COLUMBIA
Laywers Indemnity Fund
For the year ended December 31, 2022
CONSOLIDATED STATEMENT OF REVENUE AND EXPENSE

	2022 Budget	2021 Budget	Variance	%
REVENUE				
Annual Assessment	16,967,247	15,669,066		
Investment Income	11,034,561	8,528,272		
Other Income	65,000	65,000		
TOTAL REVENUE	**28,066,808**	**24,262,338**	**3,804,470**	**15.7%**
INDEMNITY EXPENSE				
Actuaries, consultants and investment management fees	1,716,419	905,577		
Allocated office rent	323,505	323,829		
Contribution to program and administrative costs of General Fund	1,513,403	1,381,456		
Insurance	1,695,150	444,219		
Office and Legal	610,610	771,635		
Premium taxes	-	7,640		
Provision for settlement of claims	17,630,000	17,952,000		
Provision for ULAE	-	-		
Salaries, wages and benefits	3,712,386	3,598,808		
	27,201,473	**25,385,164**	**1,816,309**	**7.16%**
LOSS PREVENTION EXPENSE				
Contribution to co-sponsored program costs of General Fund	1,251,859	1,055,628		
TOTAL EXPENSE	**28,453,332**	**26,440,792**	**2,012,540**	**0.1**
Net Contribution	**(386,524)**	**(2,178,454)**	**1,791,930**	

APPENDIX E – PRACTICE FEE COMPARISON

- 2022 LSBC practice fee compared to 2021 LSO & LSA fees as the 2022 fees are not yet available.

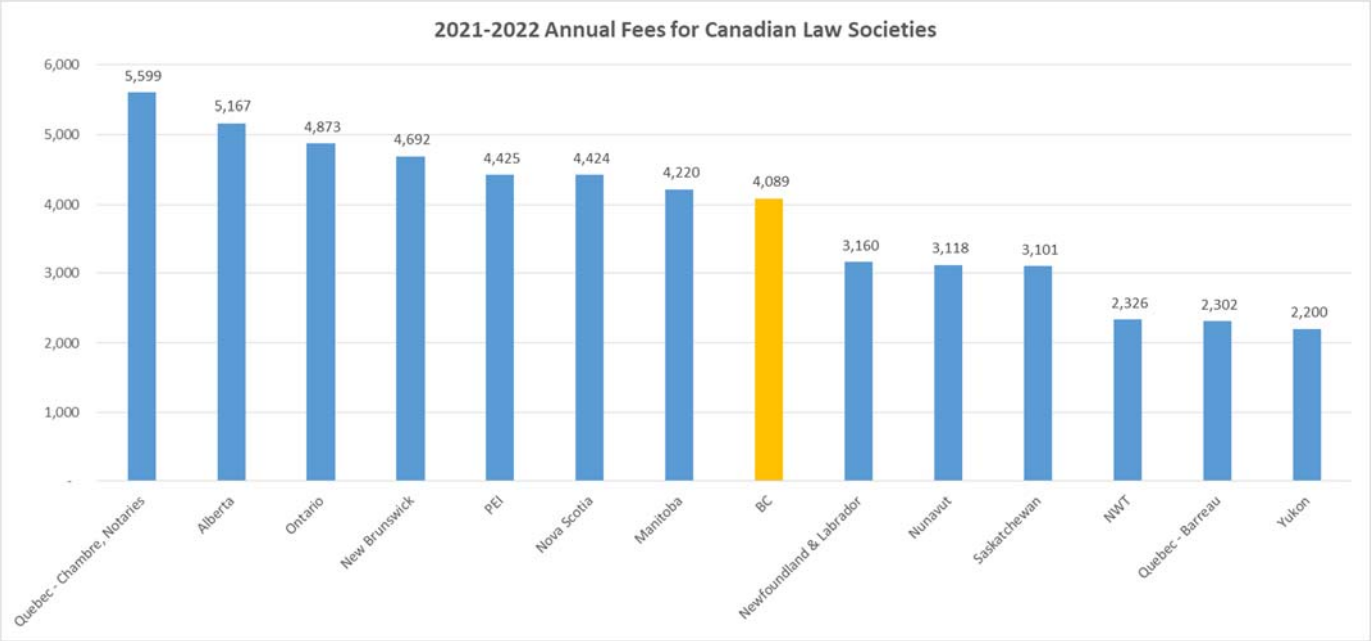


*Fees do not include external funding, if applicable, but include capital funding

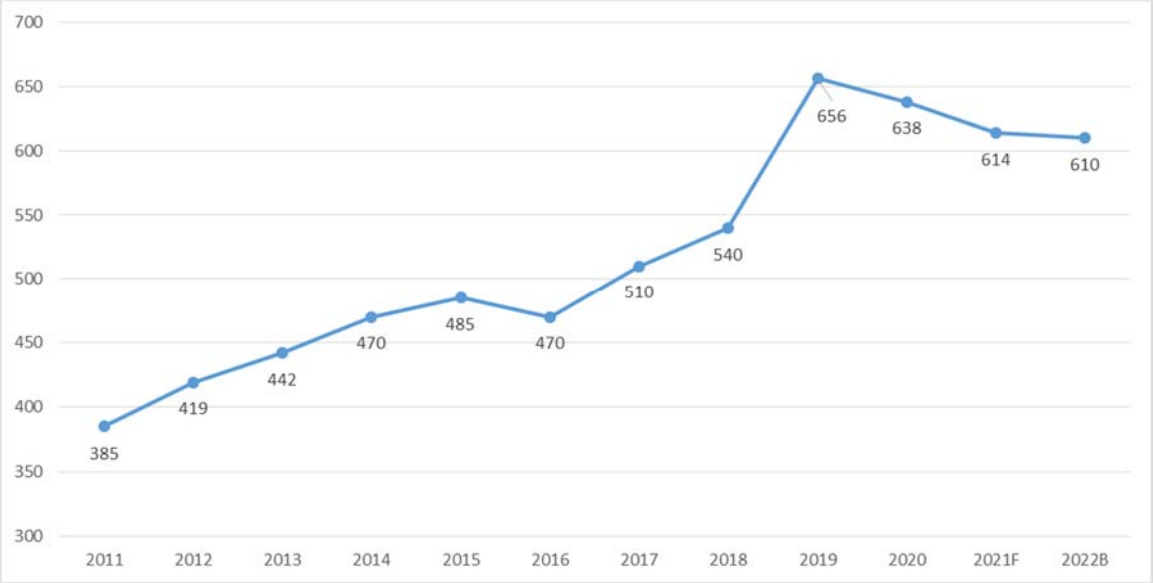
APPENDIX F – MANDATORY FEE COMPARISON

Mandatory Fee Comparison - 2022
(Full Time Practicing Covered Lawyers)

*Assumes the same fee from 2021 for all Law Societies as 2022 has not yet been set



APPENDIX G – PLTC Student History



The Law Society of British Columbia

Memo

To: Benchers
From: Indigenous Engagement in Regulatory Matters Task Force
Date: September 10, 2021
Subject: Indigenous Engagement in Regulatory Matters Task Force Terms of Reference and Work Plan

Background

At the July 9, 2021 meeting, the Benchers agreed to establish a task force to conduct a review of Law Society disciplinary processes, particularly with respect to the unique needs of Indigenous people within our regulatory and processes. The Benchers agreed that the Task Force would have the authority to propose amendments to the proposed terms of reference and work plan as needed, following consultation with the Truth and Reconciliation Advisory Committee (TRAC) and that the Task Force meet with and consult the TRAC in carrying out its work.

TRAC Review of the Terms of Reference

On August 17, 2021, TRAC met to review the proposed terms of reference for the task force.

TRAC proposed that, in consulting with the TRAC as provided in section 2 of the terms of reference, the Task Force should engage with the TRAC on an as needed basis (without the need for a prescriptive number of meetings), taking into account that a TRAC member will be Co-Chairing the Task Force.

TRAC suggested that, although the drafting of section 4(d) of the terms of reference does not require amendment, this portion of the Task Force's mandate should be carefully interpreted. Specifically, consideration of Indigenous non-adversarial approaches to conflict resolution could benefit the Law Society's processes, but care should be taken to direct this portion of the Task Force's work to complaints, investigations and discipline, as a broader incorporation of Indigenous perspectives into the Law Society's work would go beyond the realistic scope of the Task Force.

TRAC thought that the Task Force may, in the course of its work, identify lessons learned in relation to enhancing trust and relationship-building between the Law Society and communities, including Indigenous communities and that reference to witnesses and trauma-informed practice be included (expanding upon references to complainants and cultural competency).

In addition to the foregoing, TRAC members emphasized that significant work, beyond the Task Force's mandate, remains to be done regarding the Law Society's interactions and relationships

with Indigenous peoples. For example, further work may be required to consider whether complaints and other processes involving Indigenous members of the Law Society should be amended.

TRAC members also expressed a desire to provide feedback on the draft work plan and to work closely with the Task Force, as needed.

Task Force Review of the Terms of Reference

The Indigenous Engagement in Regulatory Matters Task Force ("Task Force") held its inaugural meeting on September 9, 2021, during which the Task Force reviewed its terms of reference and discussed its preliminary work plan.

The Task Force noted that the use of the adjective "vulnerable" to describe complainants and witnesses, specifically Indigenous persons, may not reflect the Law Society's respect for the strength and dignity of such persons, and that reference to vulnerability as a circumstance rather than a personal characteristic may better align with prevailing language that seeks to empower equity-seeking groups (e.g. survivor vs. victim; wheelchair user vs. handicapped)

The Task Force suggested that twelve months, rather than nine months, is a more achievable timeline for completion of the Task Force's work and that revising references to "cultural competency" to "intercultural competency" may better reflect the intended meaning for that phrase

In addition, the Task Force considered the potential forward-looking and retrospective aspects of its work.

Pursuant to its terms of reference, the Task Force is to present its work plan to the Benchers. A preliminary and high-level work plan is provided at Appendix A. We anticipate that as the Task Force's work progresses, the detailed work undertaken may be further refined.

Proposed Terms of Reference

A tracked changes copy of the terms of reference, compared against the original provided to Benchers on July 9, 2021, is provided as Appendix B.

The Law Society of British Columbia

Indigenous Engagement in Regulatory Matters Task Force
Work Plan

Phase 1: Research and Analysis of Law Society Processes	
Tasks	**Timeframe**
Researching what other entities do with respect to Indigenous complainants and witnesses Reviewing prior relevant reports Gathering and summarizing information regarding existing Law Society processes, including prior relevant investigations and discipline hearings	Sept 2021 – Dec 2021
Phase 2: Outreach and Consultation	
Tasks	**Timeframe**
Identifying key issues to discuss during consultations Identifying individuals and organizations to consult with and scheduling consultations Meeting with representatives from external organizations	Jan 2022 – May 2022
Phase 3: Draft Report and Recommendations	
Tasks	**Timeframe**
Synthesizing key findings and developing recommendations Preparing and finalizing final report Presentation of final report to the Benchers	June 2022– Sept 2022

The Law Society of British Columbia

Indigenous Engagement in Regulatory Matters Task Force

Terms of Reference

Updated: ~~July 2~~ September 9, 2021

Preamble

The decision in *Re Bronstein* raised serious questions about the ability of the Law Society's regulatory process to engage, address and accommodate marginalized complainants and witnesses, particularly Indigenous persons. In particular, the Law Society accepts the recommendation that the Law Society undertake a comprehensive review of its regulatory processes as they relate to access to justice and its responsiveness to all members of the diverse public it serves. Such a review will inform the steps to be taken by the Law Society, as contemplated within the 2021-2025 Strategic Plan, to address the unique needs of Indigenous people within our regulatory processes and to establish and maintain an interculturally competent regulatory process.

Mandate

The Task Force will examine the Law Society's regulatory processes, specifically its complaints, investigation, prosecution and adjudication processes, as they relate to ~~vulnerable and marginalized~~ complainants and witnesses, particularly Indigenous persons, who may be experiencing vulnerability or marginalization and make recommendations to the Benchers to ensure that the Law Society's regulatory processes accommodate the full participation of such ~~vulnerable and marginalized~~ complainants and witnesses.

Composition

The Task Force shall consist of seven members.

Meeting Practices

1. The Task Force shall operate in a manner that is consistent with the Benchers' governance policies.
2. The Task Force shall meet as required.
3. Quorum is four members of the Task Force (Rule 1-16(2)).

Accountability

The Task Force is accountable to the Benchers as a whole.

Reporting Requirements

The Task Force will deliver its report containing any recommendations for future action to the Benchers within ~~nine~~ twelve months from the date on which its work plan is delivered.

Duties and Responsibilities

1. Following its appointment, the Task Force will prepare a work plan which will be provided to the Benchers at their September 2021 meeting, outlining the anticipated scope of the review, including interviews and any anticipated research, and the procedures to be undertaken to gather information to complete its work. The work plan would also include any proposed changes or additions the Task Force, after consultation with the Truth and Reconciliation Advisory Committee, would recommend with respect to their mandate.
2. ~~Conduct interviews~~Consult with key stakeholders, including Law Society staff, ~~and~~ members of the Law Society Tribunal, members of the Truth and Reconciliation Advisory Committee, Indigenous leaders, and any others that the Task Force considers necessary for the purpose of preparing its report.
3. Conduct research into the engagement, accommodation and participation of Indigenous people in regulatory processes in other professions and jurisdictions.
4. The Task Force should include the following in developing any recommendations:
    a. An analysis of the effects on Indigenous complainants and witnesses of the processes used to gather, assess, introduce and submit evidence during investigations and hearings;
    b. An analysis of the nature and goals of proceedings that involve Indigenous people and Indigenous communities;
    c. Consideration and comparison of the differences that exist between Indigenous perspectives regarding conflict resolution, and the conventional approach of the Law Society and the Law Society Tribunal to investigation, discipline and adjudication;
    d. Consideration of how to incorporate Indigenous perspectives into Law Society complaints, investigation, discipline and Tribunal processes and procedures;
    e. An assessment of intercultural competence and trauma-informed practices at the Law Society, and identification of opportunities for training and development;
    f. Consideration of the use of interculturally competent and trauma-informed expertise ~~in Indigenous issues~~ by Law Society staff, the Tribunal and outside counsel; and
    g. Identification of actions to prevent, and remedial measures to address, the impacts of members' misconduct on Indigenous complainants, witnesses and ~~Indigenous~~ communities.

5. The Task Force should also consider and make recommendations where lessons learned as a result of this review could have relevance to the interests of ~~vulnerable~~ non-Indigenous ~~witnesses and~~ complainants and witnesses, or to enhancing trust and relationship-building between the Law Society and communities, including Indigenous communities.

Staff Support

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Recommendation on the Development of an Alternative Discipline Process ("ADP")

For presentation at the September 24, 2021 Bencher meeting

Mental Health Task Force

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Date: September 24, 2021

Prepared for:	Benchers
Prepared by:	Policy and Planning Staff on behalf of the Mental Health Task Force
Purpose:	For Decision in Principle

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Executive Summary

1. Many legal regulators, including the Law Society of British Columbia, have observed that mental health and substance use issues can be a contributing, though not necessarily causative, factor in some instances of lawyer misconduct. Traditional approaches to regulation, which predominantly focus on whether there has been a discipline violation and imposing appropriate sanctions, are limited in their ability to tailor the regulatory response in a manner that addresses these and other health issues. Additionally, it appears that many lawyers have apprehensions about sharing relevant health information within the Law Society's current regulatory framework.

2. As new data confirms high rates of mental health and substance use issues within the profession, establishing alternative regulatory processes to address situations where a health issue has contributed to lawyer misconduct is recognized as an emerging best practice. Accordingly, the Mental Health Task Force has undertaken a detailed examination of how the Law Society's processes might be better equipped to promote the disclosure of relevant health information, integrate support and treatment into its regulatory response and ultimately improve outcomes for both the lawyer and the public.

3. Following this comprehensive review, and pursuant to the Task Force's terms of reference and the Law Society's strategic goal to revise its regulatory processes to support and promote mental and physical health, while upholding its public interest mandate, this report is dedicated to advising the Benchers with respect to the development of an alternative discipline process, or "ADP".

4. At its core, the proposed ADP is a voluntary, confidential process designed to customize the regulatory response in circumstances where a lawyer's conduct issue is linked to a health condition. In adopting an innovative and proactive approach to professional regulation, the ADP aims to support lawyers in addressing their underlying health issues, placing practitioners in a stronger position to meet their professional responsibilities. In this regard, the ADP creates the potential to realize significant public interest benefits by reducing the likelihood that problematic behaviour will escalate or reoccur.

5. Following a discussion of the elements of the proposed model, including the ADP's guiding principles and key design features, and a consideration of the policy issues engaged by creating an alternative discipline process in BC, the report concludes with a formal recommendation that the ADP is established as a three year pilot project, commencing in 2022.

Resolution

6. The Benchers adopt the recommendations of the Mental Health Task Force that:

   No later than September 2022, the Law Society will implement an alternative discipline process ("ADP") to address circumstances in which there is a connection between a health condition and a conduct issue that has resulted in a complaint investigation. The ADP will comport with the purpose, principles, design features and policy rationale described in the Mental Health Task Force's September 2021 recommendation report and commence as a three year pilot project. Following an interim and final review of the pilot project in 2023 and 2025, respectively, the matter will return to the Benchers for a final determination as to whether to establish the ADP as a permanent regulatory program.

Background and Process

7. In recent years, a number of groundbreaking studies have documented concerning levels of mental health and substance use issues among lawyers, including rates of depression, anxiety and problematic alcohol use that greatly exceed that of the general population.[1] This emerging data indicates that these issues are widespread within the profession and can arise at any point in a lawyer's career, affecting seasoned practitioners, mid-career lawyers and new entrants to the profession alike.[2]

8. Recognition of the pervasiveness of these issues within the legal profession has led to a remarkable shift in awareness of, and discussions about, lawyer wellbeing. Outdated views that those experiencing mental health and substance use issues are

[1] In 2016, research conducted by the American Bar Association and the Hazelton Betty Ford clinic found that between one-fifth to one-third of US lawyers qualify as problem drinkers, and that approximately 28 percent and 19 percent are struggling with depression and anxiety, respectively. See P.R. Krill, R. Johnson & L. Albert, "The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys" (2016) 10 J. Addiction Med. 46 ("ABA Study"). The Federation of Law Societies is currently undertaking a national survey to explore the prevalence of mental health and substance use issues among Canadian lawyers, modelled on an earlier study commissioned by the Barreau du Québec.

[2] See for example the ABA Study *supra* note 1(lawyers in their first ten years of practice demonstrated the highest rates of problematic drinking with declining rates reported with the advancement in position and increasing age). See also J. Koltai, S. Schieman. & R. Dinovitzer, "The Status-Health Paradox: Organizational Context, Stress Exposure, and Well-Being in the Legal Profession" (2018) J. Health Soc. Behav. 59(1) at 20 (a finding that Canadian lawyers at large firms in the private sector, widely considered to be the most prestigious roles, were most likely to experience depressive symptoms); J. Anker and P.R. Krill, "Stress, drink, leave: An examination of gender-specific risk factors for mental health problems and attrition among licensed attorneys" (2021) PLoS ONE 16(5): e0250563 (a finding that there was heightened problematic drinking in female lawyers as compared to their male counterparts, and that women also had had elevated levels of anxiety, depression, and stress, highlighting a very real mental health disparity that exists within the legal profession).

blameworthy or simply not "up to" the rigours of practice have largely been displaced by evidence-based understandings of the complex physical, emotional, social and occupational causes and consequences of these issues. An increased focus on lawyer wellness by researchers, regulatory bodies, legal organizations and law schools, as well as the growing number of lawyers and judges that have stepped forward to share their personal stories, have begun to dismantle the stigma that can create significant barriers to speaking openly about these issues within the profession.

9. The Law Society of BC formally joined this conversation in 2018, with the establishment of the Mental Health Task Force. Over the course of following years, the Task Force has authored two reports that include 20 recommendations addressing the dual aspects of its mandate: to promote and protect the public interest by identifying ways to reduce the stigma of mental health issues, and to improve the manner in which the Law Society's regulatory approaches address these issues.[3]

10. The Task Force has dedicated its third report to one of its remaining responsibilities pursuant to its terms of reference, namely: to advise the Benchers with respect to the development of a "diversion" or other alternative discipline process.[4] This report, and the recommendation contained therein, reflects the Task Force's considerable efforts to advance this aspect of its mandate through a detailed examination of how the Law Society's regulatory approaches might be improved in circumstances where a health issue has contributed to lawyer misconduct.[5]

11. Work on developing a recommendation for the Benchers on alternatives to discipline began in 2019. As a preliminary step, the Task Force explored how conduct concerns associated with mental health or substance use issues are addressed within the Law Society's regulatory processes. In doing so, the Task Force undertook a detailed review of the existing rules and consulted widely with the various groups within the Professional Regulation department to improve its understanding of how mental health and substance issues manifest in the course of the traditional discipline process and the limitations of the current approaches.[6]

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[3] Mental Health Task Force First Interim Report (October 2018) and Second Interim Report (January 2020).

[4] Mental Health Task Force Terms of Reference.

[5] Misconduct refers broadly to an allegation, that if proven, would lead a hearing panel to find the lawyer had committed professional misconduct, conduct unbecoming a lawyer, a breach of the *Legal Profession Act* or the Law Society Rules or incompetent performance of duties undertaken in the capacity of a lawyer.

[6] The Professional Regulation Department is comprised of several groups: Intake and Early Resolution, Investigations, Practice Standards, Custodianships, Unauthorized Practice and Discipline.

12. Building on this foundational work, the Task Force shifted its focus to a consideration of potential improvements to the Law Society's existing processes, including establishing alternative approaches to discipline matters. Following a review of a wide range of rules, policy papers, reports and academic scholarship addressing the use of alternative discipline schemes in the medical, legal and criminal justice sectors, the Task Force concluded that establishing an alternative process for health-related conduct issues had sufficient merit to warrant the development of a recommendation to the Benchers.

13. A Task Force sub-committee was subsequently established to sketch out a framework for how such an alternative discipline process — or ADP— might operate in BC. Over the past year, the Task Force has refined this framework in consultation with the Professional Regulation and Policy and Planning departments, the results of which are presented to the Benchers in this recommendation report.

The Problem

14. Many legal regulators, including the Law Society of BC, have observed that mental health and substance use issues can be a contributing factor in some incidences of lawyer misconduct. Although there is not necessarily a causal relationship between mental health or substance use issues and misconduct, untreated health conditions can affect cognitive and other skills that are critical to a lawyer's ability to discharge their professional responsibilities.[7]

15. Traditional approaches to regulation, which predominantly focus on establishing whether there has been a discipline violation and imposing appropriate sanctions, provide limited opportunities to address health issues that have affected a lawyer's conduct. The Law Society does, however, have some latitude under Parts 3 and 4 of its rules to tailor its response in circumstances where a lawyer's health condition has contributed to problematic behaviour. This includes referrals to the Practice Standards program's remedial processes, establishing conditions or restrictions on practice or requirements for treatment and directing the lawyer to obtain clinical assessments and

[7] Cognitive deficits may result in the inability to pay attention, process information quickly, remember and recall information, respond to information quickly, think critically, plan, organize and solve problems and initiate speech. Neurocognitive deficits are common in a range of mood and substance use disorders. See for example, P. D. Harvey and C. R. Bowie "Cognition in severe mental illness: Schizophrenia, bipolar disorder, and depression" in M. Husain and J.M. Schott (eds.) Oxford Textbook of Cognitive Neurology and Dementia (2016) Oxford University Press, c. 41; C. Bruijnen et al. "Prevalence of cognitive impairment in patients with substance use disorder" (2019) Drug and Alcohol Rev. vol. 38(4) at 435.

assistance.[8] The Law Society may also consider the presence of a health issue as a mitigating factor when issuing discipline sanctions and in accommodating lawyers with a health-related disability.[9]

16. Although these measures can improve regulatory outcomes, generally speaking, very few lawyers disclose, and provide evidence in relation to, health conditions in the course of an investigation into a complaint. In the context of the high rates of mental health and substance use issues within the profession, the infrequency with which lawyers raise these issues in the Law Society's regulatory processes suggests that many practitioners have apprehensions about revealing that a health condition has adversely impacted on their ability to fulfill their professional responsibilities.[10]

17. What prevents lawyers from sharing information about mental health or substance use issues with the regulator? Research suggests that stigma and confidentiality concerns, including not wanting others to "find out", are identified as the primary barriers to disclosure.[11] These concerns are likely compounded by the public nature of the lawyer discipline system, including the possibility of information being divulged to a complainant or appearing in a hearing panel's reasons for judgment. Apprehensions may be further exacerbated by the current rules, which permit the Law Society to share health and other information across its regulatory programs,[12] as well as uncertainty as to who within the Law Society will have access to such information, for how long, and what use might be made of this information. Many lawyers may also be under the misconception that revealing a mental health or substance use

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[8] For example, a panel of three or more Benchers may order restrictions on practice or require a lawyer to undergo medical assessments, if satisfied that extraordinary action is necessary to protect the public. See Law Society Rules 3-10 and 3-11. Similarly, the Practice Standards Committee may make recommendations or orders with respect to conditions or limits on a lawyer's practice as well as various types of health assessments and assistance. See Law Society Rules 3-19 and 3-20. Restrictions on practice or a change to non-practising status may also be negotiated at the investigation stage and prior to the involvement of a Committee.

[9] In some cases, the Law Society will be required to accommodate a lawyer in order to meet its obligations under section 14 of the *Human Rights Code*, [RSBC 1996] c. 210.

[10] Even in instances where lawyers do volunteer information about mental health or substance use conditions, this often occurs at the final stages of the disciplinary process (e.g. as a defence at a hearing) when the matter becomes, from the lawyer's point of view, more serious, and from the Law Society's perspective, opportunities to take proactive steps to support the lawyer and protect the public interest have been missed.

[11] The two most common barriers to lawyers seeking assistance for substance use disorders are not wanting others to find out they need help and concerns regarding privacy or confidentiality. See ABA Study, *supra* note 1.

[12] For example, the Practice Standards Committee, which oversees a remedial program for lawyers with competency concerns, may undertake practice reviews and make recommendations with respect to restrictions on a lawyer's practice, psychological or psychiatric assessments, counselling, medical assistance or assessments. If a lawyer fails to comply with these recommendations, the Committee may issue mandatory orders in this regard. Under Rule 3-21, the Practice Standards Committee may, at any stage, refer to the Discipline Committee all or any part of a practice review report, a report on the manner in which the lawyer has (or has not) carried out or followed any recommendations or any orders made by the Committee or a report on non-compliance with such orders.

disorder will, in and of itself, result in an adverse disciplinary outcome, and that it is therefore preferable to conceal these issues.

18. Failure to provide the regulator with information about a relevant health condition can lead to suboptimal outcomes for the subject lawyer, the Law Society and the public. In addition to limiting the extent to which the Law Society can employ proactive, remedial measures to help address the health concern, it also reduces the lawyer's ability to take advantage of referrals to appropriate support and resources. Absent evidence supporting a connection between the conduct issue and a health concern, the Law Society must proceed as if the matter is simply a conduct or competence issue. This forecloses opportunities to customize the regulatory response to help address the underlying health issue and reduces the likelihood that the necessary steps are taken to ensure the problematic conduct does not reoccur or escalate.

19. There are a number of ways to address the problems identified. Promoting awareness of mental health and substance use issues within the profession, combating stigma and improving the quality of, and access to, support resources will continue to be critical. Over the past several years, the Benchers have approved a number of the Task Force's recommendations in this regard.

20. The Task Force is of the view, however, that educational initiatives are not, on their own, sufficient. In the wake of emerging data confirming high rates of mental health and substance use issues within the profession, additional steps must be taken to ensure the Law Society's regulatory processes are better equipped to promote the disclosure of health information and to integrate support and treatment into the regulatory response. On this basis, and as described in greater detail in the remainder of this report, the Task Force recommends that the Law Society establish an alternative discipline process through which eligible matters are referred from a complaint investigation into a program specifically designed to address circumstances in which there is a linkage between a lawyer's conduct issue and a health condition.

The Proposed Model

21. Recognizing that traditional disciplinary processes can be poorly suited to addressing conduct issues associated with a health condition, a number of sectors have established alternative processes that focus on remediation and rehabilitation rather than imposing discipline sanctions. Diversionary criminal justice programs, for example, have long provided an alternative to prosecution in cases where voluntary mental health treatment and support are deemed to be reasonable alternatives to

criminal justice sanctions.[13] Some self-regulating professions, including medicine and nursing, have also established alternatives to discipline to address misconduct linked to mental health or substance use issues.

22. The Task Force is aware of only one Canadian law society that has a formalized alternative discipline program.[14] However, legal regulators in the United States have utilized alternatives to discipline — often referred to as "diversion" programs — to address lawyer misconduct for some time. Although the design features of these programs vary, the voluntary nature of a subject lawyer's participation is a key feature. Additionally, to gain entry into the program, lawyers are generally required to meet a series of eligibility criteria, following which, they negotiate a contract with the regulator that sets the terms and conditions of their ongoing participation. Typically, a combination of rules and policies govern the operational aspects of the scheme. This includes referrals into the program, confidentiality assurances, the role of the complainant, the content of the diversion contract, the effect of the lawyer successfully fulfilling the terms of the contract as well as the consequences for breaching the agreement and costs associated with participating in the program.[15]

23. An examination of existing ADP schemes illustrates both the opportunities and complexities associated with creating alternative processes to deal with conduct matters linked to lawyers' health issues, as well as the diversity of current approaches.

24. In many jurisdictions, the manner in which alternative processes have been designed has resulted in low participation in, and completion of, diversionary programs. Features that have likely contributed to the limited success of existing schemes include: overly restrictive or narrow eligibility requirements; the use of orders (e.g. for an independent medical assessment) and undertakings (e.g. abstinence from alcohol use), a breach of which may lead to further disciplinary consequences and

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[13] See for example, British Columbia Prosecution Service, Crown Counsel Policy Manual "Alternatives to Prosecution - Adults" (retrieved September 5, 2021).

[14] Nova Scotia's Fitness to Practice Program is the only operational alternative discipline program for lawyers in Canada, and is specifically designed to address circumstances where a lawyer's ability to practise law has been substantially impaired by a physical, mental or emotional condition, disorder or addiction, pursuant to the process set out in Part 9 of the Nova Scotia Barristers' Regulations. The Benchers of the Law Society of Newfoundland and Labrador have approved, in principle, the development of an ADP-type program, but require legislative amendments prior to proceeding with implementation.

[15] There are currently over 30 ADP programs in operation in the United States. For a history of the development of alternatives to discipline in the United States see S. Saab Fortney, "The Role of Ethics Audits in Improving Management Systems and Practices: An Empirical Examination of Management-Based Regulation of Law Firms" (2014), St. Mary's Law Journal Symposium on Legal Ethics and Malpractice, Hofstra Univ. Legal Studies Research Paper No. 2014-01 at 10 ("Fortney").

result in more severe outcomes for the lawyer as compared to the matter being dealt with through the regular discipline process; and the unrestricted sharing of health information with the formal discipline stream should the lawyer be unsuccessful in completing the alternative measures. Additionally, a number of diversion programs conflate a conduct issue linked to mental health or substance use issues with a competence matter. This further deters participation given that most lawyers will seek to avoid having their competency challenged by the regulator on the basis of the existence of a health issue.

25. Based on this review, the Task Force concludes that there are certain design features that must be avoided, and conversely, those that ought to be included in developing an alternative process for health-related conduct issues. Additionally, as the breadth of existing schemes demonstrates, there is no one-size-fits-all model for ADP, and each program must be tailored to the particular regulatory context in which it operates. For this reason, and as outlined in further detail in the next section of this report, the Task Force has been careful to avoid replicating an existing scheme in favour of a more deliberate and innovative approach that ensures that the proposed program is optimally suited to BC's regulatory environment and maximizes the potential benefits to both participant lawyers and the public interest.

Purpose, goals and guiding principles

26. Clearly identifying the purpose and goals of, and guiding principles for, a process that provides an alternative to traditional discipline is an essential first step in engineering an effective program.

27. The purpose of developing an ADP is to provide the Law Society with an opportunity to address alleged misconduct outside of the formal discipline stream in circumstances in which a lawyer's health condition is a contributing factor. The goal of the process is to individualize the regulatory response — with a focus on support, treatment, practice interventions and other remedial measures — to address the underlying health condition, rather than simply imposing sanctions. If the health issue is successfully resolved or managed as a result of the lawyer's participation in the ADP, it is likely that the risk of the conduct reoccurring will be reduced. This, in turn, enhances the protection of the public.

28. The ability of the ADP to achieve these goals will depend on its design. Unless the program creates an environment in which lawyers are willing to share relevant health information and commit to taking the necessary steps to address their health condition, the ADP's potential public interest benefits will not be realized. On this

basis, the design of the proposed ADP is informed by the following four guiding principles:

Confidentiality: The ADP must overcome the barriers to the disclosure of health information that exist within the regular discipline processes. Lawyers will only choose to participate in the process if they are satisfied that confidentiality measures are firmly in place to govern the collection and use of health and other personal information. This is particularly important given the stigma surrounding mental health and substance use disorders. While protecting the confidentiality of this information is a key consideration, the ADP must also retain as much transparency as possible in the circumstances.

Voluntariness: Participation in the ADP will be contingent on the extent to which lawyers clearly understand the voluntary nature of the process. Lawyers are more likely to provide the Law Society with the necessary information and take the required steps to address their health and associated behavioural issues if informed consent permeates all stages of the program's design.

Without risk process: It is important for the success of the ADP that there is no risk that those lawyers that opt to participate in the program's remedial processes will be subject to a "worse" regulatory outcome than they would had they remained in the traditional discipline process. It is equally important, however, that the implementation of the ADP does not inhibit the Law Society's ability to protect the public interest. Consequently, a key feature the ADP — and one which appears to differentiate it from many existing diversion programs — is that there is no risk to either the lawyer or the Law Society if a lawyer is unable or unwilling to complete the alternative process. Sanctions will not be imposed for a failed attempt to take remedial action and the matter will simply be returned to the regular discipline process. Consequently, both the lawyer and the Law Society will be in the same position they would have been had the ADP never been attempted. The public interest will be served either by the successful completion of the ADP or the application of the regular discipline process.

Public interest: At all stages of the process, the ADP must be informed by the Law Society's statutory mandate, which requires both policy and operational decisions to be based, ultimately, on what is in the public interest.

Key design elements

29. The proposed ADP comprises four key stages that chart a lawyer's progression through the process, namely: (1) eligibility and intake (2) negotiating the terms of the consent agreement (3) approval of the consent agreement, and (4) fulfilling the terms of the consent agreement. The material that follows outlines each of these stages and describes the manner in which they comport with the program's purpose, goals and guiding principles.

Eligibility and intake

30. Lawyers will be informed about the ADP during a complaint investigation and provided with information about its objectives, eligibility requirements, confidentiality assurances and what the lawyer can expect if the matter is referred. Similarly, the potential for a lawyer's participation in the ADP will be added to the list of discipline outcomes complainants receive from the Law Society in the course of responding to a complaint.

31. To reinforce the ADP's independence from the Professional Regulation department's disciplinary and remedial programs — as discussed in more detail below — eligibility for the ADP should be determined before a citation has been issued and the Discipline Committee has become involved in the matter.

Threshold eligibility

32. To clearly establish the ADP as an *alternative* process, the program must distinguish itself from the Law Society's regular disciplinary stream and the manner in which it collects and utilizes health information. In the Task Force's view, this will require the ADP to be entirely separate from the Professional Regulation department's discipline processes and the Discipline Committee. Additionally, on the basis that the Practice Standards Committee's mandate is to address lawyer competence, any association between the Practice Standards program and the ADP risks reinforcing the stigmatizing and incorrect view that there is necessarily a causal relationship between mental health and substance use disorders and competency issues, and should therefore be avoided.[16] As such, establishing rules, policies and other operational

[16] The Practice Standards program creates a process for investigating a lawyer's practice if there are reasonable grounds to believe the lawyer is practising law in an incompetent manner, including recommending remedial programs and issuing orders that impose conditions or limitations on the lawyers practice. See section 27 of the *Legal Profession Act* and Division 2 of the Law Society Rules.

firewalls to maintain the independence of the ADP from the Law Society's other regulatory programs will be critical.

33. How might the Law Society assess whether a matter is suitable for an alternative to traditional disciplinary processes? A review of existing ADP schemes suggests that there is no standard approach to determining threshold eligibility for a referral into an alternative discipline process. In some jurisdictions, only those lawyers with a narrow set of health conditions (e.g. chemical dependency, mental health disorder) are eligible to participate. Other programs explicitly exclude certain conduct[17] or limit eligibility to matters that constitute "less serious misconduct."[18] Several schemes rely on very broad eligibility criteria, including a lawyer's need for personal assistance or circumstances where there are "reasonable concerns" about a lawyer's capacity.[19]

34. The Task Force is of the view that the public interest is best served by avoiding both an overly restrictive approach that has the potential to prematurely exclude matters that may benefit from the ADP, and an overly broad approach that may not provide the Law Society with the necessary discretion to determine that very serious allegations of misconduct are not appropriate for an alternative process.

35. Accordingly, the Task Force recommends that the following three factors govern the Executive Director's decision as to whether a matter is eligible for a referral to the ADP:

    (1) the lawyer's acknowledgement of the existence of a health issue that has contributed to the conduct issue(s);
    (2) the seriousness of the alleged conduct, including whether the conduct has resulted in, or is likely to result in, substantial harm to a client or another person; and
    (3) written consent from the lawyer to participate in the ADP.

36. Guidelines will be developed with respect to the application of the second factor, and will reflect that certain conduct is not appropriate for the ADP. For example, conduct that if proven would result in a reasonable prospect of disbarment — such as the misappropriation of trust funds — would not be eligible for the ADP. The guidance

[17] Many US diversion programs explicitly exclude certain types of conduct including misappropriation of trust funds, dishonesty, deceit, fraud or misrepresentation, conduct that constitutes a serious crime or conduct that results in substantial prejudice to a client or another person.

[18] See for example, Washington State Court Rules: Rules for Enforcement of Lawyer Conduct at 6.1.

[19] See for example, the Nova Scotia Barristers' Society's Fitness to Practice Program, which is governed by the Nova Scotia Barristers' Society Regulations 9.3.

may also identify the types of conduct that would only be considered for the ADP in exceptional circumstances.[20]

37. Adopting this principled and flexible approach when considering a matter's eligibility for ADP provides a level of consistency and transparency as to how determinations about entry into the ADP are made, and ensures that the subject lawyer consents to participation. At the same time, it provides the Law Society with the ability to assess a matter's suitability for the ADP on a case-by-case basis. [21] This is particularly important during the early years of the program, when there remains a level of uncertainty with respect to the types of conduct for which referrals to the ADP may be sought.

38. Threshold eligibility determinations also serve a gatekeeping function, providing a mechanism to ensure that matters are not automatically referred to the ADP when, from a public interest perspective, they are clearly not appropriate for an alternative process.

39. To ensure that the impact of the conduct on the complainant is considered at the threshold eligibility stage, the application of the second factor will be informed by information that is routinely collected from complainants during the initial investigation of a complaint, regardless of whether a matter is being considered for the ADP. Importantly, the Law Society's investigating lawyer will not inform the complainant that the subject lawyer is being considered for the ADP when seeking this information. Protecting the confidentiality of the lawyer's health status in this manner will reduce the likelihood that lawyers will be deterred from considering the ADP based on concerns that others will become aware of the existence of a potential health issue before their eligibility has been determined. At the same time, this approach is not expected to limit or detract from the information obtained by the Law Society during the investigation process with respect to the impact of the conduct on the complainant.

40. The complainant will be provided with notice if, following the application of the eligibility factors, a decision is made to refer the matter to the ADP. Additionally, as discussed in further detail later in this report, the impact of the lawyer's conduct on the complainant is specifically considered in subsequent stages of the alternative

[20] Outlining exemptions in the supporting guidelines is similar to the approach taken by the BC Prosecution Service in its alternative measures program. See *supra* note 13.

[21] For example, Nova Scotia's Fitness to Practice Program, which has been in operation for many years, has not established blanket exclusions on specific types of alleged misconduct.

discipline process, including an opportunity for the complainant to provide information to the Executive Director in this regard.

Provision of health information

41. Once threshold eligibility has been established and a lawyer is formally referred to the ADP, the matter will be assigned to a Law Society lawyer, referred to as the ADP counsel, who is responsible for working with the lawyer, and their counsel, if applicable, to craft the terms of the consent agreement.

42. Prior to commencing the negotiation of the terms of the consent agreement, the subject lawyer will be asked to provide the ADP counsel with health information verifying the existence of a health issue that has contributed to the conduct issue and that is sufficient to satisfy the Law Society that:

    a. a health issue likely contributed to the conduct issue(s);
    b. the lawyer could benefit from remedial initiatives; and
    c. it would be in the public interest for the lawyer to engage in such remedial initiatives.

43. Any health or other personal information that is obtained by the Law Society during the lawyer's participation in the ADP will be treated as confidential, and lawyers will be advised what use will be made of such information prior to providing it to the Law Society. Absent the lawyer's consent, this information will not be disclosed to the complainant, the lawyer's firm or the public,[22] nor will it be shared with, or used in, any concurrent or future Law Society proceedings except for the purpose of meeting the Law Society's legal obligations to accommodate the lawyer.[23]

44. If the lawyer does not provide the Law Society with the required health information, or the information provided does not support a linkage between the conduct at issue and a health condition, the matter will be referred back to the Professional Regulation department and proceed as if no referral to the ADP had been made.

45. The collection of health information at this stage in the ADP serves three purposes. First, it enables the Law Society to assess whether there is a relationship between the

[22] The Law Society Rules provide for the non-disclosure of confidential information in a number of other circumstances. See for example Rule 4-15(4) (pertaining to the confidentiality of conduct reviews) and Rule 3-23 (pertaining the confidentiality of Practice Standards Committee deliberations).

[23] If, for example, the lawyer was unsuccessful in fulfilling the terms of the consent agreement and the matter was returned to the regular discipline process, the Law Society may be required to take into account the lawyer's health condition to meet its duty to accommodate under BC's *Human Rights Code*. The use of this health information will be highly circumscribed and likely improve the regulatory outcome for the lawyer.

conduct that gave rise to the initial complaint and a health condition. Second, this information provides the Law Society with current, credible information about the lawyer's health status that will inform the next stage of the ADP, in which the terms of the consent agreement are negotiated.

46. Third, if the medical, clinical or other information indicates that it is reasonably likely that the lawyer's health condition will result in behaviour that may have an imminent, adverse impact on the public, the Law Society may be required to take immediate action. In such cases, the ADP counsel will seek the lawyer's consent to enter into an interim agreement, prior to negotiating and drafting the terms of the final consent agreement, to ensure the public is protected. Terms of the agreement will be guided by the information that is provided to the Law Society, and may include, for example, restrictions or conditions on practice until further information and treatment has been sought.

47. The Task Force regards the use of an interim agreement as preferable to requiring lawyers to enter into undertakings for a number of reasons. In addition to aligning with the principles of voluntariness and consent, interim agreements also eliminate the possibility of a lawyer being subject to disciplinary action (an outcome that the ADP is specifically designed to avoid) for a breach of an undertaking.[24] In contrast, failure to enter into, or fulfil the terms of, an interim consent agreement will not be associated with any disciplinary sanction, but will result in the matter being returned to the Professional Regulation department for further action, including any interim orders that are available through the regular discipline process. In this regard, all parties are in the same position they would have been in if the ADP did not exist.

Negotiating the terms of the consent agreement

48. Once a linkage is established between a health condition and the conduct issue, ADP counsel will work with the lawyer to negotiate the terms of the consent agreement that will govern the lawyer's ongoing participation in the alternative process. The goal of this stage of the ADP is to bring the lawyer and the Law Society together in a consent-based process to decide what remedial measures are required to support the lawyer in improving their health and meeting the expected standards of professional conduct.

49. The Task Force endorses a collaborative approach to drafting the agreement, rather than one in which the Law Society unilaterally proposes the terms. In addition to

[24] Under Rule 3-8(4) a complaint may be referred to the chair of the Discipline Committee if there are allegations that the lawyer has breached an undertaking given to the Law Society.

aligning with the ADP's overarching voluntary, consent-based approach, a cooperative and iterative process may result in lawyers suggesting additional or alternative terms, informed by their experiences of managing their health issue and their familiarity with their particular practice setting, and being more committed to actions that they, themselves, have proposed. Additionally, supports and treatments that are imposed rather than agreed to are significantly less likely to succeed or benefit the lawyer and the public interest.

50. Ultimately, the aim is to create a consent-based agreement that is tailored to the lawyer's individual health and practice circumstances. Terms may include a recommended treatment plan (e.g. participation in a rehabilitation program,[25] counselling, clinical assessments), medical monitoring and reporting requirements, practice restrictions (e.g. limits on practice, participation in mentorship programs or supervisory arrangements), restitutionary steps to mitigate loss or harm to the complainant or others resulting from the misconduct, an apology, or other corrective courses of action agreed to by the ADP counsel and the lawyer.

51. When proposing terms related to support and treatment, the Law Society must remain cognizant that its institutional expertise lies in the realm of professional regulation, not healthcare. Accordingly, prior to proposing or agreeing to terms related to the lawyer's health condition, it is expected that the ADP counsel will consult with the appropriate professionals. Additionally, ADP counsel should receive dedicated education and training in mental health first aid and substance use issues, to ensure they have a robust understanding of the types of health concerns that are anticipated to be addressed in the ADP and an enhanced level of understanding of the scope of available clinical information, diagnoses and treatments.

52. Additional terms that can be expected in every consent agreement include those that address the duration of the lawyer's participation in the alternative process; confidentiality and information-sharing; oversight of the fulfillment of, or amendment to, terms of the agreement; responsibility for reporting a breach of terms; the outcome of the lawyer's successful or unsuccessful completion of the ADP; and costs. Each agreement will also include a term that prohibits a lawyer from asserting delay or any other prejudice as the result of participation in the ADP if the matter is subsequently returned to the discipline stream.

[25] If the terms of the consent agreement include enrollment in treatment or support programs, secular options must be included among the range of options presented.

53. Neither the ADP counsel nor the subject lawyer are required to accept any given term and, if no agreement is reached, the matter will be returned to the Professional Regulation department in accordance with regular processes. If, however, the parties agree on terms, the matter advances to the next stage of the ADP, namely, the final approval of the consent agreement.

Approval of the consent agreement

54. To reinforce the objectivity and independence of the decision-making process, and to ensure the approval of the consent agreement is consistent with the standards of simplicity, fairness and expediency, the Task Force recommends that the final approval of the consent agreement is the responsibility of the Executive Director. This approach is expected to provide a more agile and timely process than is typically available through Committee decision making, and also avoids concerns about confidentiality and conflicts that may arise if the approval of the agreement were the responsibility of the Discipline or Practice Standards Committees, for example.

55. To improve transparency, it is proposed that the Executive Director's decision-making is guided by a series of factors, such as the nature and scope of the terms of the agreement, including specific action taken to protect the public; the nature and gravity of the alleged conduct; the impact of the conduct on the complainant or others; the lawyer's previous participation in the ADP, if any; the effect of the agreement on the administration of justice and the public's confidence in the integrity of the profession; whether participation in the ADP is likely to improve the lawyer's future professional conduct and accomplish the goals of the alternative discipline process; and the presence of aggravating or mitigating factors, such as whether the lawyer has acknowledged the misconduct and taken steps to redress the wrong.[26] The Executive Director's application of these factors will be supported by accompanying guidelines.

56. At this stage, it is also contemplated that the complainant will have an opportunity to provide a statement regarding the effect that the conduct has had on them, which will inform the Executive Director's consideration of this factor in the decision-making process and ensure that the complainant has a similar level of involvement as in current discipline processes, such as a conduct review.

57. To assist the Executive Director in their decision-making, limited consultations with health and other professionals may be necessary to determine whether, from a

[26] It is expected that in considering the approval of the consent agreement, the Executive Director will also be provided with submissions on behalf of the ADP counsel and the subject lawyer that addresses these types of factors.

medical and clinical perspective and in relation to the lawyer's practice environment, the proposed terms of the consent agreement are appropriate. To maintain the confidentiality of the process, the subject lawyer's identity will not be revealed to those from whom expertise is sought.

58. To provide some level of Bencher oversight of the process, it is proposed that the Executive Director provides the Executive Committee with a summary of their decision to approve or not approve a consent agreement, including the manner in which the various factors were considered as part of that determination. Again, to preserve the confidentiality of the ADP, the lawyer will not be identified in the course of this reporting function.

59. If the Executive Director approves the agreement, the parties become subject to its terms for the duration of the lawyer's participation in the program. Alternatively, if the Executive Director declines to approve the agreement, the lawyer and the ADP counsel may propose amendments. In the event that the parties are unable to agree on mutually acceptable amendments, or the Executive Director determines that the amended agreement ought not to be approved based on the application of the above factors, the matter will be returned to the Professional Regulation department's regular processes for further action at "no risk" to either party, as both the Law Society and the lawyer will be in the same position that they would have been in had the matter not initially been referred to the ADP.

60. At all times, the consent agreement will be treated as confidential and will not be disclosed to the complainant, the public or the subject lawyer's firm without the lawyer's express consent,[27] nor will information relating to the lawyer's health condition or the terms of the consent agreement be shared with the Professional Regulation department's processes or committees unless this information is necessary to accommodate the lawyer pursuant to BC's *Human Rights Code.*

Fulfilling the terms of the consent agreement

61. In circumstances where the terms of the consent agreement include a treatment plan, monitoring and reporting will be an important element of supporting the lawyer transition back to a healthier practice and ensuring they comply with the agreement while doing so. If, for example, the agreement includes reporting requirements, it is expected that the terms will include a limited waiver of confidentiality that permits the Law Society to obtain the necessary information from treating professionals and

[27] A similar approach is taken with respect to the confidentiality of information and documents, reports or actions that form part of the Practice Standards Committee's consideration of a complaint. See Rule 3-23.

monitoring agencies to evaluate whether the lawyer has fulfilled the terms of the agreement.

62. As a matter of policy, it is also expected that details about the frequency and duration of, and payment for, treatment and monitoring will have been established as terms of the agreement. To ensure that the ADP does not create barriers for those lawyers experiencing financial hardship, it is proposed that in situations where a lawyer can demonstrate that they cannot bear the full costs of the treatment or monitoring that is required to address the health issue, options for cost-sharing are considered during the process of negotiating the terms of the consent agreement.

63. Ideally, the lawyer will satisfy the terms of the consent agreement, in which case the outcome will typically be the resolution of the complaint, requiring no further action by the lawyer or the Law Society.[28] In other cases, it may be necessary to amend the consent agreement prior to the terms being fulfilled. In some circumstances, public interest considerations may support the Law Society publicizing the outcomes of completed ADP consent agreements in a general and anonymous way.

64. Amendments to the consent agreement may be proposed by either party and are subject to the approval of the Executive Director. Initiating an amendment may be appropriate, for example, if there is a change in the lawyer's circumstances or the Law Society receives new information. An amendment may also be necessary if there is a breach of terms related to treatment that requires action on behalf of the parties, such as additional clinical assessments or changes to the treatment plan. Recognizing that relapse and the reoccurrence of symptoms is a common feature of many health conditions, permitting amendments to the terms of the original agreement should be the preferred approach for a breach related to the management of the health issue, provided that it is in public interest to do so.[29]

65. A material breach of the agreement can also result in the lawyer's participation in the ADP being terminated where that is in the public interest. In such cases, the matter will be returned to the Professional Regulation department for further action in accordance with its usual processes. Information relating to the lawyer's health condition that has been disclosed during the course of the ADP, however, will not be shared with the Professional Regulation department's staff or committees unless this

[28] In some circumstances, the public interest may require additional regulatory action following the completion of the ADP, which would be established in the terms of the consent agreement. It is not contemplated that the rules would permit the complainant to initiate a review of the decision to take no further action following the completion of the ADP or to otherwise challenge the decision to permit the lawyer to enter the ADP through the Complainants Review Committee.

[29] A similar approach is taken under Rules 3-7.2 and 3-7.3.

information is necessary to accommodate the lawyer pursuant to the *Human Rights Code.*

66. There may be instances where a lawyer finds that they are unable to adhere to the terms to which they agreed, particularly where the terms include conditions related to substance use disorders. In accordance with the "no risk" nature of the ADP, a lawyer who elects to terminate the consent agreement will not be subject to sanction for doing so. Rather, the matter will be returned to the regular discipline stream for further action. As a result, failure to fulfill the terms of the consent agreement will leave the lawyer in the same position that they would have been in had participation in the ADP not been attempted. In this regard, unsuccessful efforts to complete the ADP will not have negative regulatory implications for the lawyer, nor will it constrain the Law Society's ability to fulfil its public interest mandate through the regular discipline processes.

67. In the event that a disagreement arises as to whether the terms of the agreement have been fulfilled, the matter will be determined following an application to the President of the Law Society, and will be adjudicated by the President or their delegate.

68. Complainants will be notified when the lawyer successfully completes the program or, alternatively, if the matter is referred back to the Professional Regulation department for further action.[30]

69. Finally, to reflect that the program is an *alternative* to the regular discipline process, the lawyer's participation in the ADP should not form a part of their professional conduct record.[31] Some form of internal record keeping will, however, be necessary to support a data-driven evaluation of the success of the ADP, including the number and type of conduct issues referred to the ADP, the proportion of lawyers that successfully fulfill the terms of their consent agreement and whether those that participate in the ADP experience future regulatory interventions.[32]

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[30] This is similar to the approach taken under Rule 3-24 in which the Executive Director must notify the complainant in writing of the Practice Standards Committee's decision, but not the content of any report or the Committee's recommendations about the lawyer's practice.

[31] A number of alternative discipline programs in the United States take this approach, as does Nova Scotia's Fitness to Practice Program. This is also similar to the approach adopted for conduct meetings, which do not form a part of a lawyer's professional conduct record. The fact that a lawyer has undergone a practice review also does not form a part of their professional conduct record, although any resulting recommendations from the Practice Standards Committee do.

[32] Academic commentators strongly support program administrators maintaining internal records for statistical purposes and to provide a more complete understanding of the impact and effectiveness of the alternative process. See Fortney *supra* note 15 at 15.

Policy Considerations

70. To ensure that the Benchers have a clear understanding of the ADP, much of this report has been devoted to describing the operational aspects of the proposed process. In this section of the report, a series of policy considerations are identified to further support the Benchers' discussions and deliberations regarding the establishment of an alternative discipline process in BC.

Public interest

71. Section 3 of the *Legal Profession Act* recognizes that supporting and assisting lawyers in fulfilling their professional duties is one of the ways in which the Law Society can protect and uphold the public interest.[33] This support and assistance ought to extend to all practitioners, including those experiencing health issues.

72. Establishing alternatives to traditional disciplinary approaches in circumstances where a health issue has contributed to lawyer misconduct is recognized as an emerging best practice for legal regulators.[34] By creating a process that is specifically designed to facilitate the disclosure and treatment of health conditions and focus the regulatory response on remediation and rehabilitation, the ADP aims to put lawyers in a stronger, healthier position to meet their professional responsibilities. In this regard, the ADP has the potential to realize significant public interest benefits by reducing the likelihood that the problematic behaviour associated with the health issue will escalate or recur.[35]

73. The ADP's design ensures that public interest considerations inform all aspects of the process, including the initial eligibility decision and the negotiation and approval of the consent agreement. Additionally, once an agreement is approved, if information bears out that it is not in the public interest for the lawyer to continue in the ADP, the

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[33] Section 27 of the *Legal Profession Act* provides the authority for the Benchers to establish and maintain a program to assist lawyers in handling or avoiding personal, emotional, medical or substance abuse problems. To date, this authority has been used to establish the Practice Standards program. Under section 27(2) of the Act, the Practice Standards Committee is tasked with making investigations into a lawyer's competence to practice law.

[34] The US National Task Force on Lawyer Wellbeing recommends that legal regulators adopt alternatives to discipline as a means of enhancing lawyer well-being and improving client service. See National Task Force on Lawyer Wellbeing, "The Path to Lawyer Wellbeing" (August 2017) at Recommendation 22.4.

[35] There are few empirical studies that assess the effectiveness of alternative disciple systems. A study of the Arizona alternative discipline system is frequently cited in support of such programs. Based on a review of ten years of data, the study concluded that there was a statistically significant difference in the number and severity of disciplinary charges between lawyers who had completed the state diversion program and those who had declined to participate in the program. See D.M. Ellis, "A Decade of Diversion: Empirical Evidence that Alternative Discipline is Working for Arizona Lawyers" (2003) 52 Emory L.J. 1221 at 1229. The limitations of this study are explored in L.C. Levin, "The Case for Less Secrecy in Lawyer Discipline"(2007) 20 Geo. J. Legal Ethics 1 ("Levin").

matter will be returned to the Professional Regulation department to be addressed in accordance with those traditional processes.

74. The proposed ADP also aligns with the Law Society's commitment to proactive regulation, which is premised on the theory that the public is best served by a regulatory scheme that prevents problems in the first place, rather than one that focuses on issuing sanctions once problems have occurred.[36] Discipline does not make an ill lawyer well and, even in circumstances where health issues are treated as a mitigating factor at the penalty stage of a discipline hearing, the regulator has missed a critical opportunity to take steps earlier in its processes that may have improved the outcomes for both the lawyer and the public.

75. The revision of regulatory processes to support and promote mental and physical health is also identified as one of the Law Society's key strategic objectives and, to this end, the ADP assists the Law Society meet its strategic goals. Additionally, the ADP imbues many of the values identified in the Law Society's strategic plan, including taking an innovative and adaptive approach to regulation and being responsive to the changing needs of the profession.[37]

Perceptions of the profession

76. Commentators have observed that the greater the likelihood that a lawyer's involvement in an ADP is made public, the less likely practitioners are to choose the process over traditional discipline.[38] If eligible lawyers decline to participate in the alternative process, the extent to which the ADP realizes its public interest benefits will be greatly reduced.

77. On this basis, the ADP must foster a regulatory environment in which lawyers feel it is safe to disclose health information and engage in the process of crafting and fulfilling the terms of a consent agreement. By integrating informed consent into each stage of the process, it is expected that more lawyers will consider the ADP, knowing that if they are unwilling or unable to continue to meet the program requirements, the conduct issue, but not health-related information, will simply be returned to the Professional Regulation department for further action.

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[36] The Law Society oversees a number of proactive regulatory initiatives that support lawyers and firms in improving the services they provide to clients, including the practice advice, continuing professional development and law firm regulation programs.
[37] Law Society of BC Strategic Plan 2021-2025.
[38] See for example Levin *supra* note 35.

78. As discussed earlier in this report, the ADP's actual and perceived independence from the discipline rules, processes, staff and committee will be critical to the program's acceptance by the profession as an alternative to traditional discipline. Establishing strict limits on information-sharing within and beyond the ADP is expected to diminish uncertainties regarding the confidentiality of the process and mitigate fears about the potential disciplinary consequence of providing health information to the Law Society.

79. The ADP must also be (and be seen to be) entirely separate from the Law Society's Practice Standards program. Housing the ADP within Practice Standards is at odds with the guiding principles of voluntariness and confidentiality given that the Practice Standards Committee is authorized to share health information obtained during its processes with the Discipline Committee and issue orders requiring lawyers to undergo psychiatric, psychological or other clinical assessments or counselling. Additionally, the mandate of the Practice Standards Committee is to address competency concerns.[39] As a regulatory initiative that strives to improve mental health within the profession, the ADP must not be administered in a manner that suggests that lawyers experiencing mental health or substance use issues are necessarily less competent. Although some health conditions may generate concerns about competency, care must be taken to ensure that the ADP does not conflate all health challenges with incompetence.[40]

80. There are, however, some uncertainties as to whether the ADP will be effective in combatting stigmatizing views about mental health and substance use issues or the self-stigma that can arise in individuals living with these conditions. On the one hand, the ADP strives to acknowledge the impacts that mental health and substance use issues can have on conduct, to encourage lawyers to share this information with the Law Society and to address the health issue in a data-driven, evidence-based fashion. On the other hand, the act of creating a specialized process, and particularly one involving strict confidentiality assurances and the creation of a separate process for lawyers with health-related conduct issues, does create a possibility that the ADP will further entrench, rather than reduce, the stigma surrounding mental health and substance use issues.

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[39] See section 27 of the *Legal Profession Act.* See also Law Society Rule 3-16(b).

[40] The *Legal Profession Act* recognizes a difference between conduct and competency issues. For example, section 26(2) of the Act authorizes the Benchers to make rules authorizing an investigation into the conduct *or* competence of a lawyer, and section 36(f) provides that the Benchers may authorize a hearing into the conduct *or* competence of a lawyer by issuing a citation. Similarly, the Law Society Rules recognize that discipline violations can be caused, among other things by misconduct *or* the incompetent performance of duties.

81. Clear and transparent communications with the profession about the rationale for, and operational details of, the ADP will go some ways to improving members' perceptions of the program. This messaging should strive to reduce the stigma surrounding mental health and substance use issues, which may otherwise prevent lawyers that experience these health concerns from considering the ADP.

Public perceptions

82. Consideration of the public's perception of the ADP is also important. A lack of transparency about what occurs within the ADP has the potential to negatively impact views about the program's legitimacy and fairness and the extent to which it fulfills the Law Society's public interest mandate. The ADP's emphasis on lawyers' rehabilitation and reducing the likelihood of future misconduct may also be criticized as overlooking the more immediate harms experienced by clients or others affected by a lawyer's conduct, or limiting opportunities for complainants to provide input into the regulatory process.

83. To address these concerns, communications with the profession and the public should emphasize the public interest objectives of the alternative discipline process and confront misconceptions that the ADP "protects" practitioners from discipline or otherwise limits the extent to which subject lawyers take responsibility for their actions.

84. Rules should also be established to ensure that complainants are provided with adequate notice of both a lawyer's initial referral to the alternative process and whether they have successfully completed the ADP. Additionally, as described earlier in this report, the impact of the alleged conduct on the complainant or another person is a factor that is considered in determining a matter's initial eligibility for the ADP, as well as during the final approval of a consent agreement by the Executive Director, and is expected to carry particular weight in circumstances where the complainant or others have experienced harm. Where appropriate, the terms of a consent agreement may also provide complainants with additional opportunities for input, or establish restitutionary steps or apologies agreed to by the lawyer.

85. Consideration may also be given to the merits of publicizing the outcomes of completed consent agreements in a general and anonymous way, akin to the publication of the outcome of conduct reviews, to demonstrate to the public how the

ADP achieves its objectives.[41] Evaluations of the pilot project must also be publicly available, while ensuring that lawyers' privacy and confidentiality are protected.

Program impacts and costs

86. The long-term regulatory and budgetary impacts of the ADP will greatly depend on the number and type of conduct issues that are referred to the alternative process over time. Based on the uncertainty created by these and other variables, the Task Force recommends that the ADP is initially established as a three year pilot project, commencing no later than September 2022. This will enable the Law Society to undertake a preliminary assessment of the ADP's effectiveness and costs prior to making commitments as to the program's permanence as an alternative process.

87. To ensure that an assessment of the pilot project is data-driven and evidence-based, information will be collected in relation to a number of key metrics, including: the number matters that are eligible for, and referred to, the ADP; the types of health and conduct issues for which referrals are sought and granted; the proportion of consent agreements that are successfully completed; the timeliness of the process; the extent to which lawyers and complainants are satisfied with the regulatory outcomes; and the financial and human resources required to support the process. Given the relatively short duration of the pilot project, it is expected that limited data will be available with respect to recidivism rates among ADP participants.

88. It is difficult to accurately forecast the uptake of, and expenses associated with, the pilot project. The frequency with which mental health or substance use issues arise in the course of the Professional Regulation department's regular processes is likely a poor proxy for the ADP's potential use, given the limited number of lawyers that currently share health information with the Law Society. However, based on a review of data over the course of the past ten years, the Professional Regulation department estimates that several lawyers may be eligible to participate in the ADP in the first year of the pilot. It is anticipated that the number of participants will increase over time as awareness and acceptance of the ADP grows and lawyers become more comfortable in disclosing the required health information to the Law Society.

89. The pilot project's costs will also be impacted by the complexity and severity of health issues for which referrals are sought. The resources required to support the

[41] A similar approach is taken with respect to the publication of conduct review summaries under Rule 4-15 which must not identify the lawyer or complainant unless that person consents to being identified.

drafting, approval, monitoring and enforcement of a consent agreement will vary considerably depending on the nature of the health and conduct issues.

90. The foreseeable, short-term budgetary implications of the pilot project include the costs associated with developing new rules, policies and procedures for the ADP, hiring ADP counsel and ensuring that both counsel and the Executive Director have access to the necessary consultations with health experts and other professionals during the negotiation and approval of the terms of the consent agreement.

91. It is anticipated that a proportion of these expenditures will be accounted for through existing staff resources, while others will require the allocation of additional funds. Although the uncertainties associated with the number and type of matters that may be referred to the ADP make it difficult to predict the budgetary implications of the pilot, it is likely that the costs will be at least $110,000 per year. As a result, the total costs for the ADP for the duration of the pilot are anticipated to be at least $330,000. These costs may be offset to some degree by the savings associated with channeling some matters away from the Professional Regulation department's processes. However, in advance of the pilot project, it is not possible to quantify the scale of these savings, if any.

92. The Benchers will be provided with interim and final reports analyzing the impacts of the pilot and, following a consideration of these reports, would be expected to make a final decision about the permanence of the ADP by the end of 2025, which will necessarily involve further information about the long-term cost of supporting the alternative discpline process.

Recommendation

93. The following recommendation is presented to the Benchers for discussion and decision:

No later than September 2022, the Law Society will implement an alternative discipline process ("ADP") to address circumstances in which there is a connection between a health condition and a conduct issue that has resulted in a complaint investigation. The ADP will comport with the purpose, principles, design features and policy rationale described in the Mental Health Task Force's September 2021 recommendation report and commence as a three year pilot project. Following an interim and final review of the pilot project in 2023 and 2025, respectively, the matter will return to the Benchers for a final determination as to whether to establish the ADP as a permanent regulatory program.

Conclusion and next steps

94. Over the last four years the Mental Health Task Force has recommended, and the Benchers have unanimously approved, a suite of educational and regulatory initiatives designed to improve mental health within the profession. Building on this work, the Task Force now recommends that the Benchers approve the introduction of an alternative discipline process in the form of a three year pilot project, as means of improving the Law Society's regulatory response in situations where a health issue has contributed to a lawyer's conduct issue.

95. Deeply informed by the principles of voluntariness, confidentiality, no-risk and the protection of the public, the proposed ADP takes an innovative and proactive approach to professional regulation. The scheme is also comprehensive and complex, as evidenced by the volume of material in this report devoted to describing the design elements of, and policy rationale for, the alternative discipline process.

96. By creating a regulatory environment that promotes the disclosure of health conditions that have impacted on a lawyer's conduct, and customizing the regulatory response in a manner that focuses on supporting the lawyer and the Law Society in addressing the underlying health issue, participation in the ADP reduces the likelihood that the problematic conduct will escalate or recur in the future. This, in turn, enhances the protection of the public.

97. To achieve these goals, the ADP must balance the tensions between transparency and confidentiality, certainty and flexibility, due process and timeliness. The Task Force is of the view that the proposed process strikes this balance. However, given the significant resources required to develop and implement the ADP, it would be prudent for the Law Society to test the operational aspects of the process and evaluate its impacts, based on data and best-available evidence, in advance of making final decisions on the permanence of the ADP.

98. If the recommendation contained in this report is adopted by the Benchers, the matter will be referred to the Act and Rules Committee to develop the necessary rules. Work will also commence on creating the guidelines and procedures identified in this report, which must be in place prior to implementing the ADP. Early and ongoing communication with the profession and the public regarding the rationale for, and benefits of, the ADP will also be critical in raising awareness and acceptance of the program.

The Law Society of British Columbia

Recommendations Concerning Remuneration and Hours of Work for Articled Students

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Lawyer Development Task Force

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Date: September 24, 2021

Prepared for: Benchers

Prepared by: Policy and Planning Staff on behalf of the Task Force

Purpose: For Decision in Principle

Executive Summary

1. In recent years, concerns have been raised about the existence of, and problems associated with unpaid and underpaid articles. The Law Society has been considering these issues from time to time, including past recommendations to the Benchers that the Law Society continue to gather information on the working conditions of articled students prior to determining the appropriate approach on remuneration for articles to ensure that policy decisions in this regard are evidence-based. More recently, at the Law Society's October 2020 Annual General Meeting ("AGM"), a Member Resolution was approved that raised a number of concerns regarding articled students' working conditions, and that directed the Benchers to address these issues by ensuring that articling agreements are consistent with section 16 and Parts 4 and 5 of the *Employment Standards Act* ("*ESA"*).

2. The Lawyer Development Task Force has undertaken a comprehensive, evidence-based examination of articled students' wages and hours of work, analysing a large body of survey data and evaluating the potential implications of various approaches to addressing concerns related to these issues. Many of the rationales for establishing standards for mandatory levels of compensation and limits on hours of work during articles are unified by themes of ensuring fairness and preventing exploitation, which are matters that the Law Society can address through its regulatory powers.

3. With this in mind, the Task Force supports taking some action to address the issue of unpaid and underpaid articles and excessive hours of work. At the same time, however, the Law Society's statutory mandate requires the Benchers to consider the negative implications that may arise from a policy decision to mandate remuneration and place limits on hours of work during articling, particularly as related to the public interest.

4. On this basis, the Task Force recommends that the Benchers approve, in principle, the introduction of minimum levels of financial compensation and maximum hours of work for articled students, with limited exceptions, and that the details of the new standards are developed by the Law Society following additional consultation with the profession in the coming year.

5. The Task Force is also concerned, however, that the evidence reviewed by the Task Force to date suggests that introducing these requirements would reduce the availability of articling positions, thereby creating barriers to licensure for some students. As articling is currently the only means for students to complete the experiential training portion of the licensing process in BC, remuneration standards should not be considered in isolation from the issue of the availability of articles and the development of alternative pathways to licensure. In order to avoid the foreseeable, negative consequences arising from the introduction of mandatory levels of financial compensation, the Task Force recommends that these standards are not implemented until the Law Society has established at least one

alternative to articling, through which candidates' ability to fulfill the experiential training portion of the licensing process will no longer entirely be dependent on the availability of articles.

Proposed Resolution

6. The Benchers adopt the recommendations of the Lawyer Development Task Force that:

> **Recommendation 1:** The Benchers endorse, in principle, the Law Society establishing limits on the number of hours of work during articles, with limited exceptions. Developing a specific formula or method for calculating the limits on hours of work, and identifying the circumstances under which employers and students may be eligible for a discretionary exemption from the new standards, will occur following additional consultation with the profession and will be referred back to the Benchers for final approval no later than September 2022.
>
> **Recommendation 2:** The Benchers endorse, in principle, the Law Society establishing minimum levels of financial compensation during articles, with limited exceptions. Developing a specific formula or method for calculating the minimum level of compensation, as well as identifying the circumstances under which employers and students may be eligible for a discretionary exemption from the new standards, will occur following additional consultation with the profession and will be referred back to the Benchers for final approval no later than September 2023.
>
> **Recommendation 3:** To address the potential reduction in articling positions resulting from establishing standards for financial compensation, and to ensure that the introduction of the requirement does not create barriers to licensing for some students, the new standards for financial compensation will not be implemented until at least one additional pathway to licensure is in place, which the Task Force expects to occur by September 2023.

Background and Process

7. At the Law Society's October 2020 AGM, a Member Resolution was approved that directed the Benchers to ensure that articling agreements are consistent with section 16 and Parts 4 and 5 of the *ESA*.[1] The Resolution states:

[1] The Member Resolution was carried with 1,567 votes in favour, 1,163 against and 187 abstentions.

Be it resolved that membership directs the Benchers:

To amend the appropriate sections of the Law Society Rules and/or Code of Professional Conduct within 12 months of the date of this resolution, requiring that articled student agreements provide articled students with at least such rights and protections as are guaranteed under section 16 and Parts 4 and 5 of the Employment Standards Act, RSBC 1996, c 113, and ensure that articled students are able to seek financial redress for practices that contravene the amended Law Society Rules and/or Code of Professional Conduct.

8. Following the AGM, the Law Society disseminated a survey to articled students, newly called lawyers and law firms that had recently hired articled students that sought to gather information on matters relevant to articled students' working conditions. In January 2021, the President asked the Lawyer Development Task Force to review the results of the survey and to return to the Benchers, no later than September 24, 2021, with recommendations.

9. Over the last six months, the Task Force has reviewed and discussed a comprehensive set of materials and issues relating to the matter of articled student remuneration and hours of work. This work included an analysis of the scope and application of the relevant provisions of the *ESA*; a review of the Articling Agreement, Law Society Rules and *Code of Professional Conduct for British Columbia* ("*BC Code"*); and a consideration of other provinces' employment standards legislation, articling guidelines and agreements, and policy decisions on remuneration. The Task Force also reviewed a large body of data produced by the Law Society's recent surveys on articled student remuneration and days and hours of work, and met with the proponents of the Member Resolution.

10. This foundational work has informed the Task Force's evidence-based approach to identifying problems associated with articled student remuneration and hours of work, and to consider the potential implications of different approaches to addressing these concerns, as discussed in this recommendations report.

The Problem

11. In order to be called to the bar in BC, licensing candidates must complete a period of transitional training following law school. Currently, the only option for obtaining the requisite experiential training is through the Admission Program, which consists of articles and the Professional Legal Training Course. Students cannot be admitted into the Admission Program unless they have secured articles.

12. The Law Society does not guarantee that all students will be able to obtain an articling position, nor does it directly regulate the employment relationship between a student and

the firm once articles are secured. Although students and principals must sign the Law Society's Articling Agreement, which addresses the nature of the relationship between the principal and student, the content of articles and reporting requirements, the Articling Agreement does not include provisions relating to remuneration, hours of work or other matters relating to students' working conditions. Similarly, the Law Society Rules and the *BC Code* provisions governing articles do not address remuneration, or hours and days of work.

13. In recent years, concerns have been raised about the existence of, and problems associated with, unpaid and underpaid articles. Anecdotal reports of students articling for low or no pay and, in extreme cases, paying their principal, led to a more detailed examination of these issues by the Lawyer Education Advisory Committee in 2015. Following its review, the Committee recommended, and the Benchers accepted, that principals be encouraged to pay reasonable wages, and that the Law Society continue to gather information on remuneration, and then determine whether to develop a policy on minimum payment for articles.

14. Developing a policy on articled student remuneration was subsequently identified as an organizational priority in the Law Society's 2018-2020 Strategic Plan. In 2019 and 2020, student remuneration and hours of work during articles were explored in more detail in a series of Law Society surveys. These results provided the Law Society with its first statistically significant data set regarding the working conditions of articled students. As described in more detail in the next section of this report, the results confirm that the majority of students receive a salary during their articles and that monthly earnings vary considerably. The results also indicate that students devote significant amounts of time to their articles, and that based on their monthly salaries and hours of work, many students earn less than the statutory minimum wage. Additionally, the survey results did bear out that a small minority of positions are unpaid, and that, in a few of these cases, students are paying for costs associated with their articles.

15. The Law Society sets regulatory requirements for entry into the legal profession, and these requirements include completing the articling process. The Law Society therefore has the ability to examine and address these issues, and in doing so, ensure that public interest considerations are paramount when weighing various policy options. The discussion and recommendations that follow aim to move the Law Society's policies toward striking this balance.

Research and data analysis

16. The subject of this report addresses issues provided for under section 16 and Parts 4 and 5 of the *ESA*. This requires an understanding of the scope and application of these provisions.

17. Section 16 of the *ESA* addresses minimum hourly wages. Under subsection (1), employers covered by the Act are required to pay an employee at least the minimum wage as prescribed in the regulations, which is $15.20 per hour as of June 1, 2021.

18. Part 4 of the *ESA* addresses hours of work and overtime. These provisions require that employers ensure:

    - an employee is paid overtime wages of 1 ½ times their regular wage for time over eight hours of work, and double for time over 12 hours and 1 ½ times their regular wage for time over 40 hours a week;
    - an employee has at least 32 consecutive hours free from work each week, or is paid 1 ½ times their regular wage for time worked during the 32 hour period the employee would otherwise be entitled to have free from work;
    - an employee has at least eight consecutive hours free from work between shifts;
    - an employee is not required or directly or indirectly allowed to work excessive hours or hours detrimental to the employee's health or safety;
    - no employee works more than five consecutive hours without a meal break of at least half an hour;
    - an employee working a split shift must be allowed to complete the shift within 12 hours of starting work;
    - an employee that reports for work must be paid a minimum of two hours at their regular wage, or if previously scheduled to work more than eight hours that day, is paid a minimum of four hours at their regular wage; and
    - at the employee's request, a time bank for the employee may be established and credited with overtime wages.[2]

19. Part 5 of the *ESA* addresses statutory holidays. These provisions require that an employee who is given a day off on a statutory holiday, or is given a day off instead of the statutory holiday, must be paid an amount equal to at least an average day's pay determined by a formula. Additionally, an employee who works on a statutory holiday must be paid 1 ½ times their regular wage for the time worked up to 12 hours and double their regular wage for any additional time.

[2] This Part also permits the employer and employee to enter into an averaging agreement covering up to four weeks.

20. Most professionals are excluded from the entirety of the *ESA*, including lawyers and articled students.[3] In the most recent independent review of the Act, several rationales for exempting self-governing professions were identified, including their self-governing nature, the fact that individual professionals exercise a high degree of autonomy in decision-making in their work, and that strictly controlled hours are inconsistent with professional responsibilities when the needs of clients and patients, for example, are urgent and arise unpredictably.[4]

21. This approach is relatively consistent with that of other Canadian jurisdictions, where lawyers and articled students are excluded from all or part of the applicable provincial employment standards legislation. Provinces such as Manitoba and Ontario exclude articled students from provisions relating to hours worked and payment. Other provinces, including Alberta, Saskatchewan and Nova Scotia, exempt articled students only from overtime-related provisions, but not from statutory minimum wage standards. BC's approach to exempting legal professionals and articled students from the *ESA* is, therefore, not unique.

22. Exemption from provincial employment standards legislation does not, however, prevent legal regulators from establishing their own rules and policies on remuneration and hours of work for articled students. Nevertheless, with the exception of a recent policy decision by the Law Society of Ontario ("LSO"), the Task Force is not aware of any Canadian law society that has established minimum standards for payment during articles in their rules, articling agreements or codes of conduct, although it is acknowledged that minimum wage legislation of general application applies to articled students in some provinces. Many law societies are also silent on the issue of wages in the articling guidelines, recruitment procedures and handbooks provided to principals and articled students.

23. The LSO's recent examination of the issue of mandatory payment during transitional training, which occurred in the context of broad reforms to its licensing process, is

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[3] Pursuant to section 3 of the *ESA*, the Act does not apply to employees excluded by regulation. A list of exclusions are identified in section 31 of the Employment Standards Act Regulation, B.C. Reg. 396/95. Other professions exempted from the *ESA*, in its entirety, include architects, most chartered accountants and their articled students, chiropractors (including those registered as fourth-year chiropractic students entering preceptorship programs), dentists, professional engineers and engineers-in-training, licensed insurance agents and adjusters, land surveyors and articled pupils, registrants of the College of Physicians and Surgeons of BC (including residents), naturopaths, optometrists, licensed real estate agents, persons licensed under s. 35 of the *Securities Act*, veterinarians and professional foresters. Other classes of employees are also excluded from the *ESA*, either in its entirety or from specific sections. For example, nursing students, managers, teachers and university faculty are excluded from the Act's hours of work and overtime provisions. Employees covered by a collective agreement may also be excluded from certain parts of the *ESA*.

[4] The British Columbia Law Institute, "Report on the Employment Standards Act"(December 2018).

instructive.[5] When the LSO established the Law Practice Program ("LPP") in 2018 as a new, permanent pathway to licensing, it included the introduction of a required salary for both articled and LPP candidates in accordance with LSO requirements, with limited exceptions.[6] Although concerns were raised that mandatory remuneration could reduce the number of available transitional training positions, and that some clinics, public interest organizations and sole practitioners may be unable to comply with the new requirements the introduction of a required salary for articling and LPP placements — to be calculated by a formula that would be developed following additional work — was approved. It was also proposed that some principals and work placement supervisors may be eligible to apply for an exemption in certain circumstances. With the disruptions created by the pandemic, however, work on implementing this policy decision has not progressed.

24. In considering the issue in British Columbia, the Law Society needs to be mindful of what is happening in other jurisdictions, but also must primarily be guided by the Law Society's strategic objectives and statutory mandate and base its policy decisions on the best available evidence, consultation and, ultimately, what is in the public interest.

25. In line with this approach, the Task Force has reviewed the large body of survey data on articling remuneration and hours and days of work collected by the Law Society in 2019[7] and 2020.[8] Although the survey sample sizes and questions varied, the results were relatively consistent. With respect to financial compensation, the data suggest that the large majority — approximately 97% — of articling positions in BC are paid, including up to one-third of those surveyed reporting salaries of more than $4,000 per month.

26. Approximately one quarter of respondents reported earning $2,500 or less per month during articles. This equates to an annual salary of $30,000 or less, which approximates payment at or below the "minimum wage" under the *ESA*.[9] Additionally, approximately

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[5] This issue first arose following an LSO survey that raised concerns that some employers were taking advantage of candidates' need to fulfill their transitional training requirement by employing law school graduates for minimal, or in some cases, no compensation.

[6] Law Society of Ontario, Professional Development and Competence Committee Report "Options for Lawyer Licensing" (December 2018).

[7] The issue of articling remuneration was addressed as part of the 2019 Admission Program survey distributed to all one to three year calls (call years 2015, 2016, 2017). Respondents were asked a range of questions about working conditions as well as whether the Law Society should be involved in setting minimum standards of financial compensation for articled students.

[8] Following the voting on the Member Resolution at the 2020 AGM, the Law Society conducted two online surveys. One was sent to all current articled students and lawyers who had articled in the past three years (call years 2018, 2019 and 2020), and the other to the designated representatives of firms that currently have articled students or have hired an articled student in the past three years.

[9] As of June 1, 2021, the minimum wage in BC was set at $15.20 per hour. Therefore, $2,432 is the minimum amount of compensation for a four week period of work for employees for whom the *ESA* applies.

three percent of survey respondents did not receive a salary during their articles.[10] Limited data is available as to who is taking unpaid positions, although the 2019 survey results suggest at least half came into the Admission Program with an NCA Certificate of Qualification,[11] a cohort of candidates that typically includes a higher proportion of individuals from equity-seeking groups.[12] Four respondents also reported paying for costs associated with their articles, including covering disbursements, travel costs, office space and other overhead.[13]

27. With respect to hours of work, the surveys indicate that almost all articled students work what would be considered "overtime" under the *ESA*. Almost all respondents reported working eight or more hours per day during articles, and nearly half worked 10 hours per day or more, and in excess of 50 hours per week.[14] More than one-third of students surveyed also reported working six or more days per week and more than half report working on statutory holidays.[15]

28. The Task Force also reviewed the qualitative data from the 2019 and 2020 surveys, which included over 500 written comments. These remarks indicate support within the profession for the Law Society setting minimum standards for financial compensation during articles, as well as identifying concerns about the potential for negative consequences arising from the introduction of such a requirement, including a reduction in the number of available positions and changes to the articling experience if some employers are unable to meet the new standards.

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[10] In the 2019 and 2020 surveys, 14 respondents and 26 respondents, respectively, reported receiving no payment during articles. These figures are reasonably consistent with the survey results of several other law societies, including Ontario, Alberta, Manitoba and Saskatchewan, which found that between one and four percent of articling positions are unpaid.

[11] The National Committee on Accreditation (NCA) assesses the legal education and professional experience of individuals who obtained their credentials outside of Canada or in a Canadian civil law program. The Certificate of Qualification is issued once a candidate has finished the work required by the NCA, and shows that a candidate's knowledge of Canadian law is similar to the knowledge of those who obtained their law degree through an approved Canadian law school program.

[12]The remainder of the unsalaried respondents did not answer the survey questions about their path of entry into the Admission Program. No questions were asked in the 2020 survey about students' path of entry.

[13] The 2019 survey included a question as to whether students paid for their articles and the nature of that payment, if any. No questions were asked in the 2020 survey as to whether students paid for their articles.

[14] Notably, in the 2020 survey, employers consistently reported higher levels of compensation and less time spent working than did recently and newly called articled students.

[15] Questions about work on statutory holidays were not included in the 2019 survey.

Discussion

29. Many of the policy rationales for establishing standards for mandatory minimum compensation during articles are unified by themes of ensuring fairness and preventing exploitation. Given that candidates for admission must complete articles in order to be called to the bar, the final stage of a student's pathway to licensing is, to a large degree, influenced by, and dependent on, their principal. This dynamic has the potential to create power imbalances that can, unfortunately, lead to exploitative working conditions including students accepting positions for limited or no pay, or agreeing to work excessive hours.

30. Lack of payment can also create barriers to entry into the profession for those who cannot afford to go with little or no income for the duration of the articles. Some qualified individuals simply cannot accept positions that do not provide the level of compensation necessary for them to repay student loans or otherwise make ends meet. If paid positions are unavailable, these candidates will be unable to complete the licensing process.

31. However, some students also report positive experiences with principals who, because of the nature of their practice, could afford to pay them very little or not at all, but were nevertheless willing to take on the responsibilities and provide the educational experiences necessary for the student to complete their training.

32. The survey data reveals that there is a recognition within the profession that the legal community has an ethical obligation not to use articled students as a source of cheap, or free, labour. Certainly, articled students can and do provide valuable work that contributes to the success of their employers, and typically, firms charge their clients, at least in part, for the services conducted by their students. But it must also be remembered that articles are intended to serve a teaching and learning function, and that as a result, it can be expected that the work produced by articled students may not always be valuable or profitable for the employer. Nevertheless, fairness principles would suggest that a principal charging a third party for services performed by their student should pay the person doing the work.

33. As the Admission Program is a Law Society requirement, ethical considerations would suggest that the Law Society has some responsibility to minimize opportunities for students to be exposed to harmful working conditions within the licensing program it has created.

34. With this in mind, the Task Force has concluded that these policy considerations support taking some action to address the issue of unpaid and underpaid articles and to consider how to address the question of hours of work. At the same time, however, the Law Society's statutory mandate requires the Benchers to consider the negative implications that may arise from a policy decision to mandate remuneration and limits on hours of work during articling, particularly as related to the public interest.

35. The introduction of a requirement that students be paid for articles would not adversely affect many employers, as most pay their students. However, the survey results suggest that establishing a requirement that articled students are paid the statutory minimum wage as prescribed by the *ESA* could affect a number of law firms that have recently been providing articling positions.[16]

36. Additionally, a large majority of students work more than eight hours a day and more than 40 hours per week.[17] Therefore, if the *ESA* provisions regarding the minimum levels of mandatory payment for overtime were also adopted, almost all employers that hire articled students would be required to pay overtime wages, calculated at 1 ½ times the base wage. These additional wages will be significant for many employers.

37. The potential financial implications of introducing wage protections for articled students can be expected to result in some employers – particularly small firms and sole practitioners – deciding that they can no longer afford to offer articling positions, or to reduce the number of positions. Notably, the 2019 survey data indicates that of those firms and other legal employers that hired articled students in the past three years, one-quarter will not be hiring students in 2021. Although it is not possible to discern the relative impacts of the intent expressed through the Member Resolution, the COVID-19 pandemic and other factors on hiring decisions, the data suggests that a reduction in articling positions in the coming years is likely.

38. The Task Force understands, therefore, that the Benchers must exercise caution in making policy decisions that have an expected outcome of triggering a contraction of the articling market, particularly at a time when the impacts of the pandemic on the profession and the legal marketplace are uncertain and evolving. Under the current licensing regime, in which articling is the only option for obtaining the necessary experiential training to be called to the bar, a shortage of articling positions will create additional obstacles to entering the profession for some. This result is problematic, particularly in the context of the Law Society's efforts to reduce barriers to entry by, for example, developing alternatives to articling.

39. Introducing new standards for financial compensation will also likely have a disproportionate impact on particular practice settings, including legal aid and public interest advocacy firms, as well as legal clinics and non-profit organizations that provide

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[16] See the survey results described at para. 26.

[17] As detailed in para. 27, the survey results indicated that that approximately half of students work more than ten hours a day and/or more than 50 hours per week, and up to one-third work six or more days a week.

services to vulnerable or disadvantaged members of the public. If these employers are unable to meet the new requirements, a loss of articling positions and future lawyers in these areas of law can be expected. It is also possible that imposing mandatory salary requirements could affect the ability, or willingness, of employers to pay that salary while the student is in the Professional Legal Training Course, or to pay the cost of the course, both of which most employers currently agree to do.

40. Employers could avoid some of these financial implications by ensuring that articled students do not work overtime. There is concern, however, that curtailing students' work to fit within a standard eight-hour day, 40-hour week model would fundamentally alter the articling experience for many in a number of ways.

41. First, restricting students' hours may fail to adequately prepare new lawyers for the realities of practice. It would greatly misrepresent how lawyers have to work at certain points in time, such as in trial preparation or at trial, or in the lead up to the closing of a transaction. Clients' needs frequently demand attention outside of the standard work week contemplated in the *ESA*. Although there should not be an expectation that students work excessive hours for marginal levels of compensation, the professional duties owed to the client may require working additional hours when needs arise. Recognition that the nature of legal work demands flexibility around rates of pay and hours of work is, in fact, one of the reasons articled students and lawyers (and most other professionals) are excluded from employment standards legislation.

42. Second, a loss of overtime could be expected to include the loss of training experiences during articles that are of low economic value for firms, but high educational value for students, such as observing court proceedings undertaken by leading counsel. Training, of course, is fundamentally integral to the purpose of articling and an essential element of developing competence in entry-level lawyers.

Assessment

43. The Task Force has weighed the policy considerations associated with, and the implications of, various options for addressing the issues raised by the Member Resolution and the survey data. These options include bringing the Articling Agreement and the Law Society Rules into alignment with the standards set in the *ESA*; instituting measures that encourage, but do not require, employers to provide their students with adequate levels of pay and hours of work; funding unpaid and underpaid articling positions; and devising an alternative method for establishing a level of minimum compensation and/or regulating articled students' hours of work.

44. Although the Task Force supports some of the rationales articulated for imposing wage and hour requirements, it does not recommend that, at this time, the Law Society introduce new requirements that are consistent with section 16 and Parts 4 and 5 of the *ESA* on the basis that the Task Force is concerned that doing so is likely to have significant impacts on the current availability of articles. Specifically, implementing statutory minimum wage requirements for all hours worked is expected to reduce the number of articling positions as the result of some employers' inability to provide the required levels of compensation. Should the reduction in the number of positions result in students being unable to secure articles, this will create more barriers to entry into the profession than exist under the current model. Furthermore, the strict regulation of hours of work would also be likely to result in principals providing students with fewer non-remunerative learning experiences.

45. The Task Force recommends, however, that the Law Society does more than simply encourage employers to provide articled students with reasonable remuneration. To date, this approach has not adequately addressed concerns about unpaid and underpaid articles. This option also fails to address the concerns associated with excessive hours of work, which are often linked to insufficient remuneration. Something more than encouragement seems to be required at this stage.

46. The Task Force also does not support a model in which the issue of unpaid and underpaid articles is addressed through the Law Society subsidizing or otherwise funding these positions on the basis that providing financial support to legal employers to hire students is outside the scope of the Law Society's regulatory functions, and would engage a myriad of fairness issues.

47. As described in further detail below, the Task Force members support, in principle, the introduction of requirements for minimum levels of financial compensation and maximum hours of work for articled students. The Task Force recognizes, however, that introducing these standards is likely to reduce the availability of articling positions. On the basis that articling is currently the only means for students to complete the experiential training portion of the licensing process in BC, wage and hour requirements should not be considered in isolation from the issue of the availability of articles. The Task Force therefore recommends an approach that improves articled students' working conditions while taking care to mitigate the reduction in articling positions that may result from the introduction of a new wage requirement.

48. Specifically, to address the concerns raised in the recent survey data, the Law Society could establish some minimum levels of financial compensation for articled students.

49. Additionally, the Law Society could establish limits on the number of hours articled students are required to work, although the maximum would likely be higher than the standard hours of work established by the *ESA* in order to address the realities of legal

practice and to ensure that the training experience is not fundamentally altered. As a result, employers would not be required to compensate students for all time worked outside of standard hours of employment. However, limits would be established that protect students from excessive demands.

50. Recognizing the diversity of working environments in which articling positions are offered, and to ensure that the new standards retain the necessary flexibility to address unconventional employment arrangements, the Task Force recommends that a process is developed by which employers and students may apply to the Executive Director for an exemption from the new wage and hour standards. For example, some legal employers, including those operating within non-profit, legal aid and public interest advocacy sectors may be eligible to apply for a discretionary exemption from the standards to ensure that these settings are able to continue to offer articling positions.

51. The specific method or formula for establishing the standards for minimum payment and maximum hours of work will be developed following further consultation with the profession. The circumstances under which an exemption from the new standards may be sought, as well as options for enforcing these requirements, will also be explored.

52. Following this consultative process, the matter will be returned to the Benchers for a final decision. As employers must enter into articling agreements with students in advance of the commencement of articles, a sufficient period of notice must be provided to the profession prior to the introduction of the new requirements.

53. Implementing these new requirements would help to address concerns about poorly paid articles and unregulated overtime, thereby reducing opportunities for exploitation and barriers to licensing for some candidates. This approach also addresses a number of other issues raised in the Member Resolution, including the ethical obligation to ensure that students are compensated for the valuable work they provide to firms and to minimize students' exposure to working conditions and financial pressures that can negatively impact on mental health.

54. The Task Force is cognizant that there is a level of opposition within the profession to the Law Society becoming involved in the employment relationship between firms and students. It is also aware that instituting some level of mandatory remuneration is very likely to create extra financial burdens for some employers and that this could affect the number of articling positions available. In this regard, the Benchers must guard against making a policy decision intended to improve the fairness of the licensing process, only to inadvertently create additional barriers to licensure by reducing the supply of articling positions.

55. In order to avoid foreseeable, negative consequences arising from this proposal, the Task Force has concluded that the optimal approach is to coordinate the implementation of the new standards for financial compensation with the introduction of alternatives to articling, through which candidates' ability to fulfill the Law Society's experiential training requirement will no longer depend entirely on the availability of articles. It is contemplated that providing is at least one alternative pathway to licensure will mitigate concerns that the new standards will reduce the number of training positions.

56. Work on developing additional pathways to licensure remains a priority for the Task Force, and options on alternatives to articles will be presented to the Benchers by the Task Force at a later date. If one or more alternative pathways are approved in principle by the Benchers, considerable time and resources will be required to develop and implement the new experiential training programs. The Task Force anticipates, however, that at least one alternative may be in place by September 2023.

57. The Task Force recommends that the new standards for financial compensation are not introduced until at least one additional pathway to licensure has been established. Ensuring that the implementation of these standards is contingent on, and synchronized with, the introduction of alternatives to articles is important to mitigate the potential impact of the wage requirements on the availability of articles and thus, the ability of candidates to obtain the necessary experiential training to complete the licensing process. In this regard, linking the implementation of the financial compensation standards with alternatives to articles is not reflective of equivocation or delay; rather, it is a necessary step in coordinating inter-related and complimentary Law Society initiatives.

58. In contrast, a minority of the Task Force recommends that if alternatives to articling are not in place by September 2023, the Law Society should proceed with the implementation of the standards for financial compensation to ensure that the introduction of these new requirements is not deferred for an indeterminate period of time.

Recommendations

59. Three recommendations are presented to the Benchers for discussion and decision.

60. The Task Force recommends the following in relation to hours of work during articles:

> **Recommendation 1:** The Benchers endorse, in principle, the Law Society establishing limits on the number of hours of work during articles, with limited exceptions. Developing a specific formula or method for calculating the limits on hours of work, and identifying the circumstances under which employers and students may be eligible for a discretionary exemption from the new standards, will

occur following additional consultation with the profession and will be referred back to the Benchers for final approval no later than September 2022.

61. The Task Force recommends the following in relation to *developing* the standards for financial compensation during articles:

> **Recommendation 2:** The Benchers endorse, in principle, the Law Society establishing minimum levels of financial compensation during articles, with limited exceptions. Developing a specific formula or method for calculating the minimum level of compensation, as well as identifying the circumstances under which employers and students may be eligible for a discretionary exemption from the new standards, will occur following additional consultation with the profession and will be referred back to the Benchers for final approval no later than September 2023.

62. The Task Force recommends the following in relation to *implementing* the standards for financial compensation during articles:

> **Recommendation 3:** To address the potential reduction in articling positions resulting from establishing standards for financial compensation, and to ensure that the introduction of the requirement does not create barriers to licensing for some students, the new standards for financial compensation will not be implemented until at least one additional pathway to licensure is in place, which the Task Force expects to occur by September 2023.

63. In coming to this recommendation, the Task Force also discussed an additional provision that was proposed by a minority of the Task Force namely, that if alternatives to articling are not in place by September 2023, the Law Society will proceed with the introduction of the new standards for financial compensation. Ultimately, this version of the recommendation was not supported by the Task Force in a vote. If that set of circumstances occurs, the Benchers of the day should determine what to do on the basis of then-current information.

Budgetary Implications

64. The recommendations will require a commitment of additional financial and human resources from the Law Society. Foreseeable, short-term budgetary implications are largely limited to the costs associated with commencing a profession-wide consultation and any additional focus group work. However, the costs of implementing specific new standards for remuneration and hours of work, once developed, are more uncertain and will depend upon the details of those proposals, including the degree to which additional regulatory oversight is required. It is not possible at this stage to forecast the expense of such a

program. An assessment of budgetary implications will be included in the final report on the proposal when it is made.

65. In the meantime, the cost of developing the proposal further is largely accounted for through staff resources that are already assigned to the Task Force.

Conclusion and next steps

66. The relatively high-level nature of the Task Force's recommendations aims to strike a balance between demonstrating the Law Society's commitment to addressing the issues of student remuneration and hours of work, without prematurely endorsing a specific standard or formula for either issue during articles. This approach is intended to provide the profession with a clear signal about the Law Society's policy direction on the issues, while providing opportunities for further consultation on, and examination of, the potential implications of introducing specific requirements. The consultation should extend to all practising lawyers and their legal employers, current articled students and other stakeholders.

67. If the proposed recommendations are adopted by the Benchers, the matter will return to the Lawyer Development Task Force to oversee broader consultation with the profession on matters including the appropriate level of compensation during articles, limits on working hours, eligibility for exemptions from the standards and the enforcement of the new requirements.

The Law Society of British Columbia

Increasing Access to Non-Adversarial Resolution of Family Law Matters

Access to Justice Advisory Committee:
Lisa J. Hamilton, QC (Chair)
Paul Barnett
Jennifer Chow, QC
The Honourable Thomas Cromwell
Lisa H. Dumbrell
Mark K. Gervin
Jamie Maclaren, QC
Kevin B. Westell

September 23, 2021

Prepared for:	The Benchers
Prepared by:	Policy and Planning Department
Purpose:	Discussion and Decision

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Committee Process

1. At the beginning of the year, the President asked the Committee to consider how the Law Society might advocate for greater access to non-adversarial dispute resolution in family law matters.

2. The Committee discussed the topic at its meetings from January through July 2021. This included meeting with Jane Morley, Q.C., who is involved in Access to Justice BC's Transforming the Family Justice System Collaborative ("TFJS Collaborative"),[1] Stephen McPhee, Q.C., Chair of the CBA BC's Family Law Working Group, and Kerry Simmons, Q.C. Executive Director of CBA BC Branch in May, and with Nancy Carter, Q.C. Executive Director, and Darryl Hrenyk, Legal Counsel, at Family Policy, Legislation and Transformation Office of the Ministry of the Attorney General in June, to discuss a range of concepts under the broad heading of "non-adversarial family law." The Committee is grateful for their participation in this process.

3. In addition, the Committee considered materials authored by Nancy Cameron, Q.C., J.P. Boyd, Q.C., Ms. Morley, the CBA BC and CBA National branches, and Access to Justice BC, as well as policy memoranda from staff.[2]

4. The Committee received staff support from Michael Lucas, QC., Jason Kuzminski and Doug Munro, and administrative support from Amanda Kerr.

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[1] The TFJS Collaborative is an initiative of A2JBC to create "a cross-sectors collaborative to transform the family justice system in BC by focusing it on achieving family well-being", see: Family Justice Collaborative - Access to Justice BC.

[2] This included, Access to Justice BC, "Report of the Working Group on an A2JBC Family Justice Leadership Strategy" (November 2020) ("A2JBC Family Justice Report"), CBA BC "Agenda for Justice 2021, CBA National, CBA Task Force Report on Justice Issues Arising From COVID-19, "No Turning Back" (February 2021), John-Paul E. Boyd, QC, memorandum dated January 6, 2020, "Potential amendments to the FLSC Model Code of Professional Conduct", and Nancy Cameron, QC, "Transforming the family justice system by focusing on family well-being."

Executive Summary

5. The Access to Justice Advisory Committee was tasked with making recommendations about how the Law Society might advocate for greater access to non-adversarial dispute resolution in family law matters.

6. Through its research and consultation the Committee learned about the effect Adverse Childhood Experiences ("ACEs") have on the developing brain, and long term wellness. Being subject to adversarial family disputes can be an ACE and can exacerbate existing ACEs. The data that has been collected, when considered alongside the long-recognized belief that adversarial family law dispute resolution can be harmful to those involved, requires the Law Society, lawyers, the government, courts, and other justice system stakeholders to recalibrate how family disputes are resolved in order to minimize harm and promote well-being.

7. The report contains a series of recommendations divided into two general categories based on the Law Society's Access to Justice Vision:[3] 1) matters the Law Society can control, and 2) concepts the Law Society can influence through advocacy, collaboration and consultation.

8. Central to this report is examining a policy that would align the Law Society with the long term goal of increasing the number of non-adversarial resolution options in the family law justice system while ensuring that such options are properly supported by government, the courts, lawyers, and funded agencies such as Legal Aid BC.

Resolution

9. The Committee recommends the following resolution be adopted by the Benchers:

   THAT the following recommendations of the Access to Justice Advisory Committee relating to increasing access to non-adversarial family law processes be adopted:

   > **Recommendation 1:** The Law Society will align its family law access to justice policy development and strategic initiatives with A2JBC's object of reforming family justice services based on data about ACEs, and join the TFJS Collaborative;
   >
   > **Recommendation 2:** The Law Society will explore how to use its communications tools to better educate stakeholders about ACEs;
   >
   > **Recommendation 3:** The Law Society will explore ways to use its communications tools to better educate policy makers and the public about the benefits of resolving

[3] Included for reference at Appendix 1.

family problems in a non-adversarial manner, including making available information about available services that support non-adversarial dispute resolution;

Recommendation 4: The Law Society will generate and support the creation of content for continuing professional development and PLTC around ACEs and non-adversarial family law dispute resolution;

Recommendation 5: Law Society staff will review ways the Lawyer Directory can be improved to provide the public more easily accessible information about what services are provided by Law Society lawyers accredited as mediators, arbitrators and parenting co-ordinators, and report to the Benchers with options for improving the Directory;

Recommendation 6: The Law Society's will explore how to use its communications tools to inform the public of the services that are available to support children whose families are navigating the family justice system;

Recommendation 7: The Benchers will encourage the Executive Director to consider which staff would benefit from training in ACEs and the statutory duties of family law lawyers;

Recommendation 8: The Law Society will explore with the government, the courts, lawyers and other justice system stakeholders, including the Canadian Bar Association and Trial Lawyers' Association of BC, the types of change required to incorporate options for non-adversarial processes, taking into account current and emerging data on ACEs;

Recommendation 9: The Law Society will explore with the government, in particular the Ministries of Education and Health, the creation of courses and content in high-school about law, civic rights and responsibility, and particularly with respect to family law, educate students about non-adversarial family law options and about ACEs;

Recommendation 10: The Law Society will work with Government, Legal Aid BC, the Association of Legal Aid Lawyers and the Law Foundation of BC to support proper funding for non-adversarial dispute resolution options for family law issues;

Recommendation 11: The Law Society will explore opportunities to consult with and collaborate with professionals in health and social services fields to support a multidisciplinary approach to helping families resolve family disputes.

Recommendation 12: The Law Society will explore with the Provincial and Federal Government the possibility of creating tax credits or deductions for people who access private, non-adversarial dispute resolution for resolving family law issues.

Terminology

10. In this Report, the Committee uses the term "family law" to refer to matters that arise under the *Divorce Act* and *Family Law Act* such as child support, spousal support, parenting time, guardianship and parenting responsibilities, or asset and debt division. "Family law" in the context of this report is not meant to include MCFD matters or adoption.

Background

11. The Law Society has long recognized that family law problems occupy a unique position of importance to the public and, consequently, to the administration of justice. From 2006 to 2012 the Law Society's Family Law Task Force worked on a range of matters to improve the quality of service and access to justice for individuals facing family law issues. The Law Society's Legal Aid Task Force prepared "A Vision for Publicly Funded Legal Aid" (March 2017) that highlighted the importance of better supporting family law dispute resolution and the professionals who serve them within the legal aid system. Furthermore, every year since 2014, the Law Society's $60,000 access to justice fund, administered by the Law Foundation, has been allocated to support matters related to family law, children, or the delivery of services such as unbundled independent legal advice to support family law mediation.

12. This report continues that focus on family law problems and proposes recommendations for the Benchers consideration that the Law Society could implement to reform the resolution of family law disputes.

The Problem

Adversarial Family Law Processes May Not Engender Lasting Resolutions Where a Continuing Relationship between the Parties is needed

13. The problems associated with resolving family disputes through an adversarial system are well known and have been the subject of discussion amongst family lawyers, legal researchers and academics for many years. Chief amongst the problems is that many people engaged in a family law dispute need to maintain some form of an ongoing relationship with the other party to the dispute. The classic example is the need for parents to continue to work together to raise children. Approaching these disputes in an adversarial manner entrenches a resolution process that creates "winners" and "losers," and is often less likely to result in resolution that both sides can live with.

14. Change is taking place. British Columbia has seen the rise of collaborative family law, family law mediation, the advent of parenting coordination, as well as the efforts to reform family law and court processes. The Provincial Court in particular has been at the forefront of reform, embracing innovative pilot projects and placing mediation at the front-end of the court process.

The provincial government has created justice access centres, support recalculation programs, and family justice centres to name but a few initiatives. But despite these developments, change occurs slowly.

15. Family law lawyers know the benefits of non-adversarial options for resolution of family law matters and in fact have duties under the *Divorce Act* and the *Family Law Act* to recommend such options where appropriate.[4] However, many members of the public are not represented by lawyers and are not aware of the benefits of non-adversarial processes, nor the potential for harm caused by adversarial processes.

16. Another significant problem is that the majority of current funding goes towards adversarial systems and services. Proper funding is critical in order to increase access to non-adversarial options for resolving family disputes. It would create an even greater problem to shift from a funded adversarial model to an underfunded non-adversarial model.

Adversarial Family Law Processes can generate Adverse Childhood Experiences

17. During its research and consultation the Committee learned about the effect that Adverse Childhood Experiences ("ACEs") can have on the developing brain and long term wellness. Being subject to adversarial family disputes can be an ACE and can exacerbate existing ACEs.

18. The Committee's interest in ACEs came from research conducted by Access to Justice BC ("A2JBC")[5] regarding the impact of ACEs on brain development. Based on a review of available scientific evidence, the A2JBC Family Justice Report observed:

> *The research on [ACEs] identifies ten childhood experiences that potentially create toxic stress and risk negative immediate, long-term and intergenerational impacts. Divorce and parental separation is an ACE, as are other family justice related issues such as child neglect (physical and emotional) and abuse (physical, emotional, sexual), and household dysfunction including mental illness, substance abuse violence and incarceration.*
>
> *The more ACEs experienced by children, the higher the risks of immediate and future negative outcomes. The presence of adverse social conditions*

[4] Non-adversarial family law processes may not be appropriate where a family law dispute resolution professional has screened for family violence and has determined that a particular non-adversarial process is inappropriate (pursuant to obligations in the *Family Law Act* regulations and the *Divorce Act*).

[5] The Law Society has been a participating member of A2JBC since its inception and attempts to align its policy development regarding access to justice with the policy development of A2JBC, when appropriate.

> *and historical trauma also increase risks and lead to intergenerational impacts.*
>
> *The news is not all bad, however. Resilience, inherent in all of us and strengthened through healthy brain development, helps with the management of stress. There is something that can be done to ameliorate the negative impact of ACEs: negative experiences can be reduced, resilience strengthened and positive supports provided.* [Internal reference omitted][6]

19. It is not surprising that, when people who, as children (whether past or in the present) have experienced ACEs are involved in a protracted, adversarial family law dispute, they experience new ACEs related to the court process, and their existing problems that arose from prior ACEs are magnified. Consequently, the existing adversarial model for resolving family problems can harm the developing brain of children and can lead to long term health and societal problems. An adversarial dispute resolution model can also have traumatic effects on adult participants who previously experienced ACEs.

20. In recent years the legal community has begun to better understand how legal, social, economic and health problems are connected. The data on ACEs reinforces an important aspect of this interconnectedness. The Committee has concluded that it is not enough for lawyers and other justice system stakeholders and policy-makers simply to take notice of the data and the interconnection. Rather, such actors must change their behavior based on that knowledge. Otherwise, we are failing to advance the public interest.

Evaluation Criteria

21. The Committee explored a range of ideas when analyzing what the Law Society can do to promote greater access to non-adversarial dispute resolution services for family law issues. It analysed those ideas against the policy goals and mandate of the Law Society, as well as in regard to specific organizational considerations.

Unified Family Courts

22. Early on in its work, the Committee considered whether British Columbia might develop a modernized, unified family court ("UFC"), which brought together a specialized bench and technology similar to that found in the Civil Resolution Tribunal and emerging artificial intelligence to help manage family law problems more effectively. Ultimately, the Committee decided against pursuing this line of inquiry for several reasons. The main reason is that a UFC would still likely be an adversarial model of dispute resolution, and that is not what the

[6] A2JBC Family Justice Report" at page 6.

Committee is tasked with considering. In addition, unless the UFC was truly transformative in the sense it was a fully utilised and funded non-adversarial option, the Committee is of the view it would represent an incremental, but insufficient, improvement. The Committee concluded that something more transformative is required.

Particular Organizational Evaluation Criteria

23. To address the issue, the Committee explored whether there are additional factors, beyond those that informed the development of the Strategic Plan, to support increased forms, and use, of non-adversarial dispute resolution, and then focused on what can be done to *advocate for greater access to non-adversarial dispute resolution in family law matters*.

24. Some factors that are relevant to the Committee's analysis are set out below.

- The public interest is served by society having dispute resolution mechanisms and laws that support the ability of people to function effectively, to avoid legal problems where possible, and to manage such problems efficiently when they arise so people can live full and productive lives. As suggested above, resolving family problems in an adversarial manner often prolongs conflict and causes ongoing harm to those involved. Family law lawyers know this. However, the general public is not as aware. Consequently, the public interest supports the idea of the Law Society using its authority to bring about and influence constructive change by supporting non-adversarial systems of solving or preventing family disputes whenever appropriate.

- The cost/benefit of a move away from adversarial family models to greater utilisation of non-adversarial resolutions is difficult to quantify in the abstract. Change, especially the type of systemic change required to shift to non-adversarial dispute resolution, will cost money. It is possible in the short term there will be greater costs in order to create adequate systems, modify existing systems, and educate the public involved in the various system changes. However, it is anticipated that in the long run cost savings would be realized by decreasing the adversarial aspect of matters, which can lead to repeat and chronic use of court processes and endless disputes. In addition, in light of the data on ACEs, the Committee is of the view that there is an even greater societal saving/benefit that can result by reducing the mental health issues caused to those who would otherwise have to resolve family disputes in an adversarial system.

- The Committee is of the view that public relations as well as relations with lawyers in general and family lawyers in particular should not be harmed by the Law Society advocating for non-adversarial family law dispute resolution. Most family law lawyers are well aware of the benefits of resolving matters in a non-adversarial manner early on in a file in order to prevent harm. Family law lawyers will be an excellent resource in terms of advancing and implementing reform as they have on-the-ground experience.

25. The Committee notes that recommendations may require an equity, diversity and inclusion analysis before implementation. The Committee also notes that access to justice issues do not arise equally in society. We know from research such as that of Dr. Ab Currie,[7] that people who identify with various equity-seeking groups are more likely to experience more than one serious, difficult to resolve legal problem over a three year period than the national average. And the barriers to accessing services and justice can be more acute for members of equity-seeking groups. It is important, therefore, that a move towards more non-adversarial models of family law dispute resolution does not embed and perpetuate existing systemic biases and barriers to their access.

Analysis

26. The Committee considered how the Law Society might best advocate for or promote non-adversarial resolution of family law disputes. Consistent with the Law Society's Vision for Access to Justice, the Committee categorized options into ideas the Law Society can control and ideas the Law Society can influence and participate in.

27. The ideas considered by the Committee that the Law Society can control include:

- Endorse A2JBC's approach to ACEs and align the Law Society's family law policy development with the object of reducing the harm caused to families by adversarial dispute resolution by joining A2JBC's TFJS Collaborative;
- Use the Law Society's communications tools to better educate lawyers and particularly the public about ACEs;
- Use the Law Society's communications tools to better educate the public and other stakeholders about the benefits of resolving family problems in a non-adversarial manner, including making available information about existing services that support non-adversarial family law dispute resolution;
- Generating and supporting the creation of content for continuing professional development and PLTC around ACEs and non-adversarial family law dispute resolution;
- Use the Law Society's communications tools to inform the public regarding the services that are available to support children whose families are navigating the family justice system;

[7] See, for example, Ab Currie, "The Legal Problems of Everyday Life: *The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians*" (Ottawa: Justice Canada, 2009).

- Encourage the Law Society to provide staff who investigate family law complaints with training on the statutory obligations mentioned above, as well as training regarding ACEs.

28. The Law Society can work with the following groups to advance non-adversarial resolution of family disputes:

- **Lawyers** –family law lawyers work hard to help their clients resolve matters in a non-adversarial way where appropriate. The Law Society can reach out to family law lawyers to get a better understanding of what the Law Society can do to help these lawyers continue this important work, and advocate for necessary change;

- **Government** – the Law Society can consider supporting government efforts to develop programs that are designed to promote non-adversarial family law resolution, and to help inform the public about such programs; The Law Society can also work with the government, in particular the Ministries of Education and Health, to explore the creation of courses and content in high-school about law, civic rights and responsibility, and with respect to family law, educate students about non-adversarial family law options and about ACEs;

- **Government and the courts** – the Law Society can liaise with government and the courts in order to explore ways to increase options for non-adversarial resolution of family disputes, taking into account current and emerging data about ACEs;

- **Government, Legal Aid BC, the Association of Legal Aid Lawyers and the Law Foundation of BC** – the Law Society can engage in advocacy to support proper funding for non-adversarial dispute resolution options for family law issues;

- **Medical and social health professionals** – recognizing the interconnection of law, health and social well-being, the Law Society can explore opportunities to consult with and collaborate with professionals in health and social services fields to support a multidisciplinary, non-adversarial approach to helping families resolve family disputes. A2JBC is interested in hosting joint session with doctors and the Law Society in the fall of 2021 or early 2022 regarding family justice transformation and ACEs.

Aligning Future Policy Development around ACEs and Communication on ACEs to the Profession and Public

29. If the system for solving family disputes is harmful, it is incumbent on the Law Society to work within its statutory mandate to advance the public interest in the administration of justice by finding ways to reduce harm caused to families.

30. The Committee believes that the evidence about ACEs collected by A2JBC is cogent. Hence, the Committee recommends that the Law Society endorse the objective of working towards a change in how family law disputes are resolved, taking into account current and emerging data regarding ACEs. The Committee also recognizes that such change will require the coordinated efforts of government, the courts, lawyers and others (including those in the medical and social sciences). The Committee is therefore not asking the Benchers to adopt a solution, but, rather, is recommending the Benchers to commit the Law Society to support efforts within the justice system where better solutions are identified and pursued.

31. The recommendation has the object of reducing harm and will inform the nature of future work at the Law Society. For example, the Law Society can consider how it might augment lawyer education (whether through PLTC or continuing professional development) to better equip lawyers to help clients who have, or may otherwise, experience ACEs. A decision to align with the objectives identified by A2JBC would also influence how the Law Society advocates with government and the courts regarding substantive and procedural changes to the justice system with respect to family law disputes.

32. The Committee believes that the research on ACEs reinforces the need to work towards reform to develop a system that reduces harm to families, and creates functional results.

33. The Committee therefore believes the Law Society should develop future policy and regulatory reform related to family law in a manner that has the object of reducing harm to participants, and reflects current and emerging data on ACEs.

34. As a starting point, the Law Society can explore using its Communications tools to better inform lawyers and particularly the public about ACEs and the TFJS Collaborative. The Committee anticipates that initial efforts would focus on the policy reasons to resolve matters in a non-adversarial manner where appropriate, and the information on ACEs would provide parties a broader framework for understanding why it is important to pursue less-adversarial solutions.

Modifications to the Lawyers Directory

35. As part of its discussion about how to make information more available to the public, the Committee considered potential modifications to the Lawyer Directory. At present, the Lawyer Directory permits lawyers who are Law Society-accredited family law mediators, arbitrators or parenting coordinators, to have that designation listed by their entry in the directory. The Committee considered whether the Law Society should expand on this by allowing other practice preferences and classification to be listed, as well as improve the search functionality of the Directory so people could search based on services and not just by name.

36. The Committee recognizes there may be discrete policy and practical matters associated with reforming the Lawyer Directory, so at this stage the Committee is of the view that staff should

explore ways to improve the content and functionality of the Directory, and advise the Benchers on next steps. Trying to find ways to improve the public's access to information about different ways of resolving family law problems is important, and the Lawyer Directory is a resource within the Law Society's control that might prove useful.

At least one Member of the Discipline Committee and Staff working in investigations having a background in family law practice and ACEs

37. While discussing changes the Law Society might make to its processes to move towards a culture of non-adversarial family law dispute resolution, the Committee discussed the relation between regulation and that policy objective. The Committee explored the idea that there should always be at least one family law lawyer on the Discipline Committee, as well as the idea of Law Society creating opportunities for staff to receive training in ACEs and statutory obligations of family law lawyers, are related.

38. The Committee sought input from senior staff in the Professional Regulation Department. With respect to the idea of requiring the Discipline Committee composition to include at least one family law practitioner, the Committee heard that a review of complaints and files that proceeded to the Discipline Committee revealed a low incidence of matters where input from a family law lawyer at the Discipline Committee was determinative. The Committee recognizes that the President, when appointing the Discipline Committee, needs to balance the representational skills and experiences of its members to achieve a range of functions, and prescriptive requirements from various practice areas could become limiting.

39. The Committee accepted the feedback of staff and do not recommend pursuing this option.

40. Concerning the question of whether staff hired to investigate complaints have training in the substantive legal obligations of family lawyers as well as training on ACEs, the Committee notes that some staff already have family law backgrounds and staff lawyers communicate with each other when needing help with analysis of issues. Many staff in Intake and Early Resolution also have training in trauma-informed practices.

41. Qualifications and training of staff is an operational matter for the Executive Director to address. Therefore, the Committee hesitates to make a recommendation in the form of a directive. However, in keeping with the policy objects of shifting towards a culture of non-adversarial family law, the Committee believes the Law Society can take a leadership role by ensuring its staff receive current training on the issues, similar to the Law Society's commitment to providing staff training on mental health matters. The Committee suggests that the Benchers encourage the Executive Director to explore suitable opportunities to keep staff up to date on the type of training the Society will expect of family law practitioners regarding ACEs and non-adversarial dispute resolution.

Matters outside the Law Society's sphere of control

42. With respect to matters that are beyond the Law Society's authority to control, the analysis of most options will depend on the nature of consultation and collaboration engaged in.

43. If non-adversarial processes are ever to become a primary method of resolution of family law disputes, it is essential to engage the courts, the government and the legal profession in the discussion. While the Law Society cannot control the process, it can start by making the policy declaration that it believes the shift in how family disputes are resolved is necessary, and commit to working with government, the courts and the profession to bring about the necessary change.

44. One concept the Committee favours, which requires a few additional comments, is the idea (already engrained into the current Law Society Strategic Plan) of collaborating with the Ministries of Health and Education regarding high-school course content.

45. On several occasions over the past 15 years the Committee has discussed the potential for the Law Society to influence the high school curricula to teach students basic legal life skills and knowledge about the main legal issues they will likely experience in their lives. Education about legal issues, rights, responsibilities and services that exist to help people navigate the legally complex world is an important part of helping people have access to justice and requires moving beyond the traditional conception that access to justice only occurs in court or on the doorstep to court. The Committee believes there is merit in the Law Society working with government to introduce essential legal life skills, including a focus on non-adversarial family law resolution, into the high school curriculum. This could include expanding the curriculum beyond "Law 12" to explore opportunities through social studies or related courses from Grades 8-12.

46. The Committee also discussed the importance of exploring with the Provincial and Federal governments the possibility of creating tax credits or deductions for people who try to resolve matters using private, non-adversarial dispute resolution models. The Committee is of the view that such tax credits or deductions would improve access to justice by reducing some of the financial burden that exists due to the fact that government does not currently fund non-adversarial family law dispute resolution. The Committee considers that family law mediation, including the mediation aspect of a Med-Arb arrangement, should be eligible for tax credit or deduction. The details of a submission to governments on this concept would need to be worked out. At this stage, the Committee is recommending the policy directive and that the creation of such a submission, or outreach, take place.

47. The Committee is of the view each of the options listed above regarding collaboration and outreach are worth exploring, recognizing that the Benchers will have opportunities down the road to make determinations regarding policy issues that may arise, and that the Executive Director will retain oversight and decision-making authority regarding any operational matters.

Resource Implications

48. Some of the recommendations the Committee proposes will have resource implications for the Law Society. The main impact will be allocation of staff and funding towards developing communications content to support non-adversarial family law dispute resolution, including better educating lawyers and particularly the public about what services are available and the need for change. In addition, recommendations related to continuing professional development and PLTC will also impact staff and funding. At this time, the resource impact cannot be estimated. If the Benchers accept the Committee's recommendations, the development of specific proposals will fall to the Executive Director and staff to prepare a resource analysis for consideration by the Benchers before making a final recommendation regarding implementation.

Recommendations

49. The Committee asks that the Benchers adopt the following recommendations as part of the Law Society's efforts to advocate for greater use of non-adversarial family law resolution services and systems:

> **Recommendation 1:** The Law Society will align its family law access to justice policy development and strategic initiatives with A2JBC's object of reforming family justice services based on data about ACEs, and join the TFJS Collaborative;
>
> **Recommendation 2:** The Law Society will explore how to use its communications tools to better educate stakeholders about ACEs;
>
> **Recommendation 3:** The Law Society will explore ways to use its communications tools to better educate policy makers and the public about the benefits of resolving family problems in a non-adversarial manner, including making available information about available services that support non-adversarial dispute resolution;
>
> **Recommendation 4:** The Law Society will generate and support the creation of content for continuing professional development and PLTC around ACEs and non-adversarial family law dispute resolution;
>
> **Recommendation 5:** Law Society staff will review ways the Lawyer Directory can be improved to provide the public more easily accessible information about what services are provided by Law Society lawyers accredited as mediators, arbitrators and parenting co-ordinators, and report to the Benchers with options for improving the Directory;

Recommendation 6: The Law Society's will explore how to use its communications tools to inform the public of the services that are available to support children whose families are navigating the family justice system;

Recommendation 7: The Benchers will encourage the Executive Director to consider which staff would benefit from training in ACEs and the statutory duties of family law lawyers;

Recommendation 8: The Law Society will explore with the government, the courts, lawyers and other justice system stakeholders, including the Canadian Bar Association and Trial Lawyers' Association of BC, the types of change required to incorporate options for non-adversarial processes, taking into account current and emerging data on ACEs;

Recommendation 9: The Law Society will explore with the government, in particular the Ministries of Education and Health, the creation of courses and content in high-school about law, civic rights and responsibility, and particularly with respect to family law, educate students about non-adversarial family law options and about ACEs;

Recommendation 10: The Law Society will work with Government, Legal Aid BC, the Association of Legal Aid Lawyers and the Law Foundation of BC to support proper funding for non-adversarial dispute resolution options for family law issues;

Recommendation 11: The Law Society will explore opportunities to consult with and collaborate with professionals in health and social services fields to support a multidisciplinary approach to helping families resolve family disputes.

Recommendation 12: The Law Society will explore with the Provincial and Federal Government the possibility of creating tax credits or deductions for people who access private, non-adversarial dispute resolution for resolving family law issues.

Subsequent Steps

50. The subsequent steps that are required are predicated on which recommendations the Benchers adopt. Obviously, a number of the recommendations require resource allocation, time commitment, and possible costs. In the abstract it is difficult to assess the likely requirements or impacts of each recommendation on resources.

51. The Committee is of the view that it is important to frame these unknowns within the observation that the type of transformational change that is contemplated will take some time to be fully realized. A consequence of this is that the Executive Director will retain discretion as how best to allocate resources as this work unfolds over the coming years, so that work is undertaken in a manner that is both consistent with the policy objective to be achieved but within the broader operational and strategic demands of the organization. What is important is that the Law Society commits to the journey, not that the work all needs to be completed in a calendar year or even a Strategic Plan cycle.

/Appendix

Appendix:

Access to Justice Vision for the Law Society of British Columbia

Preamble

Meaningful Access to Justice means that our justice systems, and the legal services that support them, are available, affordable, understandable and effective. Meaningful Access to Justice not only provides essential service to the people who must resort to our legal systems, but also sustains the rule of law on which our democracy depends. Without Meaningful Access to Justice, people do not receive the legal help that they need and public confidence in the rule of law and indeed, in democracy itself may falter.

The Law Society believes that:

1. Democracy depends on the rule of law and Meaningful Access to Justice is necessary to maintain it;

2. Meaningful Access to Justice can be achieved through several means, including the vindication of legal rights through our formal and informal dispute resolution systems, through law reform, and through political reform;

3. Legal service providers, including lawyers who are authorized to provide legal services for a fee, have an obligation to make their services appropriately accessible to the public;

4. Access to legal services has a regulatory component, and the Law Society should take appropriate steps to allow for legal markets and services to develop to address those needs;

5. Meaningful Access to Justice requires digitization of justice systems and legal services, as well as transformation of how those systems and services are delivered in order to reduce or eliminate the barriers identified below;

6. As the justice systems and legal services are modernized, particularly through technological solutions, it is important to ensure the solutions do not create new systemic barriers to Meaningful Access to Justice. This requires thoughtful design at the creation phase of any new approach to achieve the goal of equal access for all.

7. There are many barriers to Meaningful Access to Justice, including:
    - how our laws are developed - particularly their scope and complexity;

- how law is implemented, enforced, interpreted and how disputes are resolved;
- how our rules governing practice may prevent lawyers from creating new business models, new partnerships, new services and products, and keep out potential innovators who have made other industries more efficient, effective and resilient;
- the cost of delivering legal services;
- how lawyers direct their services, and how the government funds or does not fund legal services;
- how geographical barriers affect access to legal services and the justice system;
- historic disadvantages due to individual circumstances, including but not limited to economic means, education, race, religion, language skills, sexual orientation, disability, and gender; and
- the systemic barriers people face in accessing the systems and services that exist for managing and resolving legal problems.

The Vision

The Law Society plays an important role in reducing barriers to and enhancing Meaningful Access to Justice in British Columbia. The Law Society will address barriers to Meaningful Access to Justice by:

1. reviewing its regulatory and strategic policy, as needed, and making the necessary changes to reduce or remove barriers that are within the Law Society's authority to control guided by its statutory obligation to ensure the public is well-served by competent and ethical legal professionals;

2. understanding the nature of the barriers that lie outside the Law Society's authority to control and by exploring whether the Law Society has a role to play in helping people and groups overcome those barriers, whether by lending its voice to law and policy reform or by other advocacy efforts;

3. applying Access to Justice BC's Triple Aim measurement framework (which requires improving access to all British Columbians, including groups with particular interests, improving user experience, and improving costs in proportion to the benefits) to the Law society's development of strategic and regulatory policy;

4. analyzing available data and taking an objective, evidence-based approach to the Law Society's decisions and engagement with others in the justice sector;

5. listening to and learning from the diversity of perspectives of British Columbians; in particular, by understanding how some groups are particularly disadvantaged or face acute barriers to accessing justice, and by striving to develop policy that is responsive to those realities;

6. demonstrating leadership to help British Columbians achieve Meaningful Access to Justice. This leadership may include spearheading policy and rule reforms, and supporting government and other justice system stakeholders in developing new and innovative services. The Law Society recognizes that, from time to time, it will be necessary to advance transformative changes to our laws, legal system and related services.

While the Law Society recognizes that the challenges of access to justice and the barriers people face often manifest themselves as the problems of individuals, they are, in fact, shared problems in our society. Recognizing this, the Law Society commits to advance its Access to Justice Vision in a collaborative and constructive manner, with the Society's public interest mandate at the heart of its efforts.

2021 Annual General Meeting
of the Law Society of British Columbia

Tuesday, October 5, 2021

Call to order: 12:30 pm PDT

Meeting location: Virtual Meeting

Advance Online Voting

Advance online voting on the 2021 Annual General Meeting (AGM) resolutions will be available from **Monday, September 20, 2021 until 5:00 pm PDT on Monday, October 4, 2021**. Voter credentials and instructions on how to access the voting site will be sent to all eligible voters on September 20, 2021. Only Law Society of BC members in good standing will be eligible to vote.

To watch a live stream of the meeting, go to the Law Society website and click on the link under 2021 Annual General Meeting to access.

Virtual Meeting

Pursuant to Rule 1-9.1, the Executive Committee has directed that the 2021 AGM will be a virtual meeting and there will not be any physical meeting locations. Members will be able to join, vote, and speak at the meeting virtually.

If you are planning to attend the virtual meeting, you will need to register prior to the meeting. Please register by using the RSVP function available in the Member Portal. Please RSVP by 5:00 pm PDT on Monday, October 4, 2021.

Instructions on how to join the meeting will be sent to all registered members in advance of the meeting.

Business of the Meeting

The business of the 2021 AGM will be as follows:

- Election of Second Vice-President for 2022
- Benchers' report of proceedings since last meeting
- Resolution 1: Member Resolution to solicit the Membership's commitment to open debate on Practice Directive 59 and Notice to Profession 24 (re gender pronouns)

- Resolution 2: Member Resolution to implement changes to the Member Portal and Lawyer Directory regarding pronouns and forms of address

- Resolution 3: Appointment of Law Society auditors for 2021

- Resolution 4: Benchers' Resolution regarding authorizing Benchers to amend the Rules respecting general meetings to provide that in order to be considered at an annual general meeting, a resolution must be signed by at least 50 members of the Society in good standing at the time the request is received by the Executive Director

- Resolution 5: Benchers' Resolution regarding authorizing the Benchers to amend the Rules respecting general meetings to provide the President as chair of the annual general meeting with the authority to determine in advance of any publication whether a member resolution submitted for consideration at the annual general meeting is in order, being reasonably related to the mandate or responsibilities of the Law Society or the Benchers, or to the regulation of the legal profession.

Election of Second Vice-President for 2022

Each year at the AGM, there is to be an election for the position of Second Vice-President-elect. Pursuant to Law Society Rule 1-19, if only one candidate is nominated, the President will declare that candidate Second-Vice-President-elect. The Benchers are pleased to announce their nomination of Jeevyn Dhaliwal, QC for Second Vice-President-elect.

Pursuant to Rule 1-5(2), the Second Vice-President for 2022 will be First Vice-President in 2023 and President in 2024.

Jeevyn Dhaliwal, QC

Jeevyn Dhaliwal, QC is an elected Bencher from Vancouver County who has served the Law Society in various capacities since 2013. She currently Chairs both the Ethics and Governance Committees, and sits as a member of the Executive and Finance and Audit Committees.

Jeevyn's service to the profession has included elected positions on the Canadian Bar Association (BC Branch) Provincial Council and the Vancouver Bar Association, and she has been a longstanding Board Member and Past President of the South Asian Bar Association of British Columbia. Her community involvement more broadly includes instructing in Capilano University's Legal Studies Department, sitting as a Board Member of Creative BC and she is a past member of the UBC Alumni Advisory Council.

Called to the Bar in 1998, Jeevyn holds broad based experience in employment law and practises in the area of workplace immigration law at Larlee Rosenberg, Barristers & Solicitors, in Vancouver, British Columbia.

Benchers' Report: Proceedings since last meeting

Pursuant to Rule 1-8(4), on behalf of the Benchers, President Dean Lawton, QC will provide a brief outline of Law Society proceedings since the 2020 Annual General Meeting.

Resolutions

Resolution 1: Member Resolution submitted by James I. Heller and Shahdin Farsai

WHEREAS in December 2020 the judiciary issued PD-59 and NP-24 [the "Directives"] advising counsel to provide "correct" gender pronouns for themselves and parties when appearing in court;

AND WHEREAS the judiciary issued the Directives based solely on the guidance of the Sexual Orientation and Gender Identity Community of the Canadian Bar Association - BC Branch ["SOGIC"], and without any broader consultation with the Bar;

AND WHEREAS in its December 16th, 2020 press release, the Provincial Court sought to explain and justify the Directives by stating that one cannot assume what pronouns to use for others based solely on their "name, appearance or voice";

AND WHEREAS the undersigned consider the above assertion to be radical, controversial and ideological in nature and that the Directives arguably amount to compelled speech, contrary to s 2(b) of the *Canadian Charter of Rights and Freedoms*, which protects everyone's right to "freedom of thought, belief, opinion and expression …";

AND WHEREAS Shahdin Farsai, one of the undersigned, submitted a critical opinion piece about the Directives to the *Advocate* (the "Article"), which the magazine intended to publish alongside a response it invited from SOGIC;

AND WHEREAS instead, SOGIC informed the *Advocate* that it would not directly respond to the Article;

AND WHEREAS, the *Advocate* subsequently decided not to publish due to, *inter alia*, being "dramatically cautioned" by a Member that doing so could well lead to a human rights complaint against the magazine;

AND WHEREAS the editor told the Law Society Benchers in a letter on February 17, 2021, that he had been advised by some Members "that there is nothing to debate and the mere idea of debate is a hateful enterprise.";

AND WHEREAS Ms. Farsai then submitted an abridged version of her article to *Canadian Lawyer*, which did publish it on February 5, 2021 ("Opinion Piece");

AND WHEREAS a group of more than 200 lawyers, students, and paralegals then penned a letter to *Canadian Lawyer* (the "Letter") threatening to boycott the magazine if they did not remove the Opinion Piece and replace it with an apology declaring that "… this is not a 'two-sides' issue";

AND WHEREAS three Benchers signed the Letter;

AND WHEREAS *Canadian Lawye*r withdrew the Opinion Piece on February 8, 2021 and posted an apology;

AND WHEREAS *the Advocate* has since published several Letters to the Editor in its March, May and July issues criticizing the Directives;

AND WHEREAS Jim Heller, one of the undersigned, wrote to the chief judges on February 17th, 2021 asking them to repeal the Directives and to engage in a more inclusive consultation process but that they replied on February 26th, 2021 declining his request and explaining that they were "satisfied with the advice [they] considered";

AND WHEREAS the Canadian legal system is premised on the bedrock understanding that truth and justice must be sought through empirical, fact-based inquiry within the framework of an adversarial system in which lawyers zealously argue opposing sides of issues, thereby illuminating their relative strengths and weaknesses, irrespective of bias and emotion;

AND WHEREAS it is axiomatic in the law that all controversies, no matter how complex or sensitive, always have more than one side;

AND WHEREAS Members are duty-bound to fearlessly advance their clients' interests pursuant to our oath just as judges are obliged to rule dispassionately irrespective of public opinion;

BE IT RESOLVED THAT:

a) the Membership affirms its commitment to rational and unfettered discourse on any and all issues regarding the Directives;

b) the Membership affirms that no topic that relates to our profession and the administration of justice should be exempt from open debate;

Resolution 2: Member Resolution submitted by Emma Wilson and Kyla Lee *(Amended September 14, 2021)*

WHEREAS actual harm can come to trans, non-binary, and gender-nonconforming individuals when they are deadnamed or when the wrong pronouns are used; and

WHEREAS members of this profession have consistently for years been addressed by the wrong forms of address, deadnamed, or addressed using the wrong pronouns; and

WHEREAS the Law Society has made diversity and inclusivity a priority; and

WHEREAS diversity and inclusivity require real work and action to be taken, and not merely lip service to the concepts; and

WHEREAS the BC Provincial Court and BC Supreme Court have recently issued practice directions requiring counsel to state their pronouns and forms of address when appearing in court; and

WHEREAS the Law Society of BC Website does not currently support or allow the use of non-English characters in listing a lawyer's name; and

WHEREAS normalizing the practice of all individuals stating pronouns and forms of address reduces the burden on trans, non-binary, and gender-nonconforming people, by preventing them from being singled out;

Be it resolved that membership directs the Law Society:

To implement changes to the Member Portal and Lawyer Directory on the Law Society website to do all of the following:

- To allow members to list in their directory page the pronouns and forms of address to be used by members;
- To include technical support for Unicode characters, to allow members from diverse communities to also list their traditional names;
- To include support for audio pronunciation guides for non-English names;
- To include an easy way for members to change their names on the directory to prevent deadnaming.

That the Law Society will announce a timeline for such changes to be made within 90 days of this resolution passing, and with such changes to be effective no later than six months from the passing of this resolution, and the Benchers will be required to send a message to the membership to announce the changes, and to encourage updating their profile in the Member Directory.

Resolution 3: Appointment of Law Society auditors for 2021

BE IT RESOLVED that PricewaterhouseCoopers be appointed as the Law Society auditors for the year ending December 31, 2021.

Resolution 4: Benchers' Resolution

BE IT RESOLVED to authorize the Benchers to amend the Rules respecting general meetings to provide that in order to be considered at an annual general meeting, a resolution must be signed by at least 50 members of the Society in good standing at the time the request is received by the Executive Director.

Note:
Section 12 of the *Legal Profession Act* requires the approval of two-thirds of members voting in a general meeting or referendum to permit the Benchers to make rule changes with respect to general meetings.

Commentary:
Law Society Rule 1-8(6) presently requires that only two members of the Society in good standing are required in order to put forward a member resolution for consideration at an annual general meeting. Other provisions in the Act and Rules require the participation of at least 5% of the members to require a referendum to enforce a member resolution that has not been substantially implemented by the Benchers and at least 5% of the members to call for a special general meeting. The Bencher resolution to require 50 members to support including a member resolution on the annual general meeting agenda is intended to ensure that the resolution has the support of a meaningful constituency and not just two members while also ensuring the process is still reasonably accessible to members.

Resolution 5: Benchers' Resolution

BE IT RESOLVED to authorize the Benchers to amend the Rules respecting general meetings to provide the President as chair of the annual general meeting with the authority to determine in advance of any publication whether a member resolution submitted for consideration at the annual general meeting is in order, being reasonably related to the mandate or responsibilities of the Law Society or the Benchers, or to the regulation of the legal profession.

Note:
Section 12 of the *Legal Profession Act* requires the approval of two-thirds of members voting in a general meeting or referendum to permit the Benchers to make rule changes with respect to general meetings.

Commentary:
Law Society Rule 1-13(13) provides that the President can decide questions of procedure to be followed at a general meeting not otherwise provided for in the Act or the Rules. The extension of that Rule to the current annual general meeting process would allow the President to decide whether a resolution is in order prior to the present process for notification and comment on member resolutions. However, for certainty, this Bencher Resolution proposes to ensure that member resolutions reasonably relate to matters within the jurisdiction and authority of the Law Society and the Benchers. The Bencher resolution would provide the President with the authority to determine in advance of any notification and comment whether a member resolution is reasonably related to the mandate or responsibilities of the Law Society or the Benchers, or to the regulation of the legal profession.