The Law Society of British Columbia

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Response to the Ministry of Attorney General's Intentions Paper

Legal Professions Regulatory Modernization

November 2022

Executive Summary

The Law Society of British Columbia appreciates the opportunity to provide its comments on the Ministry of Attorney General's Intentions Paper.

We agree with the Ministry's observations that actions must be taken to increase access to justice and the Intentions Paper identifies a number of concrete steps with which we also agree. However, we do have several comments regarding the Ministry's stated intentions.

First, we agree with the Ministry that the importance of an independent bar to the functioning of a free and democratic society cannot be overstated. The ability of lawyers to fearlessly advocate for their clients even, and especially, when their client is at odds with government requires an independent bar governed by a regulatory board on which lawyers constitute a majority. The public interest in the independence of lawyers places legal regulation in a unique position in relation to government involvement and lawyers are best qualified to ensure that proper standards of competence and ethics are set and enforced in the practice of law. We are confident that self-regulation of the legal profession would be held to be a principle of fundamental justice and that a majority of lawyers on the board is essential to self-regulation.

Second, we agree with the Ministry that there is tension between the dual objectives of diversity and functionality in setting the size of the future board. In our view, a significantly smaller board will undermine diversity and it is important to consider the public interest benefits of diversity in governance in determining the size of the future board. A diverse board enhances public confidence in the regulator and in the profession and leads to better decision-making. It is our view that diversity in governance would be undermined if the board size were to be substantially changed.

Third, we agree with the Ministry that a new statute for the legal professions should authorize the delivery of legal services through licensed paralegals. However, setting a minimum scope of practice for licensed paralegals will create a barrier to entry and reduce access to justice. If the scope is too narrow or prescriptive, the door may be closed to some paralegals, which would reduce the options available to address access to justice issues. Instead, it is our view that a more flexible competency-based approach to licensing will better achieve the goal of increasing access to justice, while also ensuring protection of the public.

Lastly, we agree with the Ministry that the new statute should assign the regulator the broad authority to regulate the competence and integrity of legal service providers in B.C. and to promote the rule of law. The current *Legal Profession Act* is an effective example of a framework for regulation that is filled in with Rules passed by the Law Society and meets the objective stated by the Supreme Court of Canada that regulation of lawyers by the state must be as much as possible free from state interference.

The Law Society looks forward to working with the Ministry to ensure that these goals are achieved within a framework that recognizes the importance of an independent bar, an independent profession and an independent regulator reflecting the diversity of the British Columbia public and ensuring a variety of legal service providers meeting the legal needs of the citizens of British Columbia.

Introduction

The Law Society of British Columbia appreciates our dialogue with the Ministry regarding the establishment of a single legal regulator, including the participation of former Deputy Attorney General Shannon Salter at our board meeting on September 23, 2022, to discuss the Ministry of Attorney General's Intentions Paper.

In responding to the Ministry's Intentions Paper, we should state upfront that we agree with the Ministry's observations that further action must be taken to increase access to justice but we believe the Intentions Paper fails to recognize the many steps the Law Society has taken to address access needs. Among other things, this includes the work being done through the Law Society's Innovation Sandbox, support for pro bono initiatives and the work done in association with the Federation of Law Societies to expand recognition of foreign-earned credentials at levels few other professions have been able to achieve. We also agree that the regulator's duty to protect the public interest is paramount; that the independence of the bar is essential to the functioning of a free and democratic society; and that effective regulation should be the continuing goal of a single legal regulator.

The Intentions Paper articulates a number of concrete steps with which we also agree: 1.1 (single statute), 1.2 (single regulator), 2.1 (broad authority to regulate), 3.2 (government appointees being a minority of the board), 3.5 (staggered elections and appointments), 5.1 (modern and flexible discipline framework), and 6.1 (licensees, not members).

However, we do have comments with respect to several of the Ministry's stated intentions.

An independent bar requires self-governance by a regulatory board on which lawyers constitute a majority

The Intentions Paper states *"The directors appointed by government should constitute a minority of the board, and the Attorney General should not sit as a member of the board."*

We agree with the intention. However, what is left unstated is the composition of the remainder of the board. It is our view that a majority of any board that governs lawyers must themselves be lawyers in order to preserve and protect the independence of the bar.

The public has the right to representation by an independent bar.

As the Intentions Paper states:

> *"The importance of an independent bar to the functioning of a free and democratic society cannot be overstated. The Ministry is not proposing, and has no intention of implementing, changes that would interfere with the ability of a lawyer (or other*

> *legal service provider) to fearlessly advocate for their client and provide independent legal advice to their client, even, and especially, when their client is at odds with government."*

In so stating, the Ministry acknowledges what the Supreme Court of Canada has repeatedly stated about the fundamental importance of an independent bar in a free and democratic society:

> *"An independent bar composed of lawyers who are free of influence by public authorities is an important component of the fundamental legal framework of Canadian society."*[1]

> *"Stress was rightly laid on the high value that free societies have placed historically on an independent judiciary, free of political interference and influence on its decisions, and an independent bar, free to represent citizens without fear or favour in the protection of individual rights and civil liberties against incursions from any source, including the state."*[2]

An Independent bar can only exist when there is an independent profession of lawyers

Some have argued that references to an *"independent bar"* refer to the independence of individual lawyers that comprise the bar, as opposed to the independence of the profession. However, the independence of an individual lawyer cannot exist in isolation from the independence of the bar. This is because the activities of each lawyer, including the activities that are constitutionally protected (such as maintaining their client's privilege, or fulfilling their duty of commitment to their client's cause), are regulated in accordance with collective standards that apply to the profession as a whole.

The Supreme Court of Canada has commented on the "*...particular importance of an autonomous legal profession"*[3] and has stated:

> *"The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law."*[4]

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[1] *Finney v. Barreau du Québec*, 2004 SCC 36 at para 1.
[2] *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869 at 887, citing the Ministry of the Attorney General of Ontario, *"The Report of the Professional Organizations Committee"* (1980) at p. 26.
[3] *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869 at 887, emphasis added.
[4] *A.G. Can. v. Law Society of B.C.*, [1982] 2 SCR 307 at 335-336.

In our view, independent lawyers can only exist if there is an independent profession of lawyers.

We should be clear that an independent profession of lawyers is not unaccountable. Rather, independence co-exists with accountability in the self-governance of lawyers through a broader ecosystem of regulatory oversight and public accountability. Currently, this includes the appointment of six public board members, the appointment of the Attorney General as a board member, oversight by the provincial Office of the Ombudsperson, and the ability to appeal Law Society decisions to the courts. Like all regulators, the Law Society is subject to administrative law principles and the rule of law. Like everyone, the Law Society and lawyers remain subject to constitutionally-compliant laws and regulations.

An independent profession requires that a majority of the board that governs lawyers are themselves lawyers.

The Ministry has acknowledged in the Intentions Paper that it *"... has no intention of implementing changes that would see a shift away from what is commonly referred to as "self-regulation".*

In our view, self-regulation of the legal profession requires that a majority of the board that governs lawyers are themselves lawyers and a majority of the lawyer directors are elected. It is important that government appointees not only constitute a minority as the Ministry intends, but that lawyers constitute a majority. The whole of our board, both elected lawyers and Order-in-Council appointees, are in unanimous agreement on this point.

There are two reasons for this: (i) the public interest in the independence of lawyers places lawyers in a unique position in relation to government involvement, and (ii) lawyers are best qualified to ensure that proper standards of competence and ethics are set and enforced in the practice of law, which requires a thorough understanding and commitment to the constitutional elements attached to a lawyer's practice.

On the first point, the Supreme Court of Canada has observed:

> *"The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally. The uniqueness of position of the barrister and solicitor in the community may well have led the province to select self-administration as the mode for administrative control over the supply of legal services throughout the community."*[5]
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> *"An independent bar composed of lawyers who are free of influence by public authorities is an important component of the fundamental legal framework of*

[5] *A.G. Can. v. Law Society of B.C.*, [1982] 2 SCR 307 at 336.

> *Canadian society. In Canada, our tradition of allowing the legal profession to regulate itself can largely be attributed to a concern for protecting that independence and to lawyers' own staunch defence of their autonomy."*[6]

Although it is not yet settled law, we are confident that self-regulation of the legal profession would be held to be a principle of fundamental justice and that a majority of lawyers on the board is essential to self-regulation.[7]

On the second point, the Supreme Court of Canada noted lawyers' unique position in being able to set standards in relation to, and enforce against, lawyer misconduct. The Court has also noted that some aspects of the practice of law may be challenging for the public to evaluate:

> *"No one is better qualified to say what constitutes professional misconduct than a group of practising barristers who are themselves subject to the rules established by their governing body."*[8]

> *"Current members of the Law Society may be more intimately acquainted with the ways that these standards [of professional practice] play out in the everyday practice of law than judges who no longer take part in the solicitor-client relationship. Practising lawyers are uniquely positioned to identify professional misconduct and to appreciate its severity."*[9]

The assertion that an independent profession requires a regulatory board on which lawyers constitute a majority should not be taken to minimize the valuable contributions of board members who are not lawyers, and who bring important skillsets and diverse perspectives to bear. The contributions of public board members have enriched discussions at the Law Society. However, the setting and enforcement of professional standards for lawyers engaged in the practice of law, as broadly defined, must be carried out by those who are engaged and experienced in the full practice of law.

Based on our experience with the *Federation* case, we believe that it is in the public interest for the government and the legal professions to pursue a mutually agreeable governance structure to avoid litigation. Working together best allows all parties to proceed with the important work that must be done in accelerating access to justice. However, no compromise can come at the expense of the fundamental principles upon which our free and democratic society is based, such as the public right to an independent bar.

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[6] *Finney v. Barreau du Québec*, 2004 SCC 36 at para 1.
[7] We acknowledge the Supreme Court of Canada expressly left open this question in *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7 at para 86.
[8] *Law Society of Manitoba v. Savino*, (1983) 1 D.L.R. (4th) 285, 1983 CanLII 2995 (MB CA,) at para 18; cited with approval in *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869 at 880.
[9] *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 SCR 247 at para 31.

Any substantial change in the size of the board would undermine diversity on the board

We understand that it is government's intention that the single legal regulator will be governed by a comparatively smaller board.

In discussing board size, the Intentions Paper identifies the tension that exists between the *"dual objectives of diversity and functionality"* as follows:

> *"On the one hand, the board would be large enough to ensure that all regulated legal service providers and the public are reflected in its composition, and to ensure a diversity of skills, perspectives, regions, and backgrounds are represented in its deliberations. On the other hand, the board would be small enough to be nimble and cohesive."*[10]

In order to properly weigh the objectives of nimbleness and cohesiveness on one hand, and of diversity on the other, it is important to consider the public interest benefits of diversity in governance from both a principled and practical perspective.

The Honourable Mahmud Jamal, the first racialized person to be appointed to the Supreme Court of Canada, recently articulated the principled rationale for diversity on the bench.[11] When translated to the context of a professional regulator, his remarks apply equally well to the critical importance of diversity on the board.

First, diversity on the board enhances public confidence in the regulator as an institution and in the profession. Representativeness ensures that the public sees themselves represented in the institution and thereby builds trust that the institution will be fair and impartial in serving the public interest. In the regulatory context, when diverse members of the profession can see themselves reflected in their regulator, this also fosters respect for the legitimacy and authority of the institution in setting and enforcing standards, thereby encouraging compliance and increasing public protection.

Second, diversity on a board leads to better decision-making by including the views and values of an increasingly pluralistic society. As Justice Jamal notes, lived experience is a "*unique reservoir of knowledge that brings depth and understanding."* As such, diversity of lived experience among board members allows the board as a whole to better regulate in the public interest by improving the board's ability to consider issues from the perspectives of others.

[10] Intentions Paper, p. 12.
[11] Honourable Mahmud Jamal, Federation of Asian Canadian Lawyers BC 2021 Gala, Opening Keynote, November 26, 2021.

Third, diversity on the board ensures that the professional regulator, and by extension the legal professions, are open, and seen to be open, to all people. The public interest is served when all who aspire to join the legal professions can see themselves reflected in all aspects of it, including in its regulator.

The Law Society has long recognized the critical importance of board diversity in serving the public interest. Over the past decades, we have taken steps to increase diversity on our board, including the encouragement of diverse lawyers to stand for election, requesting the appointment of diverse board members by the government, creating resources to inform the profession as a whole about important equity issues, and implementing recommendations on policy and governance reforms from the Law Society's Truth and Reconciliation Advisory Committee and Equity, Diversity and Inclusion Advisory Committee. These and other steps, together with increasing diversity and inclusion in the legal profession and in society overall, have allowed the Law Society board to gradually and organically achieve a high degree of diversity.

Today, the board represents a diverse range of communities and backgrounds, including socially, racially, culturally, geographically, politically, and in relation to gender and sexual orientation. Among board members elected by the profession, over half (52%) are women, one in five (20%) are Indigenous, another one in four (24%) are people-of-colour. We strive for a board culture that not only includes but empowers diverse voices, and this is reflected in our board leadership. Our current board chair is a woman. Following her will be the first openly-gay board chair in the regulator's history, who would then be followed by the organization's first South-Asian board chair.

From our own experiences in striving for board diversity, and from listening to and learning from others, we know that the benefits of diversity in governance can only be meaningfully achieved if practical considerations are in place. One of those practical considerations relates to the size of the board.

First, it must be understood that achieving diversity at the board table is substantively different, and preferable, to simply having diversity "*represented in [the board's] deliberations.*"[12] It is not sufficient for diverse views to be presented to the board through consultation efforts or the appointment of diverse people to advisory committees. Rather, we recognize that the board represents the highest level of our organization's governance, strategic planning, and regulatory decision making and, as such, true diversity in governance is only achieved when diverse peoples have a seat at the board table itself. Often, the reality is that this is only achieved when there are enough seats available to be filled.

Second, as articulated by members of the Law Society's Truth and Reconciliation Advisory Committee, a statutory requirement for Indigenous representation could lead to tokenism,

[12] Intentions Paper, p. 12.

especially if there is a smaller board. Appointing a small number of people from underrepresented groups in order to give the *appearance* of equity on a board may not achieve the benefits of diversity. Rather, such appointments may unintentionally create an isolated class of board member who may feel, or be made to feel, unequal to those not appointed to fill "diversity quotas."

Third, having a single person from any underrepresented group is insufficient to ensure diverse input on the board, or to support change. For example, no single Indigenous person, or person-of-colour can be expected to convey the diversity of views on behalf of all others. Rather, having only one person from an underrepresented group on a board can place a disproportionate and unfair burden on that person. Based on our experiences working on equity issues, we also know that diverse perspectives (and calls for change) are best heard when they are amplified, and this often requires more than a token number of those diverse voices to be present at the table. Furthermore, a substantial reduction in the size of the board is also likely to limit participation across a range of practice areas which could also limit the responsiveness and relevance of the regulator.

In summary, taking into consideration the benefits of board diversity to the public interest, and the practical considerations of what meaningful diversity requires, it is our view that diversity in governance would be undermined if the board size were to be substantially reduced. The loss of such diversity would harm the public interest, and be inconsistent with the government's aims of dismantling institutional and systemic racism.[13] In coming to this assessment, we draw not only from on our own experiences in fostering diversity on our board, but also place significant weight on the perspectives of Indigenous, racialized, and 2SLGBTQ+ colleagues who guide our understanding of these issues. We accept that the future board is likely to be smaller than the existing Bencher table but substantial care must be taken to get the balance right. A substantial reduction in the size of the board risks undermining diversity for all the reasons outlined above.

Defining the regulated scope of practice for paralegals will create an unnecessary barrier to entry and reduce access to justice

The Intentions Paper expresses the intention that a new regulatory statute for the legal professions should authorize the delivery of legal services through licensed paralegals by setting a minimum scope or scopes of practice or requiring the regulator to do so within a prescribed period of time and enabling the regulator to grant licensed paralegals and notaries a license on a case-by-case basis.

In our view, the intention to establish a minimum scope of practice for licensed paralegals by legislation or by requiring the regulator to do so will not permit the government to achieve its goal of

[13] Intentions Paper, p. 6.

rapidly expanding access to justice. Rather, doing so is likely to cause the opposite effect by creating an unnecessary barrier to entry that may hinder access to justice instead.

The rationale for our view is based on the purposes for which the "practice of law" is defined in the *Legal Profession Act*, and the exclusionary effect that such definition has on who may provide legal services.

Under the *Act*, the Legislature chose to protect the public by restricting who may engage in the specific activities that are contained within the definition of the "practice of law" and to require the people who engage in those specific activities to be licensed and regulated. Generally speaking, the definition for the "practice of law" is not enabling in the sense that it does not grant lawyers the right to engage in specific activities. Rather it is restricting, by defining the services that others may not provide unless the government permits them to do so under the *Act* or other legislation (such as the *Notaries Act*, or the *Court Agent Act*).

Protecting the public by restricting who may provide legal services in order to ensure the quality of the services provided is an important objective, but it must also be balanced against the objective of increasing access to legal services. If the new legislation defines a scope of practice for licensed paralegals, then doing so may have the consequence of likewise creating an exclusionary barrier to entry affecting both (i) anyone that wishes to become a licensed paralegal, and (ii) anyone wishing to engage in the activities that fall within that defined scope (to the extent these are not already restricted under the definition for the "practice of law").

The effect of creating an exclusionary barrier to entry, as may arise from a defined scope of practice for licensed paralegals under legislation, would include reduced competition and increased prices due to restricted supply of services – not the intended outcome of increased access to justice. This is not only a theoretical concern, but an outcome that has been witnessed in other jurisdictions As Bencher and paralegal Michèle Ross articulated at the Law Society's September 23, 2022 board meeting:

> *"If the scope is too prescriptive, I would be concerned that the door would be closed on some paralegals, which potentially would eliminate a group from being licensed. That would reduce the options available to access to justice, which, in my view, is not in the public's best interest. …*
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> *We saw what happened with the [Limited Licensed Legal Technicians] in Washington [State] when the Washington Supreme Court decided to sunset the project in June of 2020. So we know that recently that model did not work, and I would say that that model was very prescriptive. My concern is that when it comes to paralegals, it's not a one size fits all model."*

Instead of entrenching a defined scope of practice for licensed paralegals in the legislation, we are of the view that a more flexible, modular, and competency-based approach to licensing would better achieve the goal of increasing access to justice, while also ensuring protection of the public. Under such an approach, paralegals who demonstrate competency in providing one or more legal services could become licensed to provide those specific services without the need to acquire additional training for other activities that they may have no interest in offering.

Such a case-by-case approach as recognized in the Intentions Paper also takes into consideration the practical realities of paralegal practice, which for many is not a "general practice" but rather often involves the development of great skill and experience in respect of particular legal services. Indeed there appears to be significant variation among the skillsets of paralegal practitioners based on their areas of practice and experiences and we agree with our colleague Michèle Ross that a one-size-fits-all approach, inherent in applying a defined scope of practice, should be avoided.

We acknowledge the government's urgency for paralegal regulation, and the desire for scalability. The flexible licensing approach described above lowers the barrier to entry by offering "right touch" regulation. It is anticipated that it will permit more paralegals to be licensed in a shorter amount of time, by allowing each paralegal to apply for a license suitable to the skills and experiences they currently possess. It could also allow licensed paralegals (and notaries) to gradually expand the number and types of legal services for which they are licensed.

The public interest is best protected through legislation that enables the regulator, and that does not fetter it

The Intentions Paper proposes that the new statute should assign the regulator the broad authority to regulate the competence and integrity of legal service providers in B.C. and to promote the rule of law. As we noted earlier in our submission, the Supreme Court of Canada has observed that

> *"… regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law."*

The current *Act*, which provides a framework for regulation that is filled in with Rules passed by the Law Society, is an effective example. As such, it is imperative that the new statute be designed to empower the regulator and not to fetter it:

> *"Government ought not to prescribe in detail the structures, processes, and policies of professional bodies. The initiative in such matters must rest with the professions*

> *themselves, recognizing their particular expertise and sensitivity to the conditions of practice."*[14]

In particular, we take to heart the advice of the Law Society's Truth and Reconciliation Advisory Committee, and the Indigenous Engagement in Regulatory Matters Task Force, in recognizing that a great degree of flexibility and change will be required in order to make meaningful progress on reconciliation. To truly grapple with the historical and ongoing harms that the legal system has caused to Indigenous Peoples, and to reform the Law Society's structures, processes and policies in ways that make space for Indigenous world views and laws, the regulator's authority to do so must be preserved.

Conclusion

The Intentions Paper noted a number of guiding principles that the new statute could advance, such as promoting and protecting the public interest; facilitating access to legal services; supporting reconciliation with Indigenous Peoples; and encouraging diverse and effective legal professions, all within the broad authority to regulate the competence and integrity of legal service providers in B.C. and to promote the rule of law. The Law Society looks forward to working with the Ministry to ensure that these goals are achieved within a framework that recognizes the importance of an independent bar, an independent profession and an independent regulator reflecting the diversity of the British Columbia public and ensuring a variety of legal service providers meeting the legal needs of the citizens of British Columbia.

[14] Ministry of the Attorney General of Ontario, *"The Report of the Professional Organizations Committee"* (1980) at p. 25, as cited with approval in *Pearlman v Manitoba Law Society Judicial Committee,* [1991] 2 S.C.R. 869 at 887.