2021 LSBC 19
Decision issued: May 20, 2021
Citation issued: June 21, 2017

THE LAW SOCIETY OF BRITISH COLUMBIA

In the matter of the *Legal Profession Act*, SBC 1998, c. 9

and a hearing concerning

STEPHEN JOHN BRONSTEIN

RESPONDENT

DECISION OF THE HEARING PANEL

Hearing date:	May 26, 2020
Panel:	**Majority decision [paras. 1-299]:** David Layton, QC, Lawyer J. Paul Ruffell, Public representative **Dissenting decision [paras. 301-452 and Appendices]** Karen L. Snowshoe, Chair
Discipline Counsel:	William Smart, QC and Trevor Bant
Counsel for the Respondent:	Gerald Cuttler, QC

INTRODUCTION

[1] As powerfully documented in the 2015 *Final Report of the Truth and Reconciliation Commission of Canada* ("*TRCC Final Report*"), for over 100 years, ending only in the 1990s, Canada's federal government and major religious institutions created and ran a residential school system for tens of thousands of Indigenous children, the primary purpose of which was to break the children's link to their culture and identity. This was a deliberate policy of cultural genocide that had devastating adverse consequences. But in addition, the residential schools:

> … were, in most cases, badly constructed, poorly maintained, overcrowded, unsanitary fire traps. Many children were fed a substandard diet and given a substandard education, and worked too hard. For far too

> long, they died in tragically high numbers. Discipline was harsh and unregulated; abuse was rife and unreported. It was, at best, institutionalized child neglect.
>
> *TRCC Final Report*, Summary, p. 43

[2] In 2006, superior courts in numerous provinces and territories, including British Columbia, approved the Indian Residential Schools Settlement Agreement (the "Settlement Agreement"), a national settlement of class action proceedings relating to Indian residential schools. The Settlement Agreement provided for a "common experience payment" to all residential school survivors. But it also created an independent, out-of-court assessment process (the "IAP") for the resolution of specific claims of sexual abuse, serious physical abuse and other wrongful acts suffered at residential schools.

[3] From 2009 until February 2015, the Respondent acted for approximately 624 survivors who made IAP claims under the Settlement Agreement. Indeed, since 2000 his practice had consisted almost exclusively of residential school claims, a focus that continued until 2017.

[4] On June 21, 2017 the Law Society issued a citation (the "Citation") containing six allegations of professional misconduct against the Respondent regarding his representation of IAP claimants.

[5] Pursuant to Rule 4-30, the Respondent has conditionally admitted to four of these allegations, which taken together relate to conduct occurring from 2008 to 2012. These four admissions of professional conduct can be grouped into the following three categories.

[6] First, the Respondent failed to exercise due diligence regarding Ivon Johnny, a residential school survivor and paroled murderer who the Respondent hired to help his clients fill out their IAP application forms. More particularly, the Respondent failed to adequately investigate Mr. Johnny's background, qualifications and suitability prior to employing Mr. Johnny to work with and have unsupervised access to his clients. Subsequently, the Respondent failed to adequately address, respond to or investigate complaints made about Mr. Johnny, including that Mr. Johnny demanded money from the Respondent's clients without justification. It is unknown whether any of the complaints made against Mr. Johnny were true, and thus whether the Respondent's lack of due diligence caused any clients actual harm.

[7] Second, the Respondent directed his staff to remove the declarations that some or all of 17 named clients had signed on their original IAP application forms, and to attach these declarations to revised forms that his clients had approved over the phone but had never seen. These declarations attested that the information in the application forms was true. The Respondent's conduct was thus somewhat comparable to attaching a signature page from an original affidavit to a revised affidavit after the client had approved the revisions over the phone. There is no suggestion that this conduct resulted in any of the application forms being materially inaccurate.

[8] Third, the Respondent provided inadequate service to certain clients. Specifically, he failed to: properly document important communications; consistently maintain adequate staff and facilities; consistently answer communications that required a reply within a reasonable time; routinely inform and take instructions; and advance their claims in a timely manner. He also improperly delegated to non-lawyers such as Mr. Johnny (his "form fillers") the task of explaining his contingency fee agreement to prospective clients. As will be elaborated on below, some of the Respondent's admissions regarding quality of service shortcomings are restricted to a group of 17 named clients.

[9] As noted, the Respondent's admission to these three categories of misconduct is conditional, pursuant to Rule 4-30. Rules 4-30 and 4-31 were substantially amended in March 2021, but in this case we refer to and apply those rules as they were at the time of the hearing and the events that led to it.

[10] Rule 4-30 permits a respondent to tender to the Discipline Committee a conditional admission of a discipline violation and the respondent's consent to the imposition of a specified disciplinary action. If the Discipline Committee accepts the tendered proposal, it must instruct discipline counsel to recommend acceptance of the proposal to the hearing panel.

[11] The specified disciplinary action to which the Respondent consents as part of the Rule 4-30 proposal is as follows: (i) a one-month suspension; (ii) a practice review under Part 3, Division 2 of the Law Society Rules for his files opened after January 1, 2017; (iii) a written commitment to the Discipline Committee that he is not acting and will not act as counsel or agent for any "Sixties Scoop" claimants; and (iv) costs of $4,000.

[12] The Discipline Committee has accepted the Respondent's proposal and, pursuant to Rule 4-30(4), has instructed discipline counsel to recommend its acceptance to the hearing panel.

[13] Rule 4-31 requires a hearing panel to either accept or reject a respondent's conditional admission and the parties' proposed disciplinary action. If the panel rejects the conditional admission and proposed disciplinary action, it cannot substitute a different determination or disciplinary action but rather must advise the Discipline Committee of its decision and proceed no further with the hearing of the citation, at which point the Discipline Committee must instruct Law Society counsel to set a date for the hearing of the citation.

[14] As discussed in more detail later in these reasons, in considering whether to accept a Rule 4-30 proposal, a hearing panel does not determine whether it would have imposed the same disciplinary action. Rather, the proposal is accorded deference, and will be accepted provided the panel is satisfied that: (i) the proposed admission on the substantive matter is appropriate; and (ii) the proposed disciplinary action is within the range of fair and reasonable outcomes in the circumstances.

[15] For the reasons set out below, the majority of the Panel has concluded that the Respondent's admission on the substantive matter is appropriate. We would have agreed with our colleague Ms. Snowshoe, for many of the reasons she provides, that suspending the Respondent for only one month does not come within the range of fair and reasonable outcomes, but for the fact that the Law Society would have difficulty in proving the allegations absent the Respondent's conditional admission. For us, this is the determinative factor that tips the balance the other way because, if we reject the parties' Rule 4-30 proposal, there is a good or real possibility that the Respondent will face no discipline at all for his misconduct.

[16] We therefore accept the parties' proposal on the basis that, while otherwise unduly lenient, it comes within the range of fair and reasonable outcomes because, but for the Respondent's conditional admission, the Law Society would have difficulty proving the alleged professional misconduct.

HISTORICAL, SOCIAL AND LEGAL CONTEXT

[17] As a preliminary but crucial point, we agree with Ms. Snowshoe that any allegation of professional misconduct concerning a lawyer's handling of IAP claims must take account of the historical, social and legal context for the Settlement Agreement. This context is described in detail in the *TRCC Final Report*. It also forms a dominant theme in the jurisprudence that has developed around the Settlement Agreement, including several cases relied on by the parties' as constituting the factual background to this discipline matter, and is nicely summarized in the passage Ms. Snowshoe has quoted from *Law Society of Saskatchewan v. Merchant,* 2020 SKLSS 6, at para. 85.

[18] One aspect of the Settlement Agreement's historical, social and legal context that deserves particular emphasis is that the harm wreaked by residential schools left many survivors in a vulnerable position in terms of asserting their rights in the legal system. This vulnerability was recognized by legal professionals knowledgeable about this area of the law well before the Settlement Agreement was approved by the courts. See, for example, the Canadian Bar Association's *Guidelines for Lawyers Acting for Survivors of Aboriginal Residential Schools*, issued in August 2000, and reproduced in the *TRCC Final Report*, Vol. 5, pp. 209-210. This vulnerability was also recognized early on in court decisions addressing the relationship between claimants and lawyers under the Settlement Agreement, beginning with *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (SCJ), at paras. 73-76. As explained by Justice Brown in *Fontaine v. Canada (Attorney General)*, 2012 BCSC 839 (the "*Blott* Decision"), at paras. 120 and 153, "Throughout this proceeding courts have recognized that IAP claimants are a particularly vulnerable class," and lawyers acting for IAP claimants are expected to recognize their "duties as a fiduciary" for these clients and "the particular vulnerability of IAP claimants as a class," and to "appreciate the need for the utmost sensitivity in dealings with claimants."

[19] The vulnerability of IAP claimants and its resulting impact on the professional obligations of lawyers handling their cases were fundamental in shaping both: (a) the *Guidelines for Lawyers Acting in Aboriginal Residential School Cases*, passed by the Law Society of Upper Canada (LSUC), as it then was, on October 23, 2003 (revised in 2012 and 2015); and (b) similar lawyer guidelines released by the Indian Residential Schools Adjudication Secretariat (the "IRS Adjudication Secretariat"), on August 30, 2012 (revised in 2013), entitled *Expectations of Legal Practice in the IAP*, which Ms. Snowshoe has reproduced in her reasons The Settlement Agreement jurisprudence indicates that the LSUC and IRS Adjudication Secretariat guidelines reflect the court's expectations of lawyers handling IAP claims (see the *Blott* decision, at para. 153; *Fontaine v. Canada (Attorney General)*, 2014 MBQB 113 ("*Manitoba Form Fillers*"), at para. 72; *Canada (Attorney General) v. Merchant Law*, 2017 BCCA 198, at para. 31). For example, in *Fontaine v. Canada (Attorney General)*, 2012 BCSC 1671, at para. 33, Justice Brown stated that, "the suggested standard of conduct as set out in the Law Society of Upper Canada Guidelines … is simply that which should be reasonably expected of any counsel participating in the claims process under the Settlement Agreement." In the same vein, in announcing the IRS Adjudication Secretariat guidelines, Chief Adjudicator Daniel Ish observed that, "[m]ost experienced IAP lawyers will find that this document reflects their existing practice." (Letter to IAP counsel from Chief Adjudicator Ish, dated August 30, 2012)

[20] We also agree with Ms. Snowshoe that the Canadian legal system is implicated in the residential schools policy and the egregious harms that arose as a result. As noted in the *TRCC Final Report*, Summary, p. 202, "When children were abused in residential schools, the law, and the ways in which it was enforced (or not), became a shield behind which churches, governments, and individuals could hide to avoid the consequences of horrific truths. … Aboriginal people came to see the law as a tool of government oppression," and as a result "[m]any Aboriginal people have a deep and abiding mistrust in Canada's … legal system." See also Vol. 5, p. 7-8, 185-276. Cultural competence in lawyering requires an understanding of this reality by counsel who act for Indigenous clients. See, for example, the *TRCC Final Report*, Vol. 5, p. 281, Call to Action 27; the Law Society's *Truth and Reconciliation Action Plan*, May 8, 2018, Action #4; and the *Guide for Lawyers Working for Indigenous Peoples*, May 8, 2018, a joint project of the Advocates' Society, the Indigenous Bar Association and the Law Society of Ontario.

[21] In sum, we share Ms. Snowshoe's view that, in administering the Settlement Agreement, Canadian courts have developed a consistent approach, and that this approach includes the recognition that: (a) IAP claimants constitute a class of highly vulnerable individuals; and (b) as a result, their lawyers must treat them with the utmost sensitivity and care in providing legal services.

RELEVANT FACTUAL BACKGROUND

[22] The parties filed an Agreed Statement of Facts ("ASF") containing the facts upon which the Rule 4-30 proposal was based. The ASF also included the Respondent's evidence as to his state of mind regarding certain material matters. The Law Society did not dispute this state of mind evidence and at the hearing urged us to accept it as reliable. The factual record was supplemented to some extent by the submissions of counsel at the hearing, as well as information in a letter submitted by the Law Society soon afterwards.

Indian Residential School litigation and the Independent Assessment Process

[23] As already noted, in 2006 the Settlement Agreement created the IAP – an independent, out-of-court assessment process for resolving specific claims of sexual abuse, serious physical abuse and other wrongful acts suffered at Indian residential schools.

[24] The deadline for Indian residential school survivors to submit an IAP application was September 19, 2012.

[25] IAP claimants were required to file a standard-form application, the penultimate page of which contained a declaration to be signed by the claimant and a witness (the "Declaration"). The Declaration included the following language:

> I confirm that the statements in this Application are true, whether made by me or on my behalf. Where someone helped me with the Application, that person has read to me everything they wrote and I confirm that it is true. I know that signing this Application has the same effect as if I had made it under oath in court.

[26] The final page of the IAP application included the following certification to be completed by the claimant's lawyer, if the claimant had a lawyer (the "Certification"):

> I certify that I have reviewed this completed Application with my client to ensure its accuracy.

[27] IAP claims could be resolved without a hearing through a negotiated settlement process (the "NSP"). The NSP was available only to claimants represented by a lawyer, where the lawyer and Canada agreed that the claim may be suitable for a negotiated settlement. If Canada did not agree to attempt to resolve the IAP claim through the NSP, or if negotiations failed to reach a mutually acceptable settlement, the claim would proceed to an IAP hearing.

[28] IAP hearings were in-person hearings before an independent adjudicator. They functioned on an inquisitorial model where the claimant was questioned by the adjudicator and not by the claimant's counsel. There was no cross-examination. Final submissions were made by counsel for the claimant and then by counsel for Canada, either in-person at the hearing or by teleconference at a later date.

The Respondent's involvement in Indian Residential School litigation

[29] The Respondent was admitted as a member of the Law Society on May 22, 1998. From about 2000 until the Citation was issued in mid-2017, his practice consisted almost exclusively of Indian residential school claims.

[30] In 2005, the Respondent incorporated his Vancouver law firm, Stephen Bronstein Law Professional Corporation (the "Firm"). From about 2008 to 2012, the Firm generally had between three and seven employees. From 2012 to 2015, it had about 12 employees.

[31] In January 2008, the Respondent hired EP to work at the Firm. EP held a civil law degree from the University of Montreal and was called to the Quebec bar in 2008. EP was never admitted as a member of the Law Society. She was employed at the Firm as a legal assistant.

[32] In January 2011, the Respondent hired KN to article at the Firm. In January 2012, KN was admitted as a member of the Law Society, and the Firm hired her as an associate.

Ivon Johnny

[33] Ivon Johnny is an Indian residential school survivor and a member of the Tsilhqot'in First Nation who speaks the Tsilhqot'in language. He was born in 1950.

[34] In 1985, Mr. Johnny was convicted of first-degree murder and sentenced to life imprisonment.

[35] On April 27, 2005, the Parole Board granted Mr. Johnny day parole, and released written reasons explaining why it had done so (the "Parole Decision").

[36] The Parole Decision indicated that Mr. Johnny's offence occurred after he lost a fight to the victim one morning. With revenge as his motive, he waited outside a bar where the victim was drinking. When the victim left the bar, Mr. Johnny shot him with a rifle. Mr. Johnny initially claimed innocence and refused to accept responsibility for his crime.

[37] The Parole Decision noted that, at the time of the murder, Mr. Johnny had an extensive criminal record that commenced when he was 12 years old. He had been convicted of impaired driving (1962), obstructing police and possession of stolen property (1968), forgery (1972), escaping lawful custody (1972), robbery (1974), driving with over 80 milligrams of alcohol in his blood (1978), four counts of assault causing bodily harm (1978 and 1980) and dangerous use of a firearm (1980).

[38] The Parole Decision identified the following factors as having contributed to Mr. Johnny's criminal behaviour: childhood circumstances and social conditions that fostered anger and rage inside him; having learned "right from the very beginning" to address inadequacies and resolve conflicts through violence; alcohol abuse; and criminal associates.

[39] However, the Parole Decision noted that, from 1995 to 2003, Mr. Johnny had completed correctional programs including a Substance Abuse Program, an

Aboriginal Family Violence Program and the In Search of Your Warrior Program (twice). The facilitator of the latter program had noted Mr. Johnny's change in attitude and emotional growth. Mr. Johnny had discovered that his anger was rooted in the emotional and physical abuse he suffered in residential school and the perception that his mother had betrayed him by returning him to the school. Mr. Johnny had come to recognize the self-destructive nature of his life path, and the corrections programs and his associations with Elders had helped him to move forward. Mr. Johnny was "now able to utilize techniques learned through the programs and diffuse situations" that would previously have caused him to become angry. In light of this progress, Mr. Johnny had been transferred to a minimum-security institution, where he had continued to participate in Aboriginal ceremonies and maintained his positive institutional behaviour.

[40] The Parole Decision, which is written to Mr. Johnny in the second person, concluded that:

> At your Elder assisted hearing today the Board heard you, your parole officer, your lawyer assistant, the institutional Elder and the National Parole Board Elder. The Board noted that over a period of approximately 21 years of incarceration you have developed a strong insight into your past anti-social and criminal behaviour that led you on the path of social and spiritual self-destruction although you are still reluctant to acknowledge the legal responsibility of your index offence.
>
> Since incarceration you have participated in several correctional programs and Aboriginal ceremonies which have been modifying your behaviour. You have developed respect, responsibility and patience for living a pro social life. Your institutional parole officer stated that you are a spiritual man of positive behaviour. You are a person who is focussed on resolving problems rather than raising them. Your institutional Elder has known you since 1990 and has worked with you shoulder to shoulder to help you change your behaviour and thinking patterns. You are a peer counsellor and contribute to organizing native ceremonies. Your assistant believes that you are ready for new freedom as your correctional programs and native spirituality has taught you patience and techniques to deal with the demands of society that is more open and less structured than the present system.

The Respondent represents and then hires Ivon Johnny

[41] Prior to the implementation of the Settlement Agreement, Canada settled some Indian residential schools litigation through an alternative dispute resolution process (the "ADRP").

[42] In March 2007, the Respondent represented Mr. Johnny at an ADRP hearing. After this hearing, Mr. Johnny contacted the Respondent seeking work connecting the Respondent with residential schools survivors and assisting the Respondent with residential schools claims.

[43] On May 22, 2008, Mr. Johnny sent an email to the Respondent advising him that he had, "met with many Chilcotins and Shuswaps that are under the assumption that their action against the Crown, Church and Government ends upon receiving their CEP [common experience payment]".

[44] On June 3, 2008, Mr. Johnny emailed the Respondent indicating that he was keeping track of "interviews with residential school survivors" and hoped to have "30 customers by the end of the summer."

[45] On August 13, 2008, Mr. Johnny faxed the Respondent a list of people who Mr. Johnny said may have residential schools claims. In this fax, Mr. Johnny advised that, "[i]f these people are treated legally fairly they also have relatives that are also survivors of St. Joseph's Mission Residential School."

[46] In late 2008, the Respondent decided to contract with Mr. Johnny to:

(a) work as a "form filler", that is, to assist claimants to complete IAP applications and to witness their signatures on the Declarations;

(b) review and explain the Firm's contingency fee agreement and document authorizations to claimants;

(c) help the Respondent make and maintain contact with clients and potential clients in the Williams Lake area;

(d) help the Respondent's clients travel to meetings and IAP and NSP hearings;

(e) as requested by the Respondent's clients, accompany them to the hearings as an elder, support person and/or translator; and

(f) generally provide support to claimants throughout the claim process.

[47] Based on his interactions with Mr. Johnny while representing him in the ADRP and his review of the Parole Decision at the time he hired Mr. Johnny, the Respondent believed that Mr. Johnny was a traditional person who was familiar with and well known by the Indigenous people of the Williams Lake area and that Mr. Johnny was a suitable person to provide assistance to IAP clients. However, the Respondent took no further steps to confirm his belief in this respect.

[48] The Respondent trained Mr. Johnny to carry out the work described at paragraph 46 above. In the course of this training, he observed Mr. Johnny's demeanour, intelligence and skills. This training process took place over many hours and included Mr. Johnny filling out mock applications.

[49] Once Mr. Johnny started working, the Respondent saw him frequently, and they were in regular contact by telephone. Mr. Johnny was also in close contact with the Respondent's staff, and they provided him instructions as to the tasks they needed him to perform, such as locating clients and arranging to transport clients to hearings safely and on time.

[50] The Respondent also saw Mr. Johnny interacting with clients in his office, in the clients' communities, and before, during and after hearings. In the Respondent's view, these interactions were all positive. Some clients told the Respondent that Mr. Johnny had been a great help and assistance to them. In all of the interactions that the Respondent witnessed between Mr. Johnny and clients, he never saw a client show any sign of fear or reluctance to deal with Mr. Johnny.

[51] At the Respondent's request, Mr. Johnny drove many hours to contact people the Firm could not reach. He got clients to hearings when the Respondent and his staff were having difficulties making the necessary arrangements. The Respondent never saw Mr. Johnny engage in misconduct nor did his staff report seeing any misconduct.

[52] Based on these interactions, the Respondent was impressed by Mr. Johnny's work ethic and formed the view that Mr. Johnny competently followed his instructions.

[53] Mr. Johnny provided the above-mentioned services to the Respondent and Firm from approximately September 2008 to July 2012. The Firm paid only for these services and did not pay Mr. Johnny for referrals. The Firm paid Mr. Johnny a total of $179,156.46 for his services and a total of $92,726.92 for expenses he claimed.

Communications about Mr. Johnny's conduct received from late 2009 to April 2012

[54] Beginning about a year after he had hired Mr. Johnny, the Respondent and his Firm began to receive communications from various sources that put into question the propriety of Mr. Johnny's conduct and, in particular, whether he was asking for money from the Firm's clients. As indicated below, ten communications were received in total, several of which were not brought to the Respondent's attention by his staff.

[55] On November 26, 2009, BQ, a court worker in Williams Lake, emailed the Firm alleging that Mr. Johnny was "demanding money from clients that he directs to your company." This email was sent to a Firm address monitored by the Respondent's staff, not directly to the Respondent. The email was not referred to the Respondent, and he was not aware of it. No one at the Firm responded to BQ's email.

[56] On December 11, 2009, the Respondent received a fax from his client BB, directing the Respondent to deduct $5,000 of her IAP settlement funds and pay the $5,000 to Mr. Johnny. The Respondent spoke to Mr. Johnny about this fax. Mr. Johnny said that BB wanted him to have some of her settlement funds because he was family and had helped her. The Respondent told Mr. Johnny that, even though BB was family, she should not be giving him part of her compensation and that Mr. Johnny should not be taking settlement money. On May 19, 2010, Mr. Johnny sent the Respondent a renunciation of BB's direction.

[57] On February 10, 2011, the court worker, BQ, sent the Respondent another email stating that she was, "still getting complaints about Mr. Johnny requesting money from clients who have received their residential money." She stated: "I have complaints on behalf of [CC] and [DD]. If you need confirmation please contact [DD] at his home." CC and DD were the Respondent's clients.

[58] EP, the Firm's legal assistant, responded to BQ's February 10, 2011 email by advising BQ that the Respondent was out of the office. But the Respondent never responded to the email and never contacted CC to ask if Mr. Johnny had sought money. The Respondent did contact DD to inquire whether Mr. Johnny had asked for money, but he did not do so until a year later, on February 15, 2012, as described at paragraph 68 below. The Respondent also spoke with Mr. Johnny about the allegations in BQ's February 10, 2011 email, but took no notes of the conversation and cannot recall what was said.

[59] In August 2011, the Respondent had a phone conversation with his client EE, who said that Mr. Johnny had asked him for money. The Respondent told EE that he did not owe any money to Mr. Johnny and should not pay Mr. Johnny anything. The Respondent subsequently spoke with Mr. Johnny about this phone call with EE. Mr. Johnny denied asking EE for money and said that EE was a "habitual liar". The Respondent told Mr. Johnny that he could never ask any claimants for money and that none of them owed him any money. Mr. Johnny repeated that he had never asked EE for money and told the Respondent that he understood he could not ask the Respondent's clients for money.

[60] After speaking to Mr. Johnny, the Respondent told EE that he had addressed this issue with Mr. Johnny. EE told the Respondent that Mr. Johnny had not contacted him again and that there was no need to follow up further regarding this matter.

[61] On October 31, 2011, the Respondent received a message from one of his assistants that his client FF had called to say that her brother GG had paid Mr. Johnny $20,000 two weeks earlier and to ask whether she had to pay Mr. Johnny too. On November 25, 2011, the Respondent spoke with FF, but she denied leaving the message. GG was also the Respondent's client, but the Respondent did not contact him to ask whether he had paid $20,000 to Mr. Johnny. Nor did the Respondent speak to Mr. Johnny about this allegation.

[62] In September or December 2011, NB called the Firm. NB was not the Respondent's client. The Respondent was out of the office, and NB left a message with the receptionist stating that Mr. Johnny was "evil" and "ripping off a lot of people," and that, after claimants had received their settlement funds, Mr. Johnny would "take them to the bank, make them cash their cheques and take money from them."

[63] The Respondent returned NB's call. She repeated her allegations about Mr. Johnny but, in addition, complained that Mr. Johnny was spreading lies that she worried would cause her not to be appointed administrator of the estate of GS, one of the Respondent's former clients who had passed away. The Respondent next contacted TS, who was also seeking to be appointed administrator of the estate of GS. TS told the Respondent that NB was lying about Mr. Johnny and would say anything if she thought she could obtain money or a benefit from saying it.

[64] On January 3, 2012, the Respondent's client HH left a phone message with the Respondent's receptionist stating that he no longer wanted Mr. Johnny to attend his hearing because of stories he had heard of Mr. Johnny "ripping people off." The Respondent did not receive HH's January 3, 2012 message until November 2012 and did not speak to Mr. Johnny about HH's allegations.

[65] On February 14, 2012, the Respondent's client II telephoned the Firm's bookkeeper to ask about her contingency fee agreement with the Respondent. During the conversation, II told the bookkeeper that Mr. Johnny was, "collecting 15-20K on the side and taking advantage of people that can't read or write." The bookkeeper made a note of this comment in the Firm's accounting software, but the note was not printed or brought to the Respondent's attention by his staff. The Respondent remained unaware of the bookkeeper's phone conversation with II and did not follow up with II about her allegations against Mr. Johnny.

[66] On February 14, 2012, the Respondent had a phone conversation with his client JJ, who said that Mr. Johnny had asked her to pay him $10,000 if she got $100,000. JJ also said that she had heard rumours that Mr. Johnny had requested money from KK, LL, MM, NN, BB, and LJ, all but the last of whom were the Respondent's clients. JJ told the Respondent that people were scared of Mr. Johnny because they knew he had been to jail for murder.

[67] The Respondent spoke to his client KK, who told him that Mr. Johnny had asked her for a loan, but she had refused and that he had never asked her for part of her settlement funds. KK also said that Mr. Johnny had not asked for part of LL's settlement funds. Although the Respondent did not speak directly with LL, LL was present with KK while the Respondent was speaking with KK.

[68] On February 15, 2012, the Respondent called DD, because his name had been mentioned in BQ's February 10, 2011 email and the Respondent thought that he should follow up with DD given the information received from JJ. DD told the Respondent that Mr. Johnny had asked him for $20,000 to build a family headstone but that he had refused and afterwards Mr. Johnny had left him alone. The Respondent told DD to call him immediately if he was ever asked for money and DD agreed to do so. The Respondent never heard anything from DD subsequently.

[69] On February 16 or 17, 2012, the Respondent spoke to Mr. Johnny about JJ's allegations. Mr. Johnny denied that he was taking money from anyone.

[70] On April 11, 2012, the Respondent met with the IRS Adjudication Secretariat's then Chief Adjudicator Daniel Ish and Adjudicator Catherine Knox. They told the Respondent that they were aware of allegations that Mr. Johnny was encouraging claimants to fabricate or embellish their IAP claims. They also advised the Respondent that allegations had been made that Mr. Johnny had demanded that claimants provide him with a portion of their settlement funds, sometimes accompanied by threats or extortion. They did not share any documents or detailed information concerning the allegations with the Respondent.

[71] Chief Adjudicator Ish and Adjudicator Knox asked the Respondent to assist in facilitating an investigation into Mr. Johnny and in securing meetings between them and his clients to look into these allegations. The Respondent advised them that he would seek legal advice to determine if it was appropriate for him to engage in such a process given his role and obligations as counsel. The Respondent was concerned that, among other things, participating in an investigation of whether his clients' claims had been fabricated or exaggerated by or at the instance of Mr. Johnny might be contrary to the duties owed to his clients, including his obligations of loyalty and to protect solicitor-client privilege and confidentiality.

[72] The Respondent thereafter obtained legal advice. Based on this advice, he informed the Chief Adjudicator that it would be inappropriate for him to assist in facilitating the proposed investigation.

Arrest and imprisonment of Mr. Johnny

[73] In the summer of 2012, Mr. Johnny was arrested, and his parole was suspended, apparently because of concerns regarding his treatment of IAP claimants (*Fontaine v. Canada (Attorney General)*, 2015 BCSC 717 (the "*Merits* Decision") at paras. 50, 95).

Accuracy of the complaints against Mr. Johnny is unknown

[74] The parties' ASF indicates that it is unknown whether any of the above-mentioned complaints against Mr. Johnny were true.

The Respondent's IAP practice: workflow, client interactions and results

[75] Under the Settlement Agreement, lawyers were entitled to fees of 15 per cent of the amounts paid by Canada to their clients. These fees were paid by Canada and did not come out of the clients' awards or settlements.

[76] As was permitted by the Settlement Agreement, the Respondent also entered into a standard-form contingency fee agreement with all of his clients (the "Contingency Fee Agreement"). We were provided with a sample Contingency Fee Agreement between the Respondent and one client, AA, pursuant to which he was entitled to fees of 10 per cent of the amount recovered.

[77] The role of Mr. Johnny and the Respondent's other form fillers included reviewing the Contingency Fee Agreement with potential clients, explaining its terms, and witnessing their signatures.

[78] Often, individuals signed the Contingency Fee Agreement before they had spoken with the Respondent or any other lawyer at the Firm. Once an individual had signed a Contingency Fee Agreement, Mr. Johnny or one of the Respondent's other form fillers would help the individual fill out an IAP application. The form filler would also witness the individual's signature on the Declaration at the end of the application.

[79] In general, sometime after an individual had signed a Contingency Fee Agreement, completed the IAP application and signed the Declaration, the Respondent would speak to the individual over the phone.

[80] The Respondent would first satisfy himself that the individual understood the Contingency Fee Agreement. If so, the Respondent would countersign it and review the completed IAP application with the individual, making handwritten notes where changes or additions were required. The Respondent would go over the application again with the individual to ensure that, as modified by his handwritten notes, it was accurate. The Respondent would then sign the Certification, after which he would give the application, with his handwritten notes, to EP to rewrite more neatly.

[81] Until around 2012, the Respondent directed his support staff to take the individual's signed Declaration from the original application and attach it to the new, rewritten application together with his signed Certification. However, in and after 2012, the Respondent changed his practice so as to certify applications that required amendments only after a fresh Declaration had been executed by the individual.

[82] At all material times, the Respondent considered that an individual who had signed a Contingency Fee Agreement only became his client once he had spoken to the individual on the phone, countersigned the individual's Contingency Fee Agreement and certified the individual's IAP application.

[83] Clients generally were not provided with a copy of their signed Contingency Fee Agreement or supporting documents, such as medical records, obtained by the Firm on their behalf, unless they requested them.

[84] The Firm did not regularly or routinely send reporting letters or otherwise contact (or attempt to contact) clients to provide updates on their claims.

[85] The Respondent would generally advise claimants that they should put their claims out of their minds and go on with their lives, that he and his staff would attend to everything required to advance their claims, that they would be contacted when

their hearing was scheduled, and that they were always welcome to contact him. The Law Society accepts that, at the time, the Respondent believed that the claimants often found the claims process difficult, stressful and upsetting because they were required to recall and relive the details of the emotional, psychological and physical traumas they had suffered.

[86] When a client contacted the Firm, the Respondent did not always return the call because, for example, he was not provided the message and was therefore not aware that the client had called. The Respondent acknowledges that he is responsible for his staff not bringing calls to his attention.

[87] After certifying a client's claim over the phone, the Respondent often did not personally meet with the client again until days before the hearing. The day before the hearing, the Respondent would meet with the client in-person to prepare the client for the hearing. The Respondent would thoroughly review the documentary evidence prior to these meetings. Beginning in February 2013, the Respondent had more frequent in-person meetings with clients. The Respondent accepts that, while on a number of occasions prior to 2013 he travelled to the Williams Lake area to meet with clients and potential clients, he did not do so as often as he should have done.

[88] From 2008 to early 2012, the Respondent did not regularly document, and did not sufficiently direct his staff to ensure that they documented:

(a) the fact that the Firm had attempted to contact a client;

(b) the fact that the Firm had requested a person (e.g., a relative of a client) to ask a client to contact the Firm;

(c) the fact that a client had contacted the Firm and the content of any message the client wished to leave the Respondent; or,

(d) the fact that the Respondent had spoken on the phone or met in-person with a client, and the content of the meeting.

[89] Between 2009 and February 2015, the Respondent was counsel in roughly 624 IAP claims in which about $70 million was granted to his clients pursuant to adjudicative awards made after a hearing or settlements negotiated through the NSP, resulting in an average of about $112,000 per client. According to statistics published by the IRS Adjudication Secretariat between September 19, 2007 and June 30, 2019 the average compensation provided was $91,000 per IAP claim.

[90] Pursuant to the Settlement Agreement, Canada paid the Firm a total of $10,541,898.95 in legal fees in relation to the 624 IAP claims noted above. These payments from Canada did not come out of the clients' awards or settlements. The Firm also sometimes collected additional legal fees from clients pursuant to the Contingency Fee Agreements. In many cases, the additional fees were reviewed and approved by an adjudicator pursuant to a process created by Settlement Agreement.

[91] We have been given no information as to the total amount of contingency fees the Respondent collected from his IAP clients. However, as noted at paragraph 76 above, he entered into a contingency fee agreement with every client, and the contingency fee agreement we were shown for AA provided for a fee of 10 per cent of the amount recovered. As noted at paragraph 111 below, an adjudicator denied the Respondent any contingency fees with respect to AA, meaning that the Respondent received only the legal fees provided by Canada in respect of this particular client.

Inadequate service provided to specific named clients

[92] The ASF sets out specific incidents where the Respondent provided inadequate professional service to a particular named client. The details regarding these instances of inadequate professional service are set out below, and involve: (i) delegating duties regarding the Contingency Fee Agreement to non-lawyers; (ii) failing to inform and consult with clients, obtain instructions from them and provide them as much control as appropriate regarding the direction of their case; and/or (iii) failing to advance their claims in a timely manner.

Client AA

[93] In May 2010, AA met with Mr. Johnny, signed a Contingency Fee Agreement, completed an IAP application and signed the Declaration. In his IAP application, AA answered "Yes" to the question, "Is your health so poor that a delay in the process would prevent you from participating in a hearing?"

[94] The Respondent provided expedited/high priority forms to form fillers. He instructed form fillers that, if a potential client answered "yes" to the question in the application regarding whether they were in failing health, the form filler should advise the potential client to have a doctor complete the expedited/high priority form and fax it to the Respondent's office. The form fillers were also instructed to advise the Firm of potential clients who had health concerns.

[95] The Respondent is unaware of whether Mr. Johnny advised AA to go to the doctor and fax a completed expedited/high priority form to the Respondent's office. However, on or about May 11, 2010, Mr. Johnny sent the Respondent a note that AA's health was failing and that he had requested an "immediate" hearing.

[96] On October 29, 2010, the Respondent spoke with AA on the phone and certified his IAP application by completing the Certification. The Respondent gave the original application, with his handwritten notes, to EP to rewrite.

[97] On November 29, 2010, an Assessment Officer at the IRS Adjudication Secretariat emailed the Respondent, noting that AA's application indicated he was in failing health and asking the Respondent to confirm whether a medical certificate would be submitted on behalf of AA and/or whether AA's file should be expedited. Neither the Respondent nor his staff responded to this email.

[98] On June 28, 2011, the Firm was notified that Canada was willing to negotiate towards a settlement of AA's claim through the NSP.

[99] On November 10, 2011, Canada's NSP team sent an email to the Firm inquiring as to dates in early 2012 on which the Respondent would be available for NSP interviews for a number of clients including AA. On November 30, 2011, the Firm responded with the Respondent's availability for five claimants on Canada's list including AA.

[100] On May 30, 2012, Canada's NSP team sent an email to the Firm again inquiring as to dates on which the Respondent would be available for NSP interviews, including AA's.

[101] On June 22, 2012, staff at the Firm responded to the May 30, 2012 email, advising that the Respondent would be available to attend AA's NSP interview on December 6, 2012.

[102] AA's NSP interview was held on December 6, 2012, some two and a half years after he had met with Mr. Johnny and completed an IAP application.

[103] On December 13, 2012, AA accepted a settlement of $159,883.20, plus 15 per cent of this amount paid by Canada to the Respondent as its contribution to his legal fees.

[104] On January 22, 2013, the Firm received AA's settlement documents from Canada. That day, the Respondent couriered the settlement documents to AA.

[105] Between January 22 and 30, 2013, AA returned his settlement documents to the Respondent and indicated that he would ask for an adjudicator to review his legal fees for fairness and reasonableness.

[106] On January 30, 2013, the Respondent phoned AA to ask if he would agree to pay three per cent of his settlement in legal fees, over and above Canada's 15 per cent contribution to the Respondent's legal fees. AA agreed. That day, the Respondent sent a letter to AA confirming this agreement.

[107] On February 27, 2013, the Firm received a cheque from Canada for AA's settlement in the total amount of $186,201.91, being: (i) the settlement amount of $159,883.20; (ii) a contribution to legal fees of $23,982.48; and (iii) disbursements of $2,336.23.

[108] On March 1, 2013, the Respondent sent a letter to AA enclosing a settlement cheque in the amount of $139,098.38. In this letter, the Respondent informed AA that the Firm was holding 10 per cent of the settlement in trust pending the adjudicator's decision in the fee review process. This 10 per cent holdback was in error, given the January 30, 2013 agreement between AA and the Respondent that the contingency payment be capped at three per cent.

[109] On March 20, 2013, AA called the Firm and left a message questioning why 10 per cent of his settlement had been held back when he and the Respondent had agreed that he would pay three per cent of his settlement in legal fees.

[110] The Respondent was not made aware of AA's March 20, 2013 phone message. He did not return AA's call and he does not have any record of any of his staff returning AA's call.

[111] On July 30, 2013, the Respondent received the fee review decision of an IAP Adjudicator holding that he was not entitled to charge AA any legal fees above the $23,982.48 paid by Canada.

[112] On January 17, 2014, the Respondent sent a letter to AA enclosing a cheque for all the funds previously held in trust, being $17,906.92.

Client OO

[113] On January 19, 2010, OO met with Mr. Johnny, signed a Contingency Fee Agreement, completed an IAP application and signed the Declaration.

[114] On June 28 and 29, 2010, the Respondent spoke with OO on the phone and certified her IAP application by completing the Certification. The Respondent gave the original application, with his handwritten notes, to EP to rewrite.

[115] On December 2, 2010, a staff member of the Firm emailed Canada's NSP team asking if a number of clients, including OO, were eligible for the NSP.

[116] On December 7, 2010, the NSP team emailed the staff member indicating that each of these files, including OO's, was better suited for a hearing.

[117] On May 4, 2011, a staff member of the Firm sent an email that was intended for the NSP team asking it to reconsider whether various claimants, including OO, could be accepted into the NSP. This email was not in fact sent to the NSP team, but rather was mistakenly sent to an email address used by EP.

[118] There is no record of the Respondent or the Firm contacting the NSP team with respect to OO's claim between May 4, 2011 and February 7, 2012.

[119] On February 7, 2012, EP sent an email to the NSP team asking whether various files, including OO's, were eligible for the NSP.

[120] On February 14, 2012, NSP team replied to EP's February 7, 2012 email and advised that OO's claim was not eligible for the NSP.

[121] On February 28, 2012, the Respondent signed a request for an IAP hearing on OO's file.

[122] On April 22, 2012, EP sent an email to Canada suggesting hearing dates.

[123] On May 3, 2012, OO's hearing was scheduled for October 23, 2012. The Respondent gave his associate KN conduct of OO's file prior to the hearing.

[124] On May 5, 2012, OO emailed the Respondent asking when her hearing date had been set and requesting an early date because she had fibromyalgia and needed the settlement so that she could quit her job. The Respondent did not respond to this email. A staff member of the Firm telephoned OO on May 15, 2012, but the Respondent is unaware of whether the staff member managed to speak with OO.

[125] On October 23, 2012, OO's IAP hearing was held.

[126] On March 19, 2013, OO's IAP claim was dismissed. The adjudicator found that the claim was not credible.

[127] On about April 11, 2013, OO instructed KN to seek a review of the dismissal of her IAP claim. KN submitted a review request, but the review was dismissed on August 13, 2013. On August 16, 2013, KN wrote OO enclosing the review decision and requesting that OO call her.

[128] Under the Settlement Agreement, any party may ask the Chief Adjudicator or designate to determine whether the decision of an adjudicator or a reviewing adjudicator properly applied the IAP model to the facts found by the adjudicator. The Respondent is not aware of whether KN had any discussion with OO regarding her right to seek such a determination by the Chief Adjudicator or designate.

Client PP

[129] PP initially retained a different lawyer (the "Lawyer") to file a claim for him under the ADRP process. The Lawyer filed PP's ADRP application on March 13, 2007.

[130] On March 15, 2007, PP met with the Respondent in Prince George, decided to retain the Respondent to advance his ADRP claim, and signed a Contingency Fee Agreement.

[131] On April 30, 2007, the Respondent sent a letter to the Lawyer requesting PP's file. The Respondent sent another letter to the Lawyer requesting the file on October 11, 2007. The Lawyer did not respond to either of the Respondent's letters.

[132] The Respondent has no record of requesting a copy of PP's filed ADRP application from Canada or the Adjudication Secretariat.

[133] On or about April 22, 2012, the Respondent sent PP a document entitled "Confirmation of Legal Representation". PP signed this document on May 8, 2012 and returned it to the Respondent. On May 22, 2012, EP emailed the signed document to Canada.

[134] On August 24, 2012, EP emailed Canada requesting an update on the status of PP's ADRP claim. On August 28, 2012, Canada responded stating that PP's file was "Closed-not active. Counsel had changed." To clarify what this meant, the Respondent emailed an employee of Canada on September 11, 2012. He then telephoned this employee, who advised that PP had changed counsel from the Firm to another law firm.

Client DD

[135] *On October 29, 2008,* DD met with Mr. Johnny, signed a Contingency Fee Agreement, completed an IAP application and signed the Declaration.

[136] On November 13, 2008, the Respondent spoke with DD by phone and certified his IAP application by completing the Certification. The Respondent gave the original application, with his handwritten notes, to EP to rewrite in legible form.

[137] DD's IAP hearing was held on July 21, 2010. He received an award of $145,200.

Client GG

[138] On November 14, 2008, GG met with Mr. Johnny, signed a Contingency Fee Agreement, completed an IAP application and signed the Declaration.

[139] On February 10, 2009, the Respondent spoke with GG by phone and certified his IAP application by completing the Certification. The Respondent gave the original application, with his handwritten notes, to EP to rewrite in legible form.

[140] GG's IAP hearing was held on September 16, 2010. He received an award of $65,700.

Client FF

[141] On July 23, 2011, FF met with the Respondent and completed an IAP application.

[142] On October 12, 2011, the Respondent spoke with FF by phone and certified her IAP application by completing the Certification. The Respondent gave the original application, with his handwritten notes, to EP to rewrite in legible form. On October 12, 2011, the Firm filed FF's IAP application.

[143] FF's IAP hearing was held on November 6, 2013. She received an award of $136,000.

Client HH

[144] On September 25, 2010, HH met with Mr. Johnny, signed a Contingency Fee Agreement, completed an IAP application and signed the Declaration.

[145] On November 26, 2010, the Respondent spoke with HH by phone and certified his IAP application by completing the Certification. The Respondent gave the original application, with his handwritten notes, to EP to rewrite in legible form

[146] The Firm submitted the application on November 26, 2010.

[147] HH's IAP hearing was held on November 22, 2012. He received a settlement of $136,000.

Client LL

[148] On October 29, 2008, LL met with Mr. Johnny, signed a Contingency Fee Agreement, completed an IAP application and signed the Declaration.

[149] On November 13, 2008, the Respondent spoke with LL by phone and certified his IAP application by completing the Certification. The Respondent gave the original application, with his handwritten notes, to EP to rewrite in legible form. The application was sent to Intake on November 13, 2008.

[150] LL's IAP hearing was held on September 1, 2010. He received an award of $136,000.

Orders and reasons of Justice Brown

[151] In approving the Settlement Agreement, the courts appointed a monitor (the "Court Monitor") to oversee its implementation and administration and to report to designated judges regarding any issues that arose. Justice Brown of the Supreme Court of British Columbia was designated the Western Administrative Judge and empowered to make orders on the application of the Court Monitor. The respective roles of the Court Monitor and the Administrative Judge are described by Justice Brown in the *Merits* Decision, at paras. 8-11.

[152] In November 2012, the Court Monitor brought a Request for Direction before Justice Brown seeking authority to review certain aspects of the Respondent's IAP practice and the conduct of Mr. Johnny. On February 22, 2013, Justice Brown made an order in response to this Request for Direction, with the consent of the Respondent and the Court Monitor (the "2013 Consent Order").

[153] The 2013 Consent Order provided, among other things, that the Respondent would retain and pay all costs for an independent lawyer approved by the Court (the "Practice Advisor") to develop and implement a practice plan to complete the Respondent's remaining IAP files that was satisfactory to the Practice Advisor and fully took into account best practices in handling IAP claims (the "Practice Plan").

[154] Pursuant to the 2013 Consent Order, lawyer Patrick Poyner was appointed Practice Advisor and the Practice Plan was developed and implemented. Regular reports

were submitted to the Court regarding the Respondent's practice and compliance with the Practice Plan.

[155] The 2013 Consent Order further required that the Respondent provide the Court Monitor with comprehensive information, including all documentation, regarding the Firm's interactions with Mr. Johnny and any other persons who had assisted the Firm in completing IAP applications. The Respondent was required to attend and be interviewed by the Court Monitor regarding such matters, and the Court Monitor was permitted to interview any persons with regards to these matters, including any claimants who had provided affidavits on the November 2012 application.

[156] Finally, the 2013 Consent Order stipulated that the Firm recertify all IAP claims that had been prepared with the assistance of Mr. Johnny but had not yet been the subject of an IAP or NSP hearing. This recertification process, which aimed to ensure that the claims accurately set out the claimants' instructions, had to be approved by the Practice Advisor. The Firm was required to follow the Practice Advisor's direction as to whether claims from clients who were not assisted by Mr. Johnny should also be recertified.

[157] In June 2014, the Court Monitor brought another Request for Direction before Justice Brown, initially seeking a further order mandating certain requirements and practices. However, during submissions the Court Monitor instead requested an order that all of the Respondent's IAP files be transferred to a different lawyer. For the most part, the Court Monitor was concerned that the Respondent had taken on a greater number of IAP claims than he could properly handle.

[158] On August 14, 2014, Justice Brown released reasons, indexed as *Fontaine v. Canada (Attorney General)*, 2014 BCSC 1550, in which she declined to make the order requested by the Court Monitor. Justice Brown noted that aspects of the Firm's practice caused her concern, but she adjourned the matter to give the Firm an opportunity to provide a report and affidavit attesting to how it would complete the remaining IAP claims in a manner consistent with the 2013 Consent Order.

[159] On September 9, 2014, the Practice Advisor filed a report that concluded that the Respondent would be able to advance his clients' claims in a manner consistent with IAP best practices.

[160] On October 15, 2014, the Court Monitor brought a Request for Direction, arguing that the Practice Advisor's report was deficient, but in reasons indexed as *Fontaine v. Canada (Attorney General)*, 2014 BCSC 1940 (*Fontaine 2014*), Justice Brown disagreed and held that the proposed plan in the report was sufficient to provide the assurances sought in her August 14, 2014 reasons. Justice Brown nonetheless

ordered that the Respondent provide a further report updating her as to the progress made regarding aspects of the proposed plan.

[161] In March 2015, the Court Monitor brought another Request for Direction before Justice Brown, again seeking, among other things, an order that all of the Respondent's IAP files be transferred to a different lawyer.

[162] On May 1, 2015, Justice Brown again declined to make such an order in the *Merits* Decision. In doing so, Justice Brown noted that the Court Monitor had not presented her with any evidence that the Respondent was failing to adhere to the terms of the Practice Advisor's September 9, 2014 plan.

[163] In the *Merits* Decision, Justice Brown commented as follows regarding: (a) past deficiencies in the Respondent's practice, including insufficient due diligence and inadequate supervision *vis-à-vis* Mr. Johnny and a failure to provide the level of client service required by the LSUC and IRS Adjudication Secretariat guidelines mentioned at paragraph 19 above; and (b) subsequent improvements to the Respondent's practice, which alleviated these concerns moving forward:

> [91] The evidence suggests that Mr. Bronstein did not provide adequate supervision to Mr. Johnny ... .
>
> [93] To be clear, there is nothing *per se* objectionable about Mr. Bronstein's use of "form fillers". When used properly, including sufficient training and supervision, such individuals can provide an important service in the implementation of the [Settlement Agreement]. A form filler's role can be akin to that of a community liaison. What is problematic is when the job of the lawyer is performed by the form filler.
>
> [94] Also, Mr. Bronstein irresponsibly granted Mr. Johnny unsupervised access to his clients. He acknowledged that he was aware of the additional services that Mr. Johnny provided to Bronstein's clients; however, there is no evidence that he ever questioned or considered whether Mr. Johnny had the requisite skills or training to provide such services. Also, the non-compensatory benefits from the Settlement Agreement (such as explaining health supports made available to class members by the [Settlement Agreement]) were not adequately ensured. Mr. Bronstein abdicated that to Mr. Johnny and left Mr. Johnny's supervision to staff members who were themselves either unqualified for the role, poorly supervised or unsupervised.

[95] The undisputed evidence was that in the year that passed from February 2011 to February 2012, Mr. Bronstein received 9 complaints regarding Mr. Johnny's conduct. Yet there is little evidence of Mr. Bronstein's efforts to follow up with the clients harmed by Mr. Johnny. There is no evidence that Mr. Bronstein took any measures to correct these issues. In fact, Mr. Johnny was only removed from Mr. Bronstein's IAP practice after the Chief Adjudicator reported Mr. Johnny to the authorities and Mr. Johnny was re-incarcerated. It was these proceedings that brought an end to Mr. Johnny's involvement; not anything Mr. Bronstein did.

[96] In fact, not only is there no evidence of efforts made by Mr. Bronstein to follow up with his clients and address Mr. Johnny's conduct, there is evidence that Mr. Bronstein actually discounted his clients' complaints against Mr. Johnny. In the affidavit sworn for this proceeding, Mr. Bronstein revealed that he discounted these allegations because of his knowledge that the clients raising the complaints suffered from alcoholism or mental illness. Far from identifying these problems as reasons to be concerned and follow up with these clients, Mr. Bronstein used these illnesses as a reason to discredit his clients. Further, in doing so, Mr. Bronstein may also have breached these clients' privilege.

> [97] Mr. Bronstein's failing with regard to his supervision of his staff facilitated Mr. Johnny's allegedly extortive behaviour. Mr. Bronstein must bear responsibility for this. For instance, because of his inadequate supervision and the inadequacy of the procedures that he established, Mr. Bronstein never received [BQ's] initial complaint regarding Mr. Johnny's behaviour in November 2009. …

[106] Finally, with regard to the structure and the nature of Bronstein's IAP practice, the evidence suggests that prior to the court's intervention, Bronstein did not meet the best practices established by the LSUC or Chief Adjudicator. Bronstein devoted inadequate resources to its practice; it lacked the basic infrastructure to meet the standards required of a legal professional. This is seen in the lost emails containing complaints about Mr. Johnny that Mr. Bronstein allegedly never received as well as the fact that there was no procedure in place to bring correspondence to Mr. Bronstein's attention.

[107] As detailed in my above-referenced decisions on Bronstein's IAP practice, prior to this court's involvement, the failings were also more fundamental in nature. As I noted there was a "serious issue" about the spectre of

inadequate representation. Similarly to the *Blott* Decision, the IAP practice established by Bronstein seemed to lack the "ordinary hallmarks" of a solicitor-client relationship. There was a lack of contact between Mr. Bronstein and his clients. The evidence suggests that Mr. Bronstein was not involved in drafting the IAP application forms and that for at least some claimants, their only meeting with Mr. Bronstein was just prior to their hearing. There was also a lack of continuity of representation that in the context of IAP claims is particularly concerning, as clients would potentially be revisiting clearly horrific memories on several occasions as they were required to meet with other lawyers.

[108] In general, the evidence suggests that Bronstein had too many IAP clients and not enough associate lawyers to adequately represent each of his clients. The fault for this lies squarely with Bronstein. As the LSUC guidelines as well as those of the Chief Adjudicator make clear, it is the lawyer's responsibility to recognize his or her limitations and to avoid taking on clients whom he or she cannot not responsibly serve. As the Chief Adjudicator's guidelines make clear: "Lawyers must restrict their IAP practice to the number of cases they can competently and responsibly take on at any one time".

[109] The record is clear that these issues continued to exist after the 2013 Order. Mr. Bronstein only began to take measures to correct these failings after two years and as a result of significant court intervention.

[110] However, the evidence suggests that Bronstein has in fact revised its practice and is currently providing adequate service to its clients. As I reviewed in [*Fontaine 2014*], the practice plan established by Mr. Poyner and Mr. Bronstein is in accordance with IAP best practices – it calls for at least two pre-hearings, continual status updates and ensures that the firm has the appropriate level of resources to respond to the demands that it faces.

[111] Further, there is no evidence to suggest that Bronstein is failing to adhere to this practice plan. To the contrary, the results thus far have been promising. Since September 2014, more than 100 IAP files have been brought to hearing and the evidence regarding the remaining files suggests that they are progressing as well.

[112] In addition, together with Mr. Poyner, Bronstein has also developed a practice plan to avoid missing important correspondence.

[113] The court does not lose sight of the fact that this is primarily the result of its intervention; however, it cannot deny that Bronstein has revised its practice and that this has likely resulted in beneficial effects for its clients.

(iii) Conclusion

[114] The evidence leads me to the conclusion that Mr. Bronstein has failed to meet the standards expected of a legal professional owing fiduciary duties to his or her clients. This is clear in both the practice that Bronstein established and in his response to the allegations regarding Mr. Johnny. Mr. Bronstein failed to exercise sufficient diligence before deciding to work with Mr. Johnny and allowing Mr. Johnny access to Bronstein's clients. Afterwards, Mr. Bronstein failed to adequately supervise Mr. Johnny. When he began to receive allegations about Mr. Johnny, Mr. Bronstein failed to appropriately investigate those complaints and thus failed to protect Bronstein's clients. While Mr. Bronstein can point to some evidence to demonstrate that he did respond to each complaint, as well as to explain his alleged belief that the complaints were untrue, ultimately, Mr. Bronstein's responses were insufficient and did not meet the standard expected of a prudent and competent lawyer.

[115] However, the issue is not whether Bronstein's conduct was improper and blameworthy. It was. The issue is whether its conduct was so improper that it is necessary to remove it from participation in the IAP in order to ensure that:

a) legitimate claims are compensated to the full extent;

b) the process by which those claims are adjudicated has the integrity, impartiality and transparency of other court processes; and

c) IAP claimants have an opportunity to have their claims adjudicated in a non-confrontational process.

[116] I have concluded that it was not. Contrary to the situation in the *Blott* Decision, Bronstein has demonstrated a capability to reform its practice. Bronstein has demonstrated that with continual supervision, it can provide service to its clients that is consistent with IAP best practices. Further, while Mr. Bronstein's response has in several respects been wanting, there is no evidence of outright misstatement as there was in the *Blott* Decision. There is no evidence of Mr. Bronstein participating

in any scheme meant to provide him with additional income (*i.e.*, outside of his legal fees) as there was with Mr. Blott.

[117] Ultimately, this application required the court to exercise its judgment in a very difficult context. At the forefront of my consideration is the fact that Bronstein still has over 150 IAP clients with outstanding claims. Given the improvements that Bronstein has demonstrated, the evidence provided by the Monitor has not convinced me that at this point in the pursuit of their claims, it would be in the claimants' best interests to force them to seek new counsel. There is nothing that suggests that continuing to be represented by Bronstein will prevent these individuals from being compensated to the full extent, or enjoying a process that has the integrity of a court process or that otherwise would prevent them from having their claims adjudicated in a non-confrontational process. Bronstein will continue to be permitted to participate in the IAP, but only if it (a) adheres to the practice plan developed by Mr. Poyner and (b) continues to retain Mr. Poyner, who is to provide the Monitor with quarterly updates on Bronstein's progress in prosecuting its clients' IAP claims.

[118] This is not to say that this court is content with Bronstein's conduct or that it does not continue to have questions. Bronstein's conduct has caused the Monitor and Canada to spend considerable resources in order to investigate his conduct and to bring his conduct in line with best practices. As will be further explained below, Mr. Bronstein must reimburse Canada for these costs.

[164] Although Justice Brown denied the Court Monitor's request that the Respondent be removed as counsel for his remaining IAP clients, she ordered that he reimburse Canada for the costs of the Court Monitor's investigation. She held that this order was justified because the Respondent had failed to devote adequate resources to ensure that his firm could handle its volume of clients, which exposed his clients to harm, and on being made aware of this exposure only implemented adequate remedial measures after the Court Monitor and court became involved. See the *Merits* Decision at paragraph 127.

[165] The Respondent was required to pay Canada $1.25 million pursuant to Justice Brown's costs order.

The Law Society's investigation

[166] At the hearing of this matter, and in a letter counsel for the Law Society sent to the Panel two days later, the parties indicated that the Respondent made all his law files

available to the Law Society for the purposes of its investigation, and that, although the Law Society reviewed the contents of only 30 or so client files, totaling about 25,000 pages, the Law Society also took other investigative steps, including:

(a) reviewing other documents produced by the Respondent to the Law Society including, for instance, records of outgoing calls to clients;

(b) reviewing various submissions made by the Court Monitor that were based on thousands of documents that the Respondent had produced to the Court Monitor;

(c) interviewing the Respondent on multiple occasions;

(d) reviewing written answers provided by the Respondent to the Law Society in response to further questions;

(e) reviewing transcripts of multiple interviews of the Respondent by the Court Monitor;

(f) reviewing seven affidavits filed by the Respondent in response to requests for direction brought by the Court Monitor;

(g) travelling to Tsilhqot'in territory and interviewing those of the Respondent's former clients who agreed to be interviewed;

(h) interviewing the Respondent's articled student and later associate, KN, and his paralegal, EP;

(i) interviewing Patrick Poyner, the lawyer appointed by Justice Brown as the Respondent's Practice Advisor;

(j) obtaining and reviewing most of the documents filed or created in respect of all requests for direction brought by the Court Monitor, including more than 80 affidavits from various Tsilhqot'in community members and participants in the IAP process, and six reports from Respondent's Practice Advisor, Mr. Poyner; and

(k) reviewing the various reasons for judgment of Justice Brown.

[167] The 30 or so client files reviewed by the Law Society were selected based on information obtained during the interviews of the Respondent, KN, EP and the Respondent's former clients themselves.

ADMISSIONS OF PROFESSIONAL MISCONDUCT ARE APPROPRIATE

[168] The Respondent has admitted to four of the six allegations of professional misconduct set out in the Citation. We agree that the Respondent's actions as established on the record before us constitute professional misconduct regarding these four allegations.

[169] Before setting out our reasoning in this respect, we will briefly review the legal test for professional misconduct.

Legal test for professional misconduct

[170] The Law Society has the onus of establishing professional misconduct on a balance of probabilities. The "evidence must be scrutinized with care" and "must always be sufficiently clear, compelling and cogent to satisfy the balance of probabilities test." See *Law Society of BC v. Schauble*, 2009 LSBC 11, at para. 43, relying on *F.H. v. MacDougall*, 2008 SCC 53.

[171] Professional misconduct is conduct that represents a "marked departure" from what the Law Society expects of lawyers (*Law Society of BC v. Martin*, 2005 LSBC 16 at para. 171; *Re: Lawyer 12*, 2011 LSBC 35, at para. 8). This is an objective test (*Law Society of BC v. Sangha*, 2020 LSBC 3, at para. 67).

[172] Factors to consider in determining whether the marked departure test is met include the gravity of the misconduct, its duration, the number of breaches, the presence or absence of bad faith and the harm caused by the misconduct (*Law Society of BC v. Vlug*, 2018 LSBC 26, at para. 68; *Law Society of BC v. Lo*, 2020 LSBC 9, at para. 34).

Allegations 1 and 4 (lack of due diligence regarding Ivon Johnny)

[173] The Respondent admits that he committed professional misconduct in not exercising due diligence with respect to Mr. Johnny as set out in allegations 1 and 4 of the Citation.

[174] Allegations 1 and 4 of the Citation assert that:

1. In or around 2008, you failed to properly investigate or otherwise exercise due diligence regarding the background, qualifications and suitability of Ivon Johnny prior to employing him to work with and have unsupervised access to the your clients, contrary to Chapter 3, Rule 3, Chapter 4, Rule 6,

and Chapter 12, Rules 1 and 2 of the *Professional Conduct Handbook* then in force.

…

4. Between November 2009 and August 2012, you failed to adequately address, respond to or investigate complaints made about your employee, Ivon Johnny, including that Mr. Johnny demanded payments of money from clients without justification, demands which were sometimes accompanied with threats, contrary to Chapter 2, Rule 1, Chapter 3, Rule 3, Chapter 4, Rule 6, and Chapter 12 Rule 1 of the *Professional Conduct Handbook* then in force.

[175] The conduct alleged in each is stated to constitute professional misconduct pursuant to s. 38(4)(b) of the *Legal Profession Act*.

[176] The relevant portions of the *Handbook* rules referenced in allegations 1 and 4 state as follows:

(a) A lawyer must not engage in questionable conduct that casts doubt on the lawyer's professional integrity or competence, or reflects adversely on the integrity of the legal profession or the administration of justice (Chapter 2, rule 1);

(b) A lawyer shall serve each client in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which would be expected of a competent lawyer in a similar situation (Chapter 3, rule 3);

(c) A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud (Chapter 4, rule 6);

(d) A lawyer has complete professional responsibility for all business entrusted to him or her and must directly supervise staff and assistants to whom the lawyer delegates particular tasks and functions (Chapter 12, rule 1, as it stood after June 2012; the version of this rule in force prior to 2012 was substantially the same);

(e) A lawyer must ensure that all matters requiring a lawyer's professional skill and judgment are dealt with by a lawyer and that legal advice is not given by unauthorized persons, whether in the lawyer's name or otherwise (Chapter 12, rule 2, as it stood prior to June 2012).

[177] The Parole Decision suggested that Mr. Johnny was a changed man who had made impressive strides to rehabilitate himself after suffering a disadvantaged childhood that included trauma suffered at a residential school. We accept that, having reviewed this decision and spent time with Mr. Johnny as a client, the Respondent believed that Mr. Johnny was a suitable person to assist his IAP clients.

[178] However, the extent and seriousness of Mr. Johnny's criminal record, together with his long period of institutionalization, required that the Respondent take further steps to ascertain Mr. Johnny's suitability before hiring him to fulfill such an important role. Further steps could have included ascertaining the circumstances of Mr. Johnny's various criminal convictions, contacting the leadership of the Tsilhqot'in First Nation to inquire about Mr. Johnny, and making inquiries as to Mr. Johnny's reputation in the Williams Lake community. Taking these or similar steps before hiring Mr. Johnny was necessary, given that Mr. Johnny would be dealing directly with vulnerable clients regarding sensitive matters of significance to the clients' IAP claims.

[179] We thus agree that the Respondent failed to exercise due diligence in investigating the background, qualifications and suitability of Mr. Johnny prior to employing him to work with and have unsupervised access to the Respondent's clients and that this failure constituted a breach of the *Handbook*, in particular its rules governing the quality of service and the supervision of staff and assistants. This failure to exercise due diligence constitutes a marked departure from the conduct that the Law Society expects of lawyers and thus amounts to professional misconduct as set out in allegation 1 of the Citation.

[180] We further agree that the Respondent failed to adequately investigate the complaints that came to the Firm's attention suggesting that Mr. Johnny may have requested or demanded money from IAP clients. While the Respondent undertook some investigation in this respect, his efforts were inadequate given: the number of complaints; the time period over which they were received; the seriousness of the alleged conduct; Mr. Johnny's significant criminal record, including for offences of violence and dishonesty; and the vulnerability of the Respondent's clients. The Respondent's failure to adequately investigate the complaints regarding Mr. Johnny amounts to a marked departure from the conduct that the Law Society expects of lawyers and thus constitutes professional misconduct as set out in allegation 4 of the Citation.

Allegation 6 (improper use of Declarations)

[181] The Respondent admits that he committed professional misconduct regarding his handling of Declarations signed by one or more of 17 named IAP clients, as set out in allegation 6 of the Citation. At the hearing, counsel for the Law Society informed us that all but one of these 17 clients are from the Tsilhqot'in First Nation.

[182] Allegation 6 states that:

> Between approximately September 2008 and October 2011, in the course of representing some or all of the 17 clients identified in Appendix A, you appended, or directed your staff to append, declarations to Independent Assessment Process applications which stated "Where someone helped me with the Application, that person has read to me everything they wrote and I confirm it is true" that were signed by the clients prior to the applications being completed and when the applications had been prepared by you or your staff and not read to the client, contrary to Chapter 1, Rule 2(3) and Chapter 2, Rule 1 of the *Professional Conduct Handbook* then in force.
>
> This conduct constitutes professional misconduct or incompetent performance of duties, pursuant to s. 38(4)(b) of the *Legal Profession Act*.

[183] The relevant portions of the *Handbook* rules referenced in allegation 6 provide as follows:

(a) A lawyer should not attempt to deceive a court or tribunal by offering false evidence or by misstating facts or law (Chapter 1, rule 2(3));

(b) A lawyer must not engage in questionable conduct that casts doubt on the lawyer's professional integrity or competence, or reflects adversely on the integrity of the legal profession or the administration of justice (Chapter 2, rule 1).

[184] Until around 2012, the Respondent's practice was to instruct his staff to append a client's Declaration from the original IAP application to the revised application that was ultimately filed by the Firm, instead of having the client sign a fresh Declaration with respect to the revised application. The Respondent admits to having followed this practice with respect to some or all of the 17 named clients. Based on our review of the admitted facts, as recounted above including at paragraphs 79-81, 93, 96, 12-114, 135-136, 138-169, 141-142, 144-145, 148-149,

we infer that the practice was employed at the very least for AA, OO, DD, FF, GG, HH and LL.

[185] We agree that this conduct breached the above-mentioned *Handbook* rules because it left the false impression that the clients in question had made the Declarations regarding the filed applications. To knowingly file misleading materials with a court or tribunal on numerous occasions is a marked departure from what the Law Society expects of lawyers and thus constitutes professional misconduct.

Allegation 3 (inadequate quality of service regarding certain clients)

[186] The Respondent admits that between January 2008 and December 2012 he committed professional misconduct by failing to serve certain of his residential school clients in a conscientious, diligent and efficient manner.

[187] This admission tracks part but not all of allegation 3 of the Citation. As modified to reflect the somewhat narrower admission made by the Respondent, allegation 3 states as follows:

> Between January 2008 and December 2012, in the course of representing certain clients in relation to Indian residential school claims, you failed to serve your clients in a conscientious, diligent, and efficient manner so as to provide the quality of service at least equal to that which would be expected of a competent lawyer in a similar situation, contrary to Chapter 3, Rules 3 and 5, and Chapter 12, Rules 1 and 2 of the *Professional Conduct Handbook* then in force:
>
> (a) you failed to properly document certain important communications regarding legal matters, including contact and attempted contact with or from clients, and failed to direct staff to do the same;
>
> (b) you failed to consistently maintain staff and facilities adequate to your practice;
>
> (c) you failed to consistently answer communications that required a reply within a reasonable time; and,
>
> (d) in relation to one or more of your clients QQ, DD, RR, GG, FF, HH, EE, CC, LL, KK, SS, II, NN, TT, OO, AA and PP (the "17 Clients") [*i.e.* the same named clients referenced at paragraph 180-81 above]:
>
> (i) you improperly delegated duties to non-lawyers by allowing them to explain the Contingency Fee Agreement to one or more of the

17 Clients, expressly or impliedly advise them to sign the Agreement, and take their signatures on the Agreement,

…

(e) you failed to routinely inform and consult with one or more of the 17 Clients, obtain instructions from them, and provide them as much control as appropriate regarding the direction of their case; and,

…

(g) you failed to advance the claim of one or more of the 17 Clients in a timely manner, including failing to promptly certify their claims, promptly obtain a hearing date, or respond appropriately to determinations that they were not eligible for the NSP.

[188] The relevant portions of the *Handbook* rules referenced in allegation 3 provide as follows:

(a) A lawyer shall serve each client in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which would be expected of a competent lawyer in a similar situation, including by answering within a reasonable time a communication that requires a reply, and by maintaining office staff and facilities adequate to the lawyer's practice (Chapter 3, rule 3);

(b) A lawyer shall make all reasonable efforts to provide prompt service to each client and, if the lawyer foresees undue delay, shall promptly inform the client (Chapter 3, rule 5);

(c) A lawyer has complete professional responsibility for all business entrusted to him or her and must directly supervise staff and assistants to whom the lawyer delegates particular tasks and functions (Chapter 12, rule 1);

(d) A lawyer must ensure that all matters requiring a lawyer's professional skill and judgment are dealt with by a lawyer and that legal advice is not given by unauthorized persons, whether in the lawyer's name or otherwise (Chapter 12, rule 2, as it stood prior to June 2012).

[189] We agree that the Respondent committed professional misconduct by breaching the *Handbook* rules as described in his admission and in paragraphs 75-150 above. The number and nature of the Respondent's shortcomings, committed over a

lengthy period of time, constitute a marked departure from the conduct that the Law Society expects of lawyers.

[190] Two minor points are worth making regarding the duration of the conduct covered by allegation 3. First, the aspect of the professional misconduct referred to in allegation 3(a) (failure to properly document client communications) ended in early 2012, and thus before the Court Monitor made the first Request for Direction to Justice Brown in November 2012. Second, at the hearing the parties agreed that, although the Respondent's written admission regarding allegation 3 limits the time frame of the professional misconduct to a period ending in December 2012, the misconduct relating to AA and OO in fact extended into 2013, as described at paragraphs 93-112 and 113-128 above.

PROPOSAL IS WITHIN THE RANGE OF A FAIR AND REASONABLE DISCIPLINARY ACTION

[191] Pursuant to Rule 4-30, the parties are proposing that the Respondent's professional misconduct result in a disciplinary action of: (i) a one-month suspension; (ii) a practice review under Part 3, Division 2 of the Law Society Rules for his files opened after January 1, 2017; (iii) a written commitment to the Discipline Committee that he is not acting and will not act as counsel or agent for any "Sixties Scoop" claimants; and (iv) costs of $4,000.

[192] As explained in *Law Society of BC v. Rai*, 2011 LSBC 2 at paras. 6-8, in considering whether to accept a Rule 4-30 proposal, the panel's task is not to determine whether it would have imposed the same disciplinary action. Rather, the panel must determine whether the proposal is within the range of a fair and reasonable disciplinary action in all the circumstances. See also *Law Society of BC v. Hart*, 2014 LSBC 17, at para. 82; *Law Society of BC v. Chaudry*, 2018 LSBC 31, at para. 7-8. Under Rule 4-31, if a panel rejects the parties' proposal the chair of the Discipline Committee must instruct discipline counsel to set a date for the hearing.

[193] According this degree of deference to proposals made under Rule 4-30 furthers the public interest in several ways. First, it encourages settlements by providing the parties with a substantial degree of certainty, without which a respondent in particular may be reluctant to forgo a contested hearing. Second, it allows the parties to craft creative and fair settlements, including where potential weaknesses in the Law Society's case make a finding of professional conduct less than certain. Third, it reduces the time and cost required to conduct a hearing, thus promoting the efficient use of limited resources, and may also operate to spare a respondent's

former clients or other witnesses the sometimes very significant emotional strain that can arise from having to testify regarding private matters. Finally, it ensures that lawyers who commit professional misconduct receive disciplinary sanctions that are fair and reasonable in the circumstances.

[194] The question thus becomes: does the parties' Rule 4-30 proposal fall within the range of a fair and reasonable disciplinary action in all the circumstances? In answering this question, we will begin by reviewing the general principles governing the imposition of a disciplinary action.

Principles governing the imposition of a disciplinary action

[195] Section 38(5) of the *Act* permits a panel to order one or more of a number of specific disciplinary actions, including a suspension from the practice of law for a specific period of time. Section 38(7) permits a panel to impose any other condition or limitation it considers appropriate. In *Law Society of BC v. Gurney*, 2017 LSBC 32, at para. 58, the panel encouraged the use of s. 38(7), "creatively and to further the purpose of disciplinary action." In our view, this section permits us to refer the Respondent for a practice review under Part 3, Division 2 of the Law Society Rules and to require that the Respondent commit in writing to the Discipline Committee that he is not acting and will not act as counsel or agent for any Sixties Scoop claimants.

[196] Determining the appropriate disciplinary action in any given case must be guided by s. 3 of the *Act* (*Law Society of BC v. Lessing*, 2013 LSBC 29, at para. 54), which provides as follows:

> It is the object and duty of the society to uphold and protect the public interest in the administration of justice by
>
> (a) preserving and protecting the rights and freedoms of all persons,
>
> (b) ensuring the independence, integrity, honour and competence of lawyers,
>
> (c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,
>
> (d) regulating the practice of law, and

(e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

[197] As noted by the review board in *Law Society of BC v. Nguyen*, 2016 LSBC 21, at para. 36 (citations omitted), the disciplinary action imposed must fulfill the two main purposes of the discipline process:

> The first and overriding purpose is to ensure the public is protected from acts of professional misconduct, and to maintain public confidence in the legal profession generally. The second purpose is to promote the rehabilitation of the respondent lawyer. If there is conflict between these two purposes, the protection of the public and the maintenance of public confidence in the profession must prevail, but in many instances the same disciplinary action will further both purposes.

[198] A global disciplinary sanction is usually appropriate where, as here, there are multiple findings of professional misconduct arising from a single citation (*Law Society of BC v. Harding*, 2015 LSBC 25, at paras. 46-49; *Law Society of BC v. Lowe*, 2019 LSBC 37, at paras. 8-9). As stated in *Law Society of BC v. Gellert*, 2014 LSBC 05, at para. 37 (citations omitted):

> In cases involving multiple allegations of professional misconduct and/or rule breaches, the usual approach is to arrive at a disciplinary action that is suitable for all of the incidents viewed globally. A global approach tends to carry with it the benefit of simplicity and will, in most cases, be particularly well-suited to arriving at a result that furthers the objective of protecting the public. After all, the extent to which the public needs protection, and the manner by which such protection is best provided, must ultimately relate to the entire scope of the misconduct in issue and not to each particular wrongdoing viewed piecemeal.

[199] Panels routinely consider a number of factors in determining whether a disciplinary action fulfills the purposes of the discipline process. A non-exhaustive but nonetheless very comprehensive list of potentially relevant factors is provided in *Law Society of BC v. Ogilvie*, 1999 LSBC 17, at para. 10. However, following the approach taken in *Law Society of BC v. Dent*, 2016 LSBC 5, we have considered and consolidated the relevant factors under the following headings:

(a) the nature, gravity and consequences of the misconduct;

(b) the Law Society's difficulty in otherwise proving the allegations and avoiding the need for the Respondent's former clients to testify at a contested hearing;

(c) the Respondent's professional conduct record;

(d) the Respondent's prospects of rehabilitation;

(e) collateral sanctions or penalties;

(f) consultation with the Tsilhqot'in Nation and the Respondent's former clients; and

(g) the range of disciplinary actions from previous cases.

[200] Finally, and importantly, as noted at paragraphs 17-21 above, we agree with our colleague Ms. Snowshoe that in deciding whether to accept the parties' Rule 4-30 proposal we must consider the historical, social and legal context within which the Respondent's professional misconduct occurred. A failure to do so risks acceptance of a proposal that does not fall within the range of a fair and reasonable disciplinary outcomes, thereby undermining public confidence in the legal profession and the administration of justice more broadly.

Nature, gravity and consequences of the misconduct

[201] While the Respondent's professional misconduct did not involve intentional wrongdoing, his neglect with respect to each category of misconduct, as well as globally, can only be described as very serious. In this respect, we agree with Ms. Snowshoe that a responsible and conscientious lawyer whose practice was devoted to this area, as had been the Respondent's since 2000, would know that IAP claimants constituted an especially vulnerable class of clients to whom was owed commensurately mindful professional obligations.

Failure to exercise due diligence regarding Mr. Johnny

[202] The Respondent's use of a form filler to assist clients in completing an IAP application form was not in itself inappropriate (*Merits* Decision, at para. 93; *Manitoba Form Fillers*, at para. 74; IRS Adjudication Secretariat, *Expectations of Legal Practice in the IAP*, "Form Fillers", Items 13.1 and 13.2). However, in completing these forms the Respondent's clients were required to discuss and detail abuse, often including sexual abuse, which they had suffered years before as children. These were vulnerable people, required to recount painful memories.

The form fillers who assisted the Respondent's clients in filling out application forms thus played an important role in the IAP process, and it was imperative that they perform this role with sensitivity and integrity.

[203] In not exercising due diligence to ascertain Mr. Johnny's suitability to carry out such an important task prior to deciding to work with him, despite knowing he had been convicted of murder and other serious offences, including offences of violence and dishonesty, the Respondent exposed vulnerable persons to a risk of harms ranging from insensitive treatment to financial exploitation. It is true that the Parole Decision painted a positive picture of Mr. Johnny as rehabilitated and that the Respondent had formed a favourable impression of Mr. Johnny through representing him in the ADRP process. However, relying solely on these sources of information in deciding to hire Mr. Johnny to carry out such an important role in engaging with IAP clients constituted a serious error in judgment.

[204] Perhaps worse still, upon receiving information on ten occasions, and from numerous sources, alleging that the above-mentioned harms were in fact occurring, the Respondent failed to adequately investigate Mr. Johnny's suitability to continue in this role. In several instances, the information received by the Firm was never brought to the Respondent's attention, an oversight for which the Respondent must be held accountable. In the rest, the Respondent made some inquiries, and spoke to Mr. Johnny about the allegations, but these investigations were not sufficient given the seriousness and frequency of the complaints, and the vulnerability of the Respondent's clients.

[205] We recognize that, as described at paragraphs 47-52 above, the Respondent's own work with Mr. Johnny, including seeing him interact with clients in various settings, left him with no concerns as to Mr. Johnny's competence and integrity, and that some clients reported that Mr. Johnny had been a great help to them. While this information was relevant in accessing the validity of the complaints against Mr. Johnny, it did not justify the Respondent's failure to undertake a thorough investigation into the many complaints received.

[206] Of paramount importance, the Respondent's misconduct exposed his vulnerable clients to a real risk of substantial harm and must therefore be viewed as exceptionally serious. While it is unknown whether the allegations against Mr. Johnny were true, the fact that some of the Respondent's clients may have suffered substantial harm at Mr. Johnny's hands is a relevant factor to consider in determining whether the proposed disciplinary action is fair and reasonable in all the circumstances.

Improper use of Declarations

[207] The Respondent's conduct in instructing his staff to attach his clients' signed Declarations to subsequently created IAP application forms is comparable to revising an affidavit after it has been sworn and reusing the original signature page instead of swearing or affirming the revised affidavit.

[208] Granted, the Respondent read the revised application form back to each client and had the client confirm its accuracy. In theory, a client could nonetheless have suffered prejudice if an inaccuracy that would have been caught in person were missed over the phone. Ultimately, however, the Respondent's misconduct likely caused no prejudice to his clients, given that a subsequent re-certification process ordered by Justice Brown resulted in few changes to any of the clients' applications.

[209] That said, the process for signing the Declarations was not a meaningless formality. Rather, it helped to ensure the accuracy of the applications, and thus had to be followed to maintain confidence in the reliability and integrity of the IAP process. Lawyers who skirt such requirements undermine public confidence in the legal profession and the administration of justice. In this respect, we rely on analogous comments made in *Law Society of BC v. Kim*, 2019 LSBC 43, at para. 63, regarding the importance of following the proper protocol in commissioning affidavits.

Inadequate client service

[210] The various aspects of the Respondent's client service misconduct amount to an overarching failure to communicate with some of his clients and take their instructions, and sometimes resulted in delay in advancing their claims. As detailed in the Respondent's admission to allegation 3 in the Citation, this misconduct is divided into two categories.

[211] First, in relation to some or all of 17 named clients, the Respondent: (i) improperly delegated to non-lawyers duties associated with explaining the Contingency Fee Agreement to the clients and having the clients sign it; (ii) failed to routinely inform and consult with the clients, obtain instructions and give the clients appropriate control on the direction of the case; and (iii) failed to advance the clients' claims in a timely manner, including by not promptly certifying the claims, not promptly obtaining hearing dates, or not responding appropriately to determinations that the clients were ineligible for NPS.

[212] Second, in relation to unnamed "certain clients", the Respondent: (i) failed to properly document important communications regarding legal matters, including contact and attempted contact with or from the clients; (ii) failed to consistently maintain office staff and facilities adequate to his practice; and (iii) failed to consistently answer communications that required a reply within a reasonable time.

[213] We do not know how many unnamed "certain clients" fall within this second category of client service misconduct. Nonetheless, for several reasons we infer that this misconduct occurred in relation to many clients, not just a few. First, in its letter sent to us two days after the hearing, the Law Society noted that most of the client service misconduct to which the Respondent has conditionally admitted relates to these unnamed "certain clients". Second, as set out at paragraph 88 above, the ASF states that the Respondent failed to regularly document client communications from 2008 to early 2012, which describes a general practice as opposed to an occasional lapse relating to only a few clients. Similarly, the Respondent's admission to not having consistently maintained sufficient office staff and facilities adequate to his law practice describes a systemic problem. Indeed, at the hearing before us the Respondent's counsel accepted that he had acquired too many clients and failed to respond by increasing the staff at his law firm, which led to the court's intervention. This is all consistent with the *Merits* Decision, in which Justice Brown commented regarding the Respondent's failure to devote adequate resources to his practice, quoted in para. 163 above.

[214] A question also arose at the hearing as to whether more than just the 17 named clients were the victims of the misconduct alleged in paragraphs 3(d), (e) and (g) of the Citation and summarized at paragraph 211 above. Counsel for the Law Society was confident that only the 17 named clients had been so victimized and indicated that all of the Respondent's files had been produced to the Law Society. However, as already noted, two days after the hearing counsel for the Law Society wrote us indicating that, while the Respondent had made all of his client files available to the Law Society, the Law Society had reviewed only 30 of them. Counsel's letter also described the scope of the Law Society's investigation, as detailed at paragraphs 164-165 above. This description indicates that the Law Society's investigation did not consist of reviewing a *sample* of 30 client files, of which 17 turned out to reveal professional misconduct. Rather, the Law Society made an informed decision to *target* these particular 30 files based on its review of a very significant amount of information, including material generated as a result of the Court Monitor's Request for Direction, and the result of having spoken to many individuals who could be expected to have relevant information about the Respondent's practice, including the Respondent, his staff, the court-appointed Practice Advisor and those Tsilhqot'in Nation clients who agreed to be interviewed.

[215] Of course, as noted at paragraphs 212-213 above, most of the client service misconduct to which the Respondent has admitted is *not* restricted to the 17 named clients. As for the misconduct that *is* so restricted, as set out in paragraphs 3(d), (e) and (g) of the Citation and summarized at paragraph 211 above, in our view we should not assess the parties' Rule 4-30 proposal based on the possibility that a more extensive or differently focused investigation might have revealed additional clients who were the victims of the misconduct described in paragraphs 3(d), (e) and (g) of the Citation.

[216] That said, for the following reasons we conclude that the ASF establishes that the Respondent committed at least some of the misconduct set out in paragraphs 3(d) and (e) of the Citation in relation to more than just the 17 named clients:

(a) Paragraph 3(d) of the Citation concerns the improper delegation to form fillers of the duty of explaining the Contingency Fee Agreement to one or more of the 17 named clients and then having clients sign it. In describing the Respondent's general IAP practice, the ASF states that the role of the Respondent's form fillers included reviewing and explaining the Contingency Fee Agreement to the clients and witnessing their signatures. It further states that the clients often signed the Contingency Fee Agreement prior to speaking to the Respondent, after which the form fillers would help the clients fill out the IAP application (see paragraph 77-78 above). In short, the ASF describes misconduct that is clearly not confined to the 17 named clients and can only reasonably be viewed as relating to many of the Respondent's clients, although how many is impossible to say.

(b) Paragraph 3(e) of the Citation concerns a failure to routinely inform and consult with one or more of the 17 named clients, obtain instructions from them and provide them with as much control as appropriate regarding the direction of the case. In describing the Respondent's general IAP practice, the ASF states that:

(i) he did not regularly or routinely send reporting letters or otherwise contact (or attempt to contact) clients to provide updates on their claims (see paragraph 84 above);

(ii) he generally did not provide his clients with a copy of their Contingency Fee Agreement or the documents, such as medical records, he obtained on their behalf unless they asked to see them (see paragraph 83 above);

(iii) he generally advised his clients to put the matter out of their minds and told them that he and his staff would look after everything and contact them when the hearing date was scheduled (see paragraph 85 above); and

(iv) after certifying a client's claim over the phone, he often did not personally meet the client until the day before the hearing when they would meet to prepare the client for the hearing (see paragraph 87 above).

These admissions in the ASF establish a general failure to routinely inform and consult with clients, and to give them appropriate control over the direction of the case, and are consistent with the findings made by Justice Brown in the portion of the *Merits* Decision reproduced at paragraph 213 above.

[217] In our view, where a citation is drafted so as to encompass a narrow group of clients, in determining whether to accept the parties' Rule 4-30 proposal a panel should not ignore evidence of similar or even identical professional misconduct relating to additional clients that has been put before it by the agreement of the parties as part of an ASF. Adopting such a restrictive approach in this case would require us to treat all of the misconduct described in allegation 3 of the Citation as if it were confined to a very small proportion of the Respondent's clients, when the ASF establishes that this is not the true state of affairs and rather some of the misconduct in paragraph 3 reflects a systemic problem with the Respondent's practice. Such a conclusion would erode public confidence in the discipline process because the evidence of a systemic problem relating to many clients arguably forms part of the circumstances of the misconduct relating to the 17 named clients and, in any event, bears on the Respondent's character (*R. v. Angelillo*, 2006 SCC 55, at paras. 22-31).

[218] Based on the record before us, we conclude that the Respondent's client service misconduct was serious. Not documenting client communications, failing to consistently maintain adequate staff and facilities, and not consistently responding to communications that require a reply within a reasonable time for unnamed "certain clients", of whom there must have been many, risked prejudicing those clients in their legal representation. A similar risk of prejudice arose from the deficiencies established regarding many of the 17 named clients – delegating aspects of the Contingency Fee Agreement to non-lawyers, failing to routinely inform and consult with the client, and not advancing the client's claim in a timely manner. And as just noted, some of the deficiencies regarding these 17 named

clients undoubtedly occurred regarding the Respondent's other clients as well, because the misconduct was at least in part reflective of a systemic problem in his practice.

[219] One can readily infer that the misconduct in question caused at least some and perhaps many of the Respondent's clients upset or stress, in particular because IAP claimants were vulnerable individuals who had suffered significant trauma. We therefore agree with Justice Brown's conclusion in the *Merits* Decision, at paras. 113 and 127, that failing to devote sufficient resources to his practice exposed the Respondent's clients to harm and likely deprived them of benefits they would otherwise have obtained with respect to their legal representation, although as noted at paragraph 225 below, we cannot conclude that the benefits with respect to which the clients were likely deprived included IAP awards that were lower than otherwise would have been the case.

[220] Of special concern in this respect is the Respondent's failure to routinely inform and consult with some or all of the 17 named clients, and to obtain instructions from and give these clients as much control as appropriate on the direction of the case. While the Respondent accepts that his conduct in this regard was lacking, he explains that his thinking at the time was that, in his experience, residential school survivors were upset, stressed and overwhelmed by the IAP process, and that he intentionally minimized his contact with them to reduce these negative impacts, albeit while assuring them that he would attend to everything to advance their claims and that they were always welcome to contact him.

[221] While we accept that this was the Respondent's thinking at the time, it is concerning that he reviewed some of these clients' applications with them only on the phone and often did not meet them in person until days before the hearing. IAP clients have unique needs that create additional demands on counsel. As recognized in the IRS Adjudication Secretariat's guidelines for lawyers handling IAP claims, *Expectations of Legal Practice in the IAP*, referenced at paragraph 19 above:

> Lawyers should routinely inform clients, consult with them, obtain instructions, and give them as much control as possible in the direction of their case.

[222] To the same effect are the similar guidelines issued by the LSUC, *Guidelines for Lawyers Acting in Aboriginal Residential School Cases*, also referenced at paragraph 19 above, which state:

> Sensitivity to the emotional, spiritual and intellectual needs of claimants is necessary in the provision of legal services to claimants. Lawyers acting for claimants should recognize and respect that many claimants have had control taken from their lives and were victims of child and sexual abuse and therefore, as clients, should be routinely informed about and consulted as much as possible on the direction of their case. Lawyers should ensure that they obtain instructions from claimants at every stage of the legal process. Lawyers should also recognize and respect that for claimants, interaction with lawyers and the legal process can be extremely stressful and difficult.

[223] The Respondent was thus seriously misguided in believing that his clients would benefit from less rather than more contact with counsel, and less rather than more control over their cases. The Respondent's misconduct, far from engendering a newfound trust in the legal system, more likely than not had the opposite effect on at least some of his clients.

[224] An aggravating factor is that, as noted by Justice Brown, the Respondent's failings in terms of inadequately resourcing his practice continued for two years after the 2013 Consent Order and were only remedied after significant judicial intervention (*Merits* Decision, at paras. 5, 109). It is true that the Respondent instituted some reforms prior to the court's involvement, in particular by ceasing the improper use of Declarations and by properly documenting client communications, and that by February 2013 he was holding more in-person meetings with his clients. But he clearly could have moved faster in adopting the IAP best practices referenced in the 2013 Consent Order.

[225] That said, we accept the parties' submission that there is no evidence to suggest that the Respondent's client service misconduct resulted in any of the affected clients receiving less compensation than would otherwise have been the case. Despite his failings, the Respondent secured significant compensation for more than 600 vulnerable individuals who had been wronged at that hands of the state. Indeed, the Respondent's clients received higher awards, on average, than the global average for IAP claimants, although the significance of the statistics must not be overstated because they have not been controlled for the nature of the abuse.

[226] We have not lost sight of the fact that reducing contact with clients, and failing to adequately resource his office, must have lowered the Respondent's expenses and concomitantly increased his profits, given that his fees were calculated on a contingency basis. However, we accept the parties' submission that the Respondent's professional misconduct was not motivated by a desire to maximize

profit, but rather that his practice grew over time to a size where it was under resourced, a problem that he eventually remedied, albeit belatedly. Furthermore, as explained at paragraph 252 below, it is possible that in the long run the Respondent's misconduct ended up costing rather than saving him money, given the significant expenses he incurred as a result of the court's intervention following the Court Monitor's Request for Direction. That said, it remains a concern that the Respondent's misconduct, if left unchecked, would have had the obvious and inevitable effect of increasing his profits and that, absent the court's intervention, he likely would have been left to enjoy those profits.

Law Society's difficulty in otherwise proving the allegations and avoiding the need for the Respondent's former clients to testify at a contested hearing

[227] Counsel for the Law Society informs us that, absent the Respondent's admission, it will be difficult to prove the allegations in the Citation with admissible evidence, especially because the Respondent's former clients have indicated that they are not willing to testify at a contested hearing. Granted, the Law Society can make further attempts to convince these individuals to testify, but if they remain unwilling, the Law Society has quite reasonably indicated that it will not force them to do so, given the real concern that testifying in an adversarial setting is likely to bring up traumatic memories and thus victimize them further.

[228] As noted in *R. v. Anthony-Cook*, 2016 SCC 43, at paras. 39, 47, flaws in a prosecution case, such as where witnesses are unwilling to testify, can provide a powerful and legitimate incentive for the Crown to enter into a joint resolution agreement under which the accused pleads guilty to a serious criminal offence in return for a lenient sentence, perhaps even one that would otherwise be viewed as outside the range of reasonable sanctions, and for that joint resolution to be accepted by the sentencing judge because, given the flaws in the prosecution case, it is in the public interest to do so.

[229] While *Anthony-Cook* addresses the criminal law context, in our view the same principle can legitimately apply to Rule 4-30 proposals.

[230] This principle carries *very* substantial force in this case, because if we reject the parties' proposal, there is a good or real possibility that the Law Society will not be able to prove the allegations in question and the Respondent will face no discipline at all for the admitted misconduct.

[231] As a final point, it is worth emphasizing that the parties are best placed to determine the impact that rejecting their Rule 4-30 proposal would have on the

ability of the Law Society to prove its case. In this regard, the following comments from *Anthony-Cook*, at para. 44, are also applicable in the discipline context:

> Crown and defence counsel are well placed to arrive at a joint submission that reflects the interests of both the public and the accused (Martin Committee Report, at p. 287). As a rule, they will be highly knowledgeable about the circumstances of the offender and the offence and the strengths and weaknesses of their respective positions. The Crown is charged with representing the community's interest in seeing that justice is done (*R. v. Power*, [1994] 1 SCR 601, at p. 616). Defence counsel is required to act in the accused's best interests, which includes ensuring that the accused's plea is voluntary and informed (see, for example, Law Society of British Columbia, *Code of Professional Conduct for British Columbia* (online), rule 5.1-8). And both counsel are bound professionally and ethically not to mislead the court (*ibid.*, rule 2.1-2(c)). In short, they are entirely capable of arriving at resolutions that are fair and consistent with the public interest (Martin Committee Report, at p. 287).

[232] The parties urge us to recognize an additional benefit as arising from the Respondent's conditional admission of professional misconduct, namely, that it obviates the need for any vulnerable persons to testify about sensitive topics at a contested hearing, in the event that some of his former clients change their mind and agree to appear as witnesses at the hearing. The parties say that a case from Ontario provides a cautionary example in this regard: *Law Society of Upper Canada v. Keshen*, 2017 ONLSTH 90.

[233] Mr. Keshen was cited by the Law Society of Ontario ("LSO"), as it has been called since January 1, 2018, for professional misconduct in relation to 34 individual complainants. The alleged misconduct was similar to, but appears to have been more serious than, the conduct in this case. The allegations were that Mr. Keshen had: failed to serve his IAP clients adequately; improperly delegated tasks to staff; used clients' trust monies to pay his fees without first sending a bill; charged unfair fees; and failed to handle settlement monies correctly. Mr. Keshen vigorously defended these allegations at a contested hearing at which a number of his former clients faced lengthy cross-examination. The LSO closed its case and Mr. Keshen began to call witnesses. After 25 hearing days, there was a long adjournment, following which the LSO and Mr. Keshen reached a resolution agreement under which the proceeding would be dismissed, and the hearing panel would provide Mr. Keshen with advice regarding his conduct (an option available pursuant to s. 36 of the *Law Society Act*, R.S.O. 1990, c. L8). Mr. Keshen also agreed to: cooperate

with a practice review and spot audit; participate in restorative justice circles in the communities of his former clients; and take additional continuing professional development courses on practice and management.

[234] As explained in the reported decision in *Keshen*, at para. 8, the LSO provided several justifications for agreeing to resolve the matter in this fashion:

> The Law Society gives three main reasons in support of the joint submission. First, it says, the nature of the evidence was different than had been expected in the initial allegations. Second, it notes that the hearing was stressful for many of the complainant witnesses and this stress warranted a reconsideration of the nature and goals of the prosecution. Third, it states that the rules of evidence led to a gap between what complainants wanted to say to the Tribunal and what it was possible for them to say. The Law Society believes that moving to a process that can be more attentive to this and to processes familiar to the Indigenous community may be helpful.

[235] The Law Society Tribunal accepted the parties' joint resolution because it was reasonable in the circumstances, including for the reasons advanced by the LSO (*Keshen*, at paras. 19-29).

[236] The *Keshen* case led the LSO to appoint a Review Panel on Regulatory and Hearing Processes Affecting Indigenous Peoples ("LSO Review Panel"), which submitted a Report to Convocation on May 24, 2018. This Report made nine recommendations regarding various aspects of the regulatory and hearing processes affecting Indigenous peoples, including that the Law Society Tribunal explore, with the assistance of Indigenous experts, how to incorporate Indigenous Law principles within its adjudicative and dispute resolution processes and apply them in appropriate cases (Recommendation 7). As noted at page 8 of the LSO Review Panel's Report, this particular recommendation floated possibilities such as developing practice directions: permitting a witness to testify with a support worker nearby, through CCTV or behind a screen; permitting a victim's statement to be admitted into evidence for its truth in certain circumstances; requiring the cessation of any part of an examination or cross-examination that in the adjudicator's opinion is abusive, repetitive or otherwise inappropriate; making independent counsel available to complainants; and creating special guidelines for cross-examining Elders. The LSO Review Panel suggested that some of these possibilities were arguably already available, but rarely if ever used.

[237] We agree that a Rule 4-30 proposal may carry with it the salutary effect of eliminating any possibility that a respondent's former clients or other vulnerable

individuals will be exposed to the stress of testifying at a contested hearing. In appropriate cases, this consideration may weigh in favour of concluding that the proposal is reasonable in all the circumstances (*Anthony-Cook*, at para. 39). This point is implicitly recognized by the LSO Review Panel, in the portion of its Report referenced at paragraph 240 below. At the same time, however, the LSO Review Panel stressed that the Law Society should strive to adopt a culturally competent and, where appropriate, trauma-informed approach to interacting with Indigenous complainants, which includes taking reasonable steps to permit their safe participation in the adjudicative process where available. In other words, where possible, the risk that testifying will cause actual harm to a complainant can and should be reduced. As noted in the preceding paragraph, the LSO Review Panel observed that some of the procedural steps that may help to reduce this risk, while not typically utilized at tribunal hearings, can perhaps be implemented without the need for any formal changes to tribunal rules. We agree that the current hearing process is likely flexible enough to permit some of these steps to be employed without contravening any mandatory rules of procedure or evidence or detracting from the fairness of the hearing vis-à-vis the respondent, an example being allowing a complainant to testify with a support person nearby.

[238] Ultimately, we give no real weight to the parties' submission that accepting the Rule 4-30 proposal will avoid the need for the Respondent's vulnerable former clients to testify, because the information provided to us at the hearing is that none of them want to testify, and that they will therefore not be called as witnesses by the Law Society. The likelihood that most or all of the Respondent's former clients will not testify explains in large part, if not entirely, why the principle in *Anthony-Cook* militates substantially in favour of accepting the parties' Rule 4-30 proposal. In these circumstances, it makes no sense to view the Rule 4-30 proposal as *further* justified because the Respondent's former clients will be spared the need to testify.

[239] It is important to add that we have no information regarding the circumstances of this particular case that suggests that the decision of the Respondent's former clients not to testify is the result of a failure by the Law Society's investigators and counsel to adopt the approach mentioned in paragraph 237 above. The decision not to testify does not, by itself and without more, lead us to such a conclusion. In fact, the opposite conclusion finds some support in the Law Society's awareness of and express reliance on the LSO Review Panel's Report at the hearing in this matter. This reliance included the Law Society's recognition in its written submissions that in this case its engagement with members of Indigenous communities had required that it take into account: (a) the needs of the complainants and their vulnerability and marginalization; (b) that some of the complainants would have difficulty trusting the legal system in which the Law Society operates and would have

challenges interacting with it; and (c) that the complainants may perceive or experience a power imbalance in the client-lawyer relationship that may be replicated in the Law Society's complaints and discipline process because a complainant is not a party, is unrepresented and has no formal role in the disposition of the case. The Law Society's approach to interviewing the Respondent's former clients, described at paragraph 255 below, suggests that it made concrete efforts to address these concerns in this particular case.

[240] Of course, given our adversarial system, even where available steps are taken to make the process safe for a vulnerable complainant, participation as a witness will expose the complainant to cross-examination by opposing counsel, who will be permitted to challenge the complainant's reliability and credibility at a public hearing. This can be an extraordinarily difficult experience for the complainant. Consequently, to give but one example, for this and other reasons it is not uncommon in sexual assault prosecutions for a victim to decide not to testify, despite Crown counsel taking all reasonably available steps to make the court process as safe as possible, and it is also not uncommon for Crown counsel to therefore decide not to call the victim as an unwilling witness. Similarly, at p. 7 of its report the LSO Review Panel acknowledges that, where appearing as a witness risks causing a vulnerable complainant actual harm, it may not be in the public interest to require the complainant to testify without informed consent. In other words, the LSO Review Panel accepts that, where a vulnerable complainant makes an informed decision not to testify, the Law Society may be justified or even obligated in the public interest not to call the complainant as a witness.

[241] That said, if it turns out that the safe participation of the Respondent's former clients' in the adjudicative process was made unduly difficult by the procedural or evidentiary rules of the current adversarial discipline system, so as to negatively impact their decision whether to testify, and that these rules cannot be changed without formal intervention, then the Law Society should consider whether and what changes can be made to remedy the problem without causing unfairness to respondents, in the spirit of its *Truth and Reconciliation Action Plan* and as occurred in Ontario following *Keshen*. In this respect, we strongly agree with Ms. Snowshoe that public confidence in the Law Society's ability to self-regulate requires that it be able to appropriately ensure the safety and protection of the most vulnerable and marginalized members of society within the regulatory process. However, we have very little information regarding what actually happened in this case – only what is recounted in these reasons, for example at paragraph 239 above. Nor do we have the necessary expertise upon which to make recommendations for change. But even were we to reject the parties' Rule 4-30 proposal, under Rule 4-31(4) the Discipline Committee would be required to instruct discipline counsel to

set a hearing date for this already quite dated Citation. It is highly unlikely that any formal changes necessary to address perceived defects in the procedural or evidentiary rules of the current adversarial discipline system could be identified, approved and implemented prior to that hearing taking place.

Respondent's Professional Conduct Record

[242] The Respondent has no professional conduct record, which is a mitigating factor.

Respondent's prospects of rehabilitation

[243] The Respondent's acknowledgment of professional misconduct shows remorse on his part and thus speaks well to his prospects for rehabilitation. The Respondent's contrition in this respect was evident at the hearing, where he delivered an apology to his clients and to the Law Society. He described how over the past seven years he has reflected on and learned from his serious mistakes, and he expressed the hope that his apology would be shared with the leaders of the Tsilhqot'in Nations. This apology made clear that the Respondent understood the gravity of his misconduct. Counsel for the Law Society informs us that the Respondent's former clients in this case have indicated that an apology from the Respondent is important to them.

[244] Furthermore, in May 2015, after a thorough hearing into his conduct as counsel, Justice Brown found that the Respondent had reformed his practice and was by then providing adequate client service to Settlement Agreement claimants (*Merits* Decision, at paras. 110-111):

> [...] the evidence suggests that Bronstein has in fact revised its practice and is currently providing adequate service to its clients. As I reviewed in [*Fontaine 2014*], the practice plan established by Mr. Poyner and Mr. Bronstein is in accordance with IAP best practices – it calls for at least two pre-hearings, continual status updates and ensures that the firm has the appropriate level of resources to respond to the demands that it faces.
>
> Further, there is no evidence to suggest that Bronstein is failing to adhere to the practice plan. To the contrary, the results thus far have been promising. Since September 2014, more than 100 IAP files have been brought to hearing and the evidence regarding the remaining files suggests that they are progressing as well.

[245] Although this satisfactory state of affairs was only accomplished after considerable judicial intervention, as described at paragraph 224 above, Justice Brown's finding is some indication that the Respondent has rehabilitated himself.

[246] For these reasons, we conclude that the Respondent poses a fairly low risk of committing professional misconduct in the future and that specific deterrence is not a significant concern in this case.

Collateral sanctions or penalties

[247] *Ogilvie*, at para. 10, provides that in determining the appropriate disciplinary action a panel can consider the impact on a respondent of any criminal or other sanctions or penalties imposed in relation to the misconduct in issue.

[248] Collateral consequences of this sort do not bear on the gravity of the misconduct or the blameworthiness of the respondent. Nonetheless, they may operate so that a particular disciplinary action will have a more significant adverse impact on a respondent than would otherwise have been the case, which in some circumstances may be relevant in assessing the appropriateness of that disciplinary action, provided of course that the disciplinary action imposed ensures that the public is protected from acts of professional misconduct and does not undermine public confidence in the legal profession.

[249] Here, the Respondent has already faced a number of serious consequences for the conduct at issue, pursuant to the series of orders made by Justice Brown. He had a court-appointed Practice Advisor, with whom he was required to meet regularly for several years. He paid the fees of this Practice Advisor, as well as fees of approximately $765,000 paid to the firm that represented him in the proceedings before Justice Brown (*Fontaine v. Canada (Attorney General)*, 2015 BCSC 1968, at para. 75). The Respondent also paid $1.25 million in special costs to Canada. And he was rebuked by the court in publicly reported reasons for judgment (see, for example, the excerpts reproduced at paragraph 163 above).

[250] The Law Society and the Respondent both take the position that these court-imposed sanctions favour a lesser disciplinary action than might otherwise have been appropriate. But we give them modest weight for three reasons.

[251] First, these sanctions were arguably the inevitable consequence of the Respondent's professional misconduct, as opposed to an unforeseeable deleterious outcome of his malfeasance (*R. v. Suter*, 2018 SCC 34, at para. 50).

[252] Second, the lengthy court process that resulted in the Respondent facing significant collateral financial consequences allowed him to retain a large number of IPA clients, from whom he presumably collected substantial fees. (Having said this, as explained at paragraph 226 above, we recognize that the financial costs the Respondent incurred as a result of the court's intervention may have exceeded any savings that arose from inadequately resourcing his office).

[253] Third, it appears that the court-imposed sanctions would have been less significant had the Respondent acted more promptly to reform his legal practice after the 2013 Consent Order (*Merits* Decision, at paras. 109, 127).

Consultation with Tsilhqot'in Nation and Respondent's former clients

[254] The LSO Review Panel appointed in the aftermath of *Keshen* recommended that, where complainants are members of Indigenous communities, information about the Law Society, its regulatory process and the role of complainants be made available and communicated in an understandable and culturally appropriate way. Depending upon the stage of the matter, these communications should include discussion of the issue of remedy from the complainants' perspectives, including the concept of restoration and how that intersects with the LSO's regulatory mandate. See the Review Panel's Report to Convocation, May 24, 2018, Recommendation 2.

[255] Prior to issuing the Citation in this case, the Law Society met with representatives from the Tsilhqot'in National Government, which had intervened in the proceedings brought by the Court Monitor regarding the Respondent's practice (*Fontaine v. Canada (Attorney General)*, 2014 BCSC 2531), including its Tribal Chairman, and also with some of the Respondent's former clients. To assist in this regard, including by interviewing the Respondent's former clients, the Law Society engaged a law firm that devotes its practice to serving Indigenous peoples and is known and trusted in the Tsilhqot'in community. Further meetings occurred prior to the Discipline Committee's acceptance of the Rule 4-30 proposal, for the purpose of explaining the Rule 4-30 process. The Law Society had regard to the results of these consultations while negotiating the proposed resolution with the Respondent. After the Discipline Committee accepted the Rule 4-30 proposal, the Tsilhqot'in leadership were informed and invited to attend the hearing.

[256] Counsel for the Law Society informs us that, having conducted these consultations, there appeared to be no interest in the Tsilhqot'in community in undertaking a further restorative process in this matter, or in holding a hearing in the Williams

Lake area, and that, as already noted, the Respondent's former clients had no interest in testifying at a contested hearing.

[257] Even if we treat this factor as neutral, on the basis that we were not told why the Tsilhqot'in community and the Respondent's former clients have taken these positions, or whether they support the parties' Rule 4-30 proposal, our decision regarding the appropriate outcome in the case does not change.

Range of disciplinary actions from previous cases

[258] The Respondent misconducted himself by failing to exercise due diligence regarding Mr. Johnny, by attaching previously signed Declarations to revised IAP application forms, and by providing inadequate service to a number of clients. There are previous discipline cases that deal with one of these three types of misconduct, but none considers all three at once.

[259] There are also previous discipline cases in which a lawyer has committed misconduct regarding one or more IAP clients. However, the circumstances in these cases tend to be very different from the Respondent's matter. In one case where there is some similarity, the misconduct in issue was much more egregious.

[260] More generally, some important mitigating factors evident in the Respondent's matter are absent from the previous discipline cases that we have considered. Perhaps most notably, none of the previous cases indicate that it would be difficult to prove the allegations absent an admission by the respondent.

[261] As the discussion below demonstrates, for these reasons no single previous case is sufficiently analogous to the Respondent's case to be of significant assistance in determining whether the parties' Rule 4-30 proposal falls within the range of fair and reasonable disciplinary action in all the circumstances.

Failure to exercise due diligence regarding Mr. Johnny

[262] The parties were unable to locate any previous case in which a respondent's misconduct involved failing to exercise due diligence prior to hiring a contractor or employee or after receiving information suggesting that the contractor or employee may have acted inappropriately towards a client.

Improper use of Declarations

[263] In *Kim*, the respondent removed the signature page of a sworn affidavit and appended it to a new affidavit that her client had not seen, but which she had read

to him over the phone. She also repeatedly misled her client about matters relating to billing the Legal Services Society (now Legal Aid BC) and the amount for which her client would be responsible. The respondent admitted all of the facts and that her actions constituted professional misconduct, albeit very late in the proceedings. She had a minimal and unrelated professional conduct record. The respondent was suspended for one month for these two instances of professional misconduct.

[264] In *Law Society of BC v. Batchelor*, 2014 LSBC 11, the respondent admitted to two allegations of professional misconduct: first, by twice adding exhibits to a sworn affidavit; and second, by lying to the court about what he had done regarding one of the affidavits. The respondent had a significant disciplinary history. The hearing panel accepted the proposed disciplinary action made under what is now Rule 4-30 and suspended the respondent for one month.

[265] In *Law Society of BC v. Nielsen*, 2007 LSBC 35, the respondent altered an exhibit to a sworn affidavit and then filed the altered affidavit in court. He also submitted a final order to the registry for entry without his client's knowledge or consent. The matter proceeded under what is now Rule 4-30, and the respondent was fined $10,000.

Inadequate client service

[266] In *Law Society of BC v. Simons*, 2012 LSBC 23, the respondent did nothing to advance his client's action for more than three years. He failed to respond substantively to emails from his client for more than two years and lied to her about taking steps he had not in fact taken. He also concealed from his client that the defendant had brought an application to dismiss her action for want of prosecution. This application was successful, with costs of the application and the proceeding to the defendant. The respondent admitted to professional misconduct for failing to provide adequate service and also for misleading his client. He was suspended for one month.

[267] In *Law Society of BC v. Menkes*, 2016 LSBC 24, the respondent delayed for four years in taking steps to advance his client's claim, failed to respond to communications from the client and failed to carry out steps he had told the client he would take. In particular, the respondent failed to serve the claim he had filed on his client's behalf. The respondent had a professional conduct record, which contained three unrelated conduct reviews and a referral to the Practice Standards Committee intended to address his struggles with procrastination. The panel accepted a Rule 4-30 proposal and he was fined $7,500.

[268] In *Hart*, the respondent took few steps to advance his client's straightforward family claim for approximately two years. He also failed to: provide promised work; correct an address on a Notice of Intention to Act in Person; tell his client that her husband had retained a new lawyer; and inform her that he would cease work until his account was paid. The respondent had a significant disciplinary history consisting of three prior citations, three conduct reviews, and a referral to the Practice Standards Committee. The matter proceeded under what is now Rule 4-30, and he was fined $7,500.

[269] In *Harding*, the respondent did nothing to advance his client's action for more than four years, although other than the delay she suffered no tangible harm. When he was served with an application to dismiss the action for want of prosecution, he committed a further act of professional misconduct by failing to advise his client to obtain independent legal advice. The respondent had an unrelated professional conduct record, which consisted of two citations and two conduct reviews. He was fined $4,000, the panel noting that there was no element of dishonesty, unlike in many of the inadequate service cases in which a suspension had been ordered.

[270] In *Law Society of BC v. Vondette*, 2018 LSBC 36, the respondent took approximately five years to have his client's costs assessed after obtaining judgment. He also failed to respond to calls and emails from his client in this period. The panel accepted the respondent's Rule 4-30 proposal and fined him $3,000.

[271] In *Law Society of BC v. Chiasson*, 2020 LSBC 32, over a period of five years the respondent failed to take any substantive steps to advance a client's civil claim for sexual assault and did not answer the client's reasonable requests for information, causing her undue stress, confusion and frustration. The respondent's professional conduct record revealed similar issues around procrastination and quality of service, including a citation for which he was fined $4,500, a practice standards referral regarding two client complaints, and a conduct review. Accepting the parties' Rule 4-30 proposal, the panel imposed a $10,000 fine.

Other discipline cases involving IAP clients

[272] We have located a number of cases, most of them from other jurisdictions, in which a lawyer has been disciplined for misconduct occurring in the course of representing IAP clients.

[273] Most of these cases involve conduct bearing no real resemblance to the conduct at issue here, and so are not worth discussing any further (*e.g. Law Society of Saskatchewan v. Merchant*, 2020 SKLSS 6; *Law Society of Saskatchewan v.*

Migneault, 2017 SKLSS 7, at para. 69-73, 79; *Law Society of Saskatchewan v. Cherkewich*, 2014 SKLSS 3; *Law Society of Saskatchewan v. Merchant*, 2014 SKCA 56; *Law Society of Manitoba v. Okimaw*, 2016 MBLS 7; *Law Society of Manitoba v. Tennenhouse*, 2012 MBLS 14; *Law Society of BC v. Daniels*, 2016 LSBC 17).

[274] A case that does, however, bear some similarity to the Respondent's matter concerns a lawyer named David Blott. In 2012, Justice Brown ordered that Mr. Blott be prohibited from continuing to act for a large number of IAP clients because of serious shortcomings in his practice (*Blott* Decision). The *Blott* Decision is mentioned in Justice Brown's subsequent decision refusing to make the same kind of order in respect of the Respondent (*Merits* Decision, at paras. 86-89, 106-109). Notably, at paragraph 107 of the latter decision, which is quoted above in para. 163, Justice Brown found that there were similarities between some of Mr. Blott's shortcomings and some of the failings evident in the Respondent's practice.

[275] As indicated in the lengthy quotation from Justice Brown's decision set out at paragraph 163 above, she concluded that the evidence suggested that the Respondent had too many IAP clients and not enough associate lawyers to represent them adequately. While noting that he had been dilatory in remedying this problem, Justice Brown held that the Respondent had in fact revised his practice so as to provide adequate service to his clients, and that since September 2014 more than 100 IAP files had been brought to a hearing and the remaining files were progressing as well. Accordingly, unlike with Mr. Blott, Justice Brown did not make an order prohibiting the Respondent from acting in IAP matters.

[276] Mr. Blott was also the subject of a disciplinary proceeding launched by the Law Society of Alberta ("LSA") (*Law Society of Alberta v. Blott*, 2014 ABLS 7). The LSA permitted Mr. Blott to resign based on an agreed statement of facts that, while somewhat brief, described a myriad of types of misconduct regarding the representation of IAP claimants. As revealed in the LSA's reported decision, and in our opinion crucially, Mr. Blott's misconduct was much more serious and varied than is the Respondent's in the case before us. Improper conduct engaged in by Mr. Blott, but not the Respondent, included the following:

(a) Mr. Blott encouraged clients to take out 380 loans in the amount of $3.3 million from several companies. These loans had very high and even criminal rates of interest, and he was in a conflict of interest because of his relationship with the companies or their principals. In some instances, portions of the monies loaned and repaid out of IAP awards or settlements appear never to have been provided to the clients;

(b) Mr. Blott instructed the company whose employees met with most of his clients to fill out the IAP applications to focus on "common harms", which sometimes led to discrepancies at the hearing stage and in certain cases led adjudicators to question his clients' credibility;

(c) LSA investigators sampled 25 of the 641 instances in which Mr. Blott personally certified an IAP application, and determined that on average he spent less than eight minutes on this process with each client, in contrast to some of the other lawyers he had contracted, who followed a detailed script that took 35 to 40 minutes to complete;

(d) LSA investigators found in a storage facility 1,159 completed IAP application forms that Mr. Blott's firm had not filed with the IRS Adjudication Secretariat;

(e) In several instances, Mr. Blott did not submit a client's application with the IRS Adjudication Secretariat because he incorrectly concluded that the client did not qualify, thereby depriving eligible clients of compensation;

(f) Mr. Blott told a number of clients that the government had determined that their claims were ineligible, when in fact he had made that determination himself and had not submitted their claims to the IRS Adjudication Secretariat;

(g) An LSA report indicated that 20-30 per cent of Mr. Blott's clients were only prepared for their hearings by a lawyer moments before entering the hearing room;

(h) Some adjudicators were critical of Mr. Blott's firm because clients' testimony at the hearings did not accord with the information in applications, which the LSA concluded was the result of an assembly line approach that sometimes led to errors and oversights in the collection and compilation of client information;

(i) Mr. Blott misled or attempted to mislead the Court Monitor and others investigating his conduct in relation to IAP clients;

(j) In an attempt to reduce the size of his practice in order to respond to concerns raised by the Court Monitor, Mr. Blott sent letters to categories of clients that purported to unilaterally and abruptly terminate the solicitor-client relationship; and

(k) Mr. Blott had a prior professional conduct record involving IAP matters.

[277] Another disciplinary case whose facts somewhat resemble the Respondent's case is *Law Society of BC v. Levesque*, Discipline Digest Summary, 2013: No. 3, which summarizes the Discipline Committee's May 12, 2011 decision regarding a respondent who, by that point, had ceased membership in the Law Society for over a year. The Discipline Committee accepted the respondent's admission to various instances of professional misconduct on the condition that she not apply for reinstatement as a lawyer for five years and provide a medical report in the event that she applied for reinstatement.

[278] As indicated in the Discipline Digest Summary in *Levesque*, as well as a related ASF available on the Law Society's website, Ms. Levesque's practice had involved assisting residential school survivors in making claims under the ADR and IAP processes. Ms. Levesque's admitted professional conduct comprised the following:

(a) She took a ten per cent contingency payment from an IAP client on an award of $196,289, on top of the 15 per cent payable to her from Canada, despite not having a contingency agreement with the client and knowing that she was not entitled to this ten per cent payment;

(b) She took a ten per cent contingency payment from an IAP client on an award of $67,518.21, on top of the 15 per cent payable to her from Canada, despite knowing that the IAP adjudicator was conducting a fee review and that she was therefore not entitled to remove the funds from her trust account. The adjudicator later ruled that she was not entitled to this ten per cent payment. Ms. Levesque repaid the money to her client;

(c) She made submissions to the Chief Adjudicator and Deputy Chief Adjudicator about the above-mentioned IAP adjudicator that were not in keeping with her duty of courtesy and respect to the tribunal;

(d) She arranged a $10,000 loan for an IAP client from a third-party lender purporting to irrevocably assign to the lender $12,500 from the proceeds of a motor vehicle accident claim on which she was representing the client. The client loaned the $10,000 received from the third-party lender to Ms. Levesque. In fact, the client did not have a motor vehicle accident claim and the respondent had knowingly fabricated this information for the purpose of obtaining the loan. Furthermore, she borrowed the $10,000 from her client without advising her client to get independent legal advice;

(e) She arranged for an IAP client to obtain a $10,000.05 loan from a third-party lender for the purpose of paying her legal fees and disbursements, prior to the client receiving an award, despite knowing that: (i) her contingency agreement with the client only permitted her to obtain fees if and when an award was received; and (ii) the invoice provided to the third-party lender was false, because she had not earned the fees or incurred the disbursements described in it. In fact, the false invoice was prepared so that Ms. Levesque could borrow the $10,000.05, which she did without advising her client to get independent legal advice; and

(f) She took over an IAP claim from another lawyer, who provided the client's file on an undertaking to pay the client's disbursements within seven days of receiving the file. Yet she failed to pay these disbursements and kept the file until after the other lawyer complained to the Law Society.

[279] Three aspects of the *Levesque* decision distinguish it from the Respondent's case. First, Ms. Levesque obtained substantial funds from third parties and clients despite knowing she was not entitled to the funds. Second, she knowingly made false statements to obtain advantages for herself. Third, there is no indication that, but for her admissions, the Law Society would have had difficulty in proving the professional misconduct in issue.

[280] Finally, the allegations in the *Keshen* disciplinary matter from Ontario bear some resemblance to the Respondent's case, but as discussed at paragraphs 232-241 above, it ended with the LSO withdrawing the allegations, it seems in large part because of difficulties in proving them by means of a culturally acceptable process.

Summary

[281] Previous cases indicate that professional misconduct involving inadequate client service or altering an affidavit typically results in a fine, although a suspension of up to one month may be justified where the lawyer has also lied to a client (*Simons* and *Kim*) or to the court (*Batchelor*). On the other hand, these cases typically involve only one client and, unlike in the Respondent's case, do not have the added significant component of a lawyer having failed to exercise due diligence in relation to a contractor or employee who worked closely with vulnerable clients, despite clear warnings that were not followed up.

[282] As for the discipline cases involving lawyers doing IAP work, most of these are not at all similar to the Respondent's case. The decisions that bear some similarity are *Blott*, *Levesque* and *Kushen*. However, the professional conduct in *Blott* was much

more serious and extensive. For this reason alone, *Blott* is not of much assistance in determining whether the parties' Rule 4-30 proposal falls within the range of fair and reasonable disciplinary actions. As for *Levesque*, unlike in the Respondent's case, the professional misconduct involved improperly obtaining substantial funds from others, including clients, and significant dishonesty. Finally, *Kushen* is of no assistance because the allegations were not proven and so no disciplinary action was taken.

[283] Critically, the discipline cases discussed above are distinguishable from this case because in none of them is there any indication that, but for the respondent's conditional admission, the regulator would have had trouble proving the misconduct. By contrast, absent the Respondent's conditional admission, the Law Society will have difficulty establishing its case, and so if we reject the parties' Rule 4-30 proposal, there is a good or real possibility that the Law Society will be unable to prove the misconduct. Accordingly, the principle from *Anthony-Cook*, mentioned at paragraphs 227-231 above, which was not engaged in these other discipline cases, is very much applicable in our case.

CONCLUSION

[284] A number of circumstances favour accepting the parties' Rule 4-30 proposal. The Respondent's misconduct was not the result of intentional wrongdoing. There is no evidence to suggest that the affected clients' awards or compensation were reduced as a result. The Respondent has no previous professional conduct record, has apologized for his wrongdoing, and presents a fairly low risk of committing future professional misconduct. He has also been the subject of significant sanctions imposed by the court in relation to some of the same misconduct, although as already explained we do not view this to be a particularly compelling factor.

[285] Furthermore, while we do not view specific deterrence as a significant concern, the proposed resolution provides prospective public protection. The Respondent is prepared to commit not to act as counsel or agent for any Sixties Scoop claimants, alleviating any worry that he might revert to his old ways in that particular context. More significantly, the Rule 4-30 proposal provides that the Respondent will be referred to the Practice Standards Committee for a practice review for files opened after January 1, 2017. If this review identifies any ongoing concerns with the Respondent's practice, the Practice Standards Committee will have all the usual powers to make recommendations and orders under Rules 3-19 and 3-20.

[286] On the other hand, a number of circumstances support the conclusion that the Rule 4-30 proposal should be rejected because it falls outside the range of fair and

reasonable discipline outcomes. The Respondent's professional misconduct was multifaceted, pervasive and impacted many clients. It persisted for a substantial period of time, in some respects long after the court had intervened in an attempt to address deficiencies in his practice. Crucially, the victims of the Respondent's misconduct constituted a class of particularly vulnerable clients who had suffered abuse and trauma as children. They deserved professional legal assistance delivered with the utmost sensitivity and care. But they did not receive it from the Respondent. Instead, the Respondent committed professional misconduct that caused at least some of his clients stress and upset. It also exposed some of them to very serious harm at the hands of Mr. Johnny. And while the Respondent did not commit his misconduct with the intention of increasing his profits, at least some of it had this obvious and inevitable result, which would have left him better off financially but for the intervention of the court.

[287] As our colleague Ms. Snowshoe aptly notes, the Respondent's misconduct takes on added significance given the historical, social and legal context surrounding the representation of IAP claimants. The law had failed these claimants once before, in a very serious way. The intention of the IAP process was to start a journey towards healing and remediation. In these circumstances, the Respondent's misconduct can only be seen as extremely serious. The need for general deterrence looms large. So too does the need to ensure that the public has confidence in the legal profession and the administration of justice more generally.

[288] The factors that favour rejecting the parties' Rule 4-30 proposal are sufficiently compelling that, but for the critical consideration mentioned at paragraphs 289-291 below, we would have agreed with Ms. Snowshoe, for many of the reasons she provides, that suspending the Respondent for only one-month does not come within the fair and reasonable range of acceptable discipline outcomes, given the nature of the misconduct viewed in proper historical, social and legal context. That is, we would have concluded that the proposed one-month suspension does not fairly and reasonably underscore the gravity of the Respondent's misconduct so as to maintain public confidence in the legal profession and to protect the public, and in particular, Indigenous people, by deterring other lawyers from committing similar misconduct in the future.

[289] However, while it is a close call, in our view the principle in *Anthony-Cook*, discussed at paragraphs 227-231 above, tips the balance in favour of accepting the Rule 4-30 proposal. To recap, that principle operates so that, where there is a good or real possibility that rejecting the proposal will mean that the Law Society cannot prove its case, the range of fair and reasonable outcomes may shift downwards. This downward shift is justified because, absent the conditional admission, there is

a good or real possibility that the respondent will face no discipline consequences for his misconduct.

[290] This is the situation here. If we reject the parties' proposal, then under Rule 4-31 this matter will go to a hearing. At that hearing, the Law Society will have difficulty proving the allegations. There is therefore a good or real possibility that our rejecting the proffered Rule 4-30 proposal will result in the Respondent facing no discipline at all for his misconduct. In this respect, we reiterate the points made at paragraphs 239-241 above, including that we have no information as to why the Respondent's former clients decided not to testify, and that, in any event, if they decided not to testify because of systemic defects that can only be remedied through formal changes to the procedural or evidentiary rules, it is highly unlikely that such changes can be identified, approved and implemented prior to a contested hearing taking place on this already very dated Citation.

[291] Accordingly, this is one of those rare instances where a joint proposal for a disciplinary action that would otherwise be unduly lenient nonetheless falls within the range of fair and reasonable outcomes because the Law Society would have difficulty proving the alleged professional misconduct absent the Respondent's conditional admission. We therefore accept the Rule 4-30 proposal advanced by the parties.

COSTS

[292] Rule 5-11(3) provides that a panel must have regard to the tariff in Schedule 4 when calculating the costs payable in respect of a hearing.

[293] The tariff in Schedule 4 provides that costs of a Rule 4-30 hearing must be between $1,000 and $3,500 and should be assessed holistically based on the complexity of the matter, the number and nature of allegations and the time at which respondent elected to make conditional admission relative to scheduled hearing and amount of pre-hearing preparation required.

[294] Rule 5-11(4) permits a hearing panel to depart from the tariff "if, in the judgment of the panel ..., it is reasonable and appropriate to so order."

[295] We agree with the parties that there is no reason to depart from the tariff in this matter, and that costs of $3,500, plus $500 in disbursements, for a total of $4,000, is fair and reasonable.

NON-DISCLOSURE ORDER

[296] At the commencement of the hearing, the Law Society sought an order under Rule 5-8(2) that:

(a) no person may publish or broadcast any information that could identify any of the Respondent's former clients, except for Ivon Johnny, or any other information that is protected by solicitor-client privilege or client confidentiality; and

(b) if any person, other than the Law Society or the Respondent, seeks to obtain a transcript of this hearing, a copy of any exhibit marked during this hearing, or a copy of the Law Society or the Respondent's written submissions, any information that could identify any of the Respondent's former clients, except for Ivon Johnny, and any other information that is protected by solicitor-client privilege or client confidentiality, must be redacted from the document.

[297] The Respondent did not oppose the sought-after order, which we granted prior to any exhibits being filed or any submissions being heard.

SUMMARY OF ORDERS AND INSTRUCTIONS TO THE EXECUTIVE DIRECTOR

[298] We order that:

(a) the Respondent is suspended from the practice of law for one month, commencing on such date as the parties may agree upon provided the suspension is completed no later than six months following the release of this decision;

(b) the Respondent is referred for a practice review under Part 3, Division 2 of the Law Society Rules, limited to files opened after January 1, 2017;

(c) the Respondent must commit in writing to the Discipline Committee that he is not acting and will not act as counsel or agent for any "Sixties Scoop" claimants;

(d) the Respondent must pay costs of $4,000, inclusive of disbursements;

(e) no person may publish or broadcast any information that could identify any of the Respondent's former clients, except for Ivon Johnny, or any

other information that is protected by solicitor-client privilege or client confidentiality; and

(f) if any person, other than the Law Society or the Respondent, seeks to obtain a transcript of this hearing, a copy of any exhibit marked during this hearing, or a copy of the Law Society or the Respondent's written submissions, any information that could identify any of the Respondent's former clients, except for Mr. Johnny, and any other information that is protected by solicitor-client privilege or client confidentiality, must be redacted from the document.

[299] Pursuant to Rule 4-30(5)(a), we instruct the Executive Director to record the Respondent's admissions of professional misconduct on his professional conduct record.

DISSENTING DECISION OF KAREN L. SNOWSHOE

[300] I have carefully reviewed and considered the majority decision of the Hearing Panel.

[301] I agree with the facts set out in the majority decision.

[302] I also agree that the Respondent's admissions of professional misconduct are best characterized as professional misconduct.

[303] I disagree with the majority decision to accept the parties' proposed disciplinary action consisting of:

(a) a one-month suspension;

(b) a practice review under Part 3, Division 2 of the Law Society Rules for his files opened after January 1, 2017;

(c) a written commitment to the Discipline Committee that he is not acting and will not act as counsel or agent for any "Sixties Scoop" claimants; and

(d) costs of $4,000.

[304] I do not find that the proposed disciplinary actions fall within the range of fair and reasonable disciplinary actions, in all the circumstances. They are grossly inadequate.

IS THE PROPOSED DISCIPLINARY ACTION APPROPRIATE?

General principles

[305] In *Law Society of BC v. Lessing*, 2013 LSBC 29, the review panel confirmed that the starting point in determining the appropriate disciplinary action to be imposed under section 38(5) and (7) of the *Legal Profession Act* (the "*Act*") is a consideration of the Law Society's mandate under section 3 of the *Act*. Section 3 provides as follows:

> **Object and duty of society**
>
> It is the object and duty of the society to uphold and protect the public interest in the administration of justice by
>
> (a) preserving and protecting the rights and freedoms of all persons,
>
> (b) ensuring the independence, integrity, honor and competence of lawyers,
>
> (c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,
>
> (d) regulating the practice of law, and
>
> (e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

[306] As noted by the review board in *Law Society of BC v. Nguyen*, 2016 LSBC 21, at para. 36 (citations omitted), the disciplinary action imposed must fulfill the two main purposes of the discipline process:

> The first and overriding purpose is to ensure the public is protected from acts of professional misconduct, and to maintain public confidence in the legal profession generally. The second purpose is to promote the rehabilitation of the respondent lawyer. If there is conflict between these two purposes, the protection of the public and the maintenance of public confidence in the profession must prevail, but in many instances the same disciplinary action will further both purposes.

[307] The review panel in *Lessing* noted that the objects and duties set out in section 3 of the *Act* were reflected in the factors set out in *Law Society of BC v. Ogilvie*, 1999 LSBC 17, [1999] LSDD No. 45 at paragraphs 9 and 10 of the disciplinary action report:

> Given that the primary focus of the *Legal Profession Act* is the protection of the public interest, it follows that the sentencing process must ensure that the public is protected from acts of professional misconduct. Section 38 of the *Act* sets forth the range of penalties, from reprimand to disbarment, from which a panel must choose following a finding of misconduct. In determining an appropriate penalty, the panel must consider what steps might be necessary to ensure that the public is protected, while also taking into account the risk of allowing the respondent to continue in practice.
>
> The criminal sentencing process provides some helpful guidelines, such as: the need for specific deterrence of the respondent, the need for general deterrence, the need for rehabilitation and the need for punishment or denunciation. In the context of a self-regulatory body one must also consider the need to maintain the public's confidence in the ability of the disciplinary process to regulate the conduct of its members. While no list of appropriate factors to be taken into account can be considered exhaustive or appropriate in all cases, the following might be said to be worthy of general consideration in disciplinary dispositions:
>
> (a) the nature and gravity of the conduct proven;
>
> (b) the age and experience of the respondent;
>
> (c) the previous character of the respondent, including details of prior discipline;
>
> (d) the impact upon the victim;
>
> (e) the advantage gained, or to be gained, by the respondent;
>
> (f) the number of times the offending conduct occurred
>
> (g) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;
>
> (h) the possibility of remediating or rehabilitating the respondent;

(i) the impact on the respondent of criminal or other sanctions or penalties;

(j) the impact of the proposed penalty on the respondent;

(k) the need for specific and general deterrence;

(l) the need to ensure the public's confidence in the integrity of the profession; and

(m) the range of penalties imposed in similar cases.

[308] I will also consider the Law Society's consultation with the Tsilhquot'in Nation about this matter.

Social, legal and historical context

[309] When considering this case, it is necessary to do so within the broader social and legal context within which the Respondent's misconduct took place. The Respondent's misconduct did not take place in a typical or common law practice; rather it took place within a discrete body of law involving a complex framework of court orders, rules, guidelines, protocols and directions. This discrete body of law and complex framework arose out of negotiated settlement agreement responding to historical claims of childhood sexual and/or serious physical abuse.

[310] Paragraph 85 of *Law Society of Saskatchewan v. Merchant*, 2020 SKLSS 6, a recent of the Law Society of Saskatchewan Hearing Committee, highlights the primary objective of the Indian Residential School Settlement Agreement (the "Settlement Agreement" or "IRSSA") being the protection of a vulnerable group of people:

> [T]he scheme for administering and monitoring the payment of compensation to residential school survivors under the IRSSA was created and has been vigilantly tracked by the courts. In a series of rulings commenting on the nature and purpose of the scheme, which we outlined in our earlier decision, the courts have repeatedly emphasized the distinctiveness of the regime they have put in place, *and noted that its primary objective is to protect the interests of a vulnerable group of people whose ability to advance their rights under the usual protocols of the justice system has been impaired by historic wrongs.*
>
> [emphasis added]

[311] In *Fontaine v. Canada (Attorney General)*, 2008 BCCA 329, (the *Levesque* Decision) at paragraph 16, Justice Saunders emphasized the *sui generis* nature of the Settlement Agreement:

> The process whereby these complicated, longstanding and culturally significant claims have been settled, and the settlement administered, is *sui generis* … . In my view, this appeal is but another marker of unique proceedings that have led to this landmark resolution.

[312] I will now provide a brief outline of how the Settlement Agreement came to be and why its unique nature was grounded in the protection of vulnerable individuals.

The Indian Residential Schools Settlement Agreement

[313] In terms of how the Settlement Agreement arose and was administered, Justice Brown provides a helpful overview in her decision involving the Respondent: *Fontaine v. Canada (Attorney General)*, 2015 BCSC 717, (the "*Merits* Decision") at paragraphs 7 to 16:

> (a) *Administration of the Settlement Agreement*
>
> For over a century, until the program finally ended in 1996, Aboriginal children were removed from their families and communities and educated in "Indian residential schools" ("IRSs"). The result was generations of Aboriginal youth growing up away from their families, language and culture, and many suffering sexual and other forms of abuse. The Government of Canada ("Canada") has conceded that the IRS program was a misguided policy, and has formally apologized to Canada's First Nations people for its implementation.
>
> Canada has committed to providing compensation to affected individuals pursuant to the terms of the Settlement Agreement. On December 15, 2006, the superior courts in nine provinces and territories (the "Courts") concurrently issued reasons approving a national settlement concluding various class actions related to IRSs throughout Canada (the "Approval Orders").
>
> The Courts subsequently issued orders on March 8, 2007, which incorporated the terms of the Settlement Agreement and otherwise addressed its implementation and administration (the "Implementation Orders"). The Implementation Orders provide additional administrative details regarding the implementation and administration of the IRSSA.

Paragraphs 1 to 6 of the Implementation Orders deal with the appointment and scope of engagement of the Monitor. The Monitor's role is to oversee the administration of the Settlement Agreement and to communicate and report any issues that arise to the Courts.

Paragraphs 20 and 23 as well as Schedule "A" of the Implementation Orders provide for the Courts' ongoing supervision of the Settlement Agreement. Paragraph 20 and Schedule "A" deal with the manner in which applications relating to the implementation of the IRSSA will be dealt with by the Courts. Pursuant to Schedule "A", one of two Administrative Judges will respond to issues that arise in relation to the administration of the Settlement Agreement. These issues are brought before the court through the use of a "Request for Direction". I am currently the Western Administrative Judge.

Paragraph 23 of the Implementation Orders explicitly grants the Courts supervisory authority over the IRSSA, the Approval Orders and the Implementation Orders:

> 23. The Courts shall supervise the implementation of the Agreement and this order and, without limiting the generality of the foregoing, *may issue such further and ancillary orders, from time to time, as are necessary to implement and enforce the provisions of the Agreement, the judgment dated December 15, 2006 and this order*. [emphasis added by Justice Brown]

(b) *Compensation under the Settlement Agreement*

Pursuant to the Settlement Agreement there are two types of compensation available to class members:

a) a "Common Experience Payment" for those who resided at an IRS, as that term is defined in the IRSSA; and

b) compensation by way of the IAP.

As alluded to above, this application arises in relation to the IAP and the representation of claimants within that process.

The IAP is a procedure that allows class members to advance claims for physical or sexual abuse suffered while at any of the IRSs recognized in the IRSSA. Those types of abuse which are compensable within the IAP are labeled "continuing claims" (see Schedule D, Part I at p. 2).

> The purpose of the IAP is to provide a forum for the resolution of the above-noted claims of abuse. The hearings are inquisitorial. The process is designed to minimize further harm to claimants. The adjudicator presiding over a hearing is charged with asking questions to elicit the claimant's testimony. The hearings are meant to be considerate of the claimant's comfort and well-being but they also serve an adjudicative purpose where evidence and credibility are tested. It is strongly recommended that claimants retain legal counsel to advance their claims within the IAP.

[314] The Settlement Agreement was a historical process in Canada's history. It not only took place within the context of Canada apologizing for its role in the creation and operation of over 103 Indian Residential Schools across Canada, it was an act of reconciliation between Indigenous and non-Indigenous Peoples. The spirit and intention of the Settlement Agreement was healing and reconciliation. Its unique body of law and framework was grounded in protecting vulnerable individuals from further harm. This also included protecting vulnerable claimants from harm by their representatives (legal counsel).

[315] Here, I consider the expectations of legal counsel working in the Independent Assessment Process ("IAP").

Expectations of lawyers working in the Independent Assessment Process

[316] The courts, law societies and the Canadian Bar Association have all published guidelines concerning the expectations of legal counsel acting for survivors of Indian Residential Schools. What they all have in common is the need to protect vulnerable claimants from lawyers who intentionally or unintentionally cause further harm and/or exploitation.

[317] In *Fontaine v. Canada (Attorney General)*, 2012 BCSC 839 (the "*Blott* Decision") at paragraphs 153-154, Justice Brown commented on "the *particular vulnerability of IAP claimants as a class*," *and referred to the rules of professional conduct requiring the utmost sensitivity and care* "*when offering legal services to vulnerable persons or those who have suffered a traumatic experience and have not yet had a chance to recover*." [emphasis added]

[318] The Law Society of Upper Canada's special guidelines for dealing with IAP claimants also explicitly acknowledge the unique position and needs of claimants as a class.

[319] Due to the vulnerable nature of Indian Residential Schools survivors and underlying historical nature of wrongs committed by Canada, the architects designed the IAP with the spirit and intention of healing and reconciliation. In recognition of this, the Adjudication Secretariat paid for up to two support persons, as well as an Elder or religious person, to attend a claimant's adjudication hearing. There were also health support options available to claimants prior to and on the day of the hearing. Accommodations for special requirements, such as interpreters, special dietary needs, mobility requirements or health concerns, were also provided by the Adjudication Secretariat. Additionally, the inquisitorial model allowed for limited questioning by lawyers and instead relied on sole adjudicators whose responsibility it was to manage the hearing, elicit witness testimony and decide cases.

[320] In 2012 the IAP Chief Adjudicator began a process of providing guidance around minimal acceptable standards of professional conduct for IAP lawyers, their employees, associates, and agents of a lawyer, including any form filling or other agency connected with a lawyer of from whom the lawyer accepts referrals. This was in response to increasing complaints from claimants about lawyer misconduct.

[321] In 2013 the Chief Adjudicator published a document entitled "Expectations of Legal Counsel." This document outlines minimum standards of lawyer conduct, including making initial contact with claimants, working with claimants, preparation for and attendance at hearings, the assessment of legal fees, the making of financial arrangements, the use of form fillers, changing lawyers and other rules and guidelines. The preamble of this document states:

> Claimants in the Indian Residential School Independent Assessment Process depend on seasoned, competent lawyers to successfully pursue their compensation claims and assist with their healing journey.
>
> The Chief Adjudicator has established these Expectations to provide guidance to claimants on what they can expect from their lawyer, and to lawyers on the appropriate norms of practice in the IAP. These Expectations are intended to supplement the specific rules and guidelines of the IAP as well as Law Society rules and the Canadian Bar Association guidelines for lawyers working on Indian Residential School claims.
>
> For most IAP lawyers, these Expectations will reflect their existing practice. For others, they will provide useful guidance on the minimum acceptable standards of practice in the IAP.

In these Expectations, “lawyer” includes the employees, associates, and agents of a lawyer, including any form-filling or other agency connected with a lawyer from whom the lawyer accepts referrals.

[322] The “Chief Adjudicator’s Expectations of Legal Counsel” is divided into nine topics: competency, initial contact, working with claimants, hearings, legal fees, financial arrangements, form fillers, changing lawyers, and other rules and guidelines. The Expectations outlined in each of these categories reads as follows:

Competency

1. Lawyers must ensure they are competent to act prior to accepting clients for IAP claims.

2. Lawyers must restrict their IAP practice to the number of cases they can competently and responsibly take on at any one time.

Initial contact

3. Upon initial contact with the claimant, lawyers must ensure that:

    a. communications offering legal services to survivors are welcomed and respectful. Lawyers should not initiate contact with individual survivors to solicit them as clients or inquire about whether they were sexually assaulted;

    b. advertising is respectful, and is not false or misleading; and

    c. unconscionable or exploitative means are not used in offering legal services to vulnerable persons, or persons who have suffered a traumatic experience and may not yet have had a chance to recover.

4. Lawyers should not enter into a contingency fee agreement until they have met in person with the client, unless it is not reasonable to do so for reasons such as remote location.

4.1 Contingency fee agreements between a claimant and a lawyer should:

    a. not be completed by third parties;

    b. be the subject of informed discussion between the lawyer and the claimant before signature by the claimant; and

    c. be provided to the claimant once signed.

5. Lawyers should, when receiving a referral or inquiry:

    a. make initial contact to arrange a meeting within 7 days; and

    b. meet with the claimant in their home community, or in a mutually agreeable location, within 60 days of contact or referral.

Working with claimants

6. Lawyers should routinely inform clients, consult with them, obtain instructions, and give them as much control as possible on the direction of their case. When working with claimants, lawyers should:

    a. explain the process to the claimant in a way that is understandable and helps the claimant prepare for the IAP experience;

    b. provide realistic expectations of the length and time required to resolve the claim;

    c. avoid unnecessary delay, particularly for ill or aging claimants;

    d. recognize claimants' special communication needs, including language barriers, cultural expectations, and limited access to telephone and internet service;

    e. return calls from claimants within 72 hours of receipt; and

    f. be prepared to deal with claimants' progressive disclosure of issues related to the claim, and ensure that any new information arising from such disclosure is communicated to the Secretariat and other parties as soon as practicable.

7. Lawyers should facilitate their client's healing process through:

    a. identifying and providing referrals to appropriate community resources, including counselling resources;

    b. referring their client to treatment programs, if appropriate;

    c. recognizing and respecting the need for the client to develop a personal support network;

d. cooperating fully with the Adjudication Secretariat to ensure that a health support worker is present at the hearing and any other time the claimant is asked to give evidence;

e. making every effort to ensure that their client has an opportunity to meet with the health support worker before their hearing;

f. working with their client to ensure that an appropriate future care plan has been developed (where applicable) for presentation at the hearing;

g. considering having support people available at other meetings; and

h. being aware of available and appropriate referrals in times of crisis.

Hearings

8. Lawyers should obtain the claimant's preference for the location of their hearing and communicate it to the Adjudication Secretariat. Lawyers must be prepared to travel to the hearing location determined by the Secretariat in accordance with the Settlement Agreement. The primary factors in the location of hearings are economy and the convenience and comfort of the claimant, not the convenience of counsel.

9. Lawyers must fully prepare claimants for the hearing. In particular, lawyers should ensure that claimants:

    a. understand the nature and purpose of the hearing, and what will be expected of them;

    b. have an opportunity to review (with assistance, where required) pertinent documents such as the application form that may be referred to during the hearing;

    c. have been given the opportunity to request the hearing location of their choice, and are comfortable with the travel and accommodation arrangements made for them;

    d. are aware of their right to have a traditional or religious ceremony before and/or after their hearing, such as a smudge, prayer, drum, or song;

e. are aware of their right to have support persons attend the hearing with them, and that the Adjudication Secretariat will pay for up to two support persons, as well as an elder or religious person;

f. are aware of the health support options available to them, including the opportunity to meet with the health support worker before the hearing;

g. are aware of their right to indicate their non-binding preference of whether a representative of the church organization attend their hearing; and

h. are asked about any special requirements, such as interpreters, special dietary needs, mobility requirements, or health concerns, and are informed that these needs should be communicated to the Adjudication Secretariat in sufficient time for arrangements to be made.

10. Lawyers must advise the parties, the adjudicator, and the Adjudication Secretariat of any health issues or security concerns that might obstruct the safe conduct of the hearing.

10.1 If an interpreter is required, the lawyer must communicate the need for this service and the language and dialect of the claimant so that the Adjudication Secretariat can arrange for a certified interpreter to be available at the hearing. An interpreter who is not arranged by the Adjudication Secretariat may not be permitted to perform this role in a hearing.

Legal Fees

11. Lawyers must:

a. ensure that all fees and disbursements are clearly communicated to the claimant in a way that is understandable;

b. explain the unique rules that govern legal fees in the IAP, including the government's contribution toward legal fees/disbursements, the right to have legal fees reviewed by an adjudicator, and the claimant's responsibility for GST, PST, or HST as applicable;

c. release compensation funds to claimants immediately upon receipt, other than legal fees specified in a contingency fee agreement which

must remain in a lawyer's trust account until legal fee review decision is issued;

d. pay any remaining compensation funds over and above the approved fees to the claimant immediately upon receipt of the legal fee review decision (or the decision of a reviewing adjudicator where a review has been sought pursuant to paragraph 19 of the Implementation Orders); and

e. withdraw fees from the trust account only once authorized by a legal fee review decision (or the decision of a reviewing adjudicator where a review has been sought pursuant to paragraph 19 of the Implementation Orders).

12. Lawyers must not:

a. charge any disbursements to a claimant. The IAP provides that Canada will pay all reasonable and necessary disbursements upon resolution of the claim, and that adjudicators will resolve any disputes about disbursements; or

b. withhold any part of the compensation amount payable to the claimant for any purpose, other than legal fees approved by the adjudicator. The lawyer must not deduct any third party assignments, cash advances, directions to pay, disbursements, costs associated with the management of the file, or anything else, from the amount payable to the claimant.

Financial arrangements

13. Lawyers must not make, recommend, or participate in arrangements:

a. to advance or loan compensation funds to claimants;

b. to charge the claimant directly for services normally provided by a lawyer, including but not limited to form-filling and document collection; or

c. to assign or direct any part of a claimant's IAP compensation to a third party.

Form fillers

13.1 Lawyers must personally review the application form with the claimant and certify the accuracy of its contents. This applies whether or not the application form was prepared by the lawyer, office staff, or a third party, including a form filler.

13.2 If a form filler or form filling agency has a fee agreement with the claimant or makes a claim against the lawyer or the claimant, the lawyer must pay any such claim and must notify the claimant immediately in writing. This applies whether or not the agency or form filler is employed by, on contract with, or a source of referrals for the lawyer.

Changing lawyers

14. Lawyers must respect their clients' right to change counsel, and must assist in the orderly transition of the file to new counsel. Legal fees are only collectible at the successful conclusion of the matter.

14.1 Lawyers must not:

a. contact or harass a claimant who has exercised the right to change lawyers;

b. attempt to dissuade a claimant from exercising their right to change lawyers;

c. state or imply that a client will have to pay duplicate or higher fees for having changed to a new lawyer.

14.2 A lawyer who takes over a file from another lawyer must protect the claimant from any claims for legal fees, disbursements, taxes, or otherwise by any previous lawyer. Lawyers must not withdraw legal fees from their trust account until those claims have been resolved.

Other rules and guidelines

15. In addition to these Expectations, lawyers must comply with rules and guidelines issued by the Chief Adjudicator, the applicable Law Society, and the Canadian Bar Association's guidelines for lawyers working on Indian Residential Schools claims.

[323] As the preamble states, for most IAP lawyers, the Expectations reflected their existing practice. Most IAP lawyers understood the spirit and intention behind the IAP: healing and reconciliation. Most lawyers also understood the inherent vulnerability of IAP claimants and their need for the utmost care and protection from being re-traumatized and/or re-victimized. Some lawyers, however, did the opposite by exposing their clients to various types of harms. It is within this context that the Respondent's case arises and context within which the IAP Chief Adjudicator saw it necessary to publish a list of Expectations.

Lawyer misconduct in the IAP

[324] The Respondent was fifth in line as the subject of investigation by the Adjudication Secretariat, the courts and in some cases, law societies. The seven investigations involved: Jacqueline B. Levesque, Howard Tennenhouse, David Blott, the *Manitoba Form Filler* case, the Respondent Steven Bronstein, Douglas J. Keshen, and Tony Merchant. I will now provide a brief outline of each investigation in order to provide context within which the Respondent's case arises.

[325] Jacqueline B. Levesque was an IAP lawyer who was the subject of both court and law society investigations arising in 2010. Ms. Levesque admitted to professional misconduct and was not considered for reinstatement as a lawyer for at least five years. Ms. Levesque withdrew from practice in January 2010, after a Law Society of BC investigation revealed that she had engaged in improper conduct including paying herself funds on two files on a contingency fee basis when there was no written contingency fee agreement with the client, making unprofessional and rude statements about an adjudicator of Indian Residential School claims, and breaching an undertaking by failing to pay money owed to another lawyer in a timely way. Ms. Levesque also used false information in the securing of loans from two lending firms on behalf of a client and then improperly borrowed that money from her client.

[326] In 2012, Howard Lorne Tennenhouse admitted seven counts of professional misconduct relating to over-charging Indian Residential School clients $960,104.20. The Law Society of Manitoba Hearing Panel accepted the joint recommendation of the Law Society and Mr. Tennenhouse's counsel that the appropriate disciplinary action included disbarment and an order to pay costs of $57,512.00.

[327] The third investigation into lawyer misconduct in the IAP involves David James Blott. Issues in this case involved the quality of legal representation provided to clients, the facilitation of loans with third parties, and the use of a third-party

agency to recruit clients and complete application forms. See the *Blott* Decision. After a hearing in April 2012, Justice Brown made an order prohibiting Blott & Company, Mr. Blott, and several others from dealing with or representing IAP claimants, and she directed the process for an orderly wind-down of the firm's IAP practice.

[328] Mr. Blott also faced Law Society of Alberta discipline proceedings in which it was alleged that he failed to serve his clients, improperly facilitated and encouraged loans to his clients, acted while in a conflict of interest that impacted his professional judgment and professional obligations, brought the profession into disrepute, paid referral fees and showed disregard for the rules of the Law Society and the Code of Conduct. On June 13, 2014, a Resignation Committee of the Benchers of the Law Society of Alberta granted the application of Mr. Blott to resign pursuant to s.61 of the *Legal Profession Act*, RSA 2000, c.L-8. Mr. Blott is therefore disbarred. Mr. Blott was a suspended member of the Law Society at the time of his resignation.

[329] The fourth case of alleged misconduct in the IAP involves form fillers in Manitoba. On November 8, 2012, the Chief Adjudicator of the IAP filed a Request for Direction to the supervising court, out of concern for activities of counsel and other individuals or entities ("Form Fillers or "Form Filling Agencies") who have assisted claimants in Manitoba in the processing of IAP claims. It was alleged that certain Form Fillers, often in conjunction with claimant's counsel, have exercised inappropriate – sometimes coercive – tactics in collecting form filling fees charged to IAP claimants. It was further alleged that such fees are, in any event, illegal, as legal fees (in the sense of lawyers' fees) are the only type of fee permitted to be charged to claimants in the processing of IAP claims under the Settlement Agreement.

[330] In that case, referred to as the "*Manitoba Form Fillers*" case, *Fontaine et al. v. Canada (Attorney General) et al.*, 2014 MBQB 113, Justice Shulman concluded at para. 90, that any service agreements between Form Fillers and claimants that purport to be assignments or directions to pay are void. She further concluded that any such agreements providing for compensation on a contingency fee basis are also void. Finally, Justice Shulman found that all Form Filler agreements amounting to contracts for entities not regulated by a provincial or territorial law society to provide legal services are contrary to public policy and are void. Service agreements between claimants and Form Fillers may also be voidable at the instance of the claimants if such agreements are unconscionable, as were those in this case.

[331] As indicated above, I highlight Justice Brown's reference to the inherent vulnerability of claimants, specifically in their dealings with legal counsel and the rules of professional conduct requiring the utmost sensitivity and care when offering legal services to vulnerable person or those who have suffered a traumatic experience and have not yet had a chance to recover. (*Blott* Decision at paragraphs 153-154)

[332] In the *Manitoba Form Fillers* case at paragraphs 71-73, Justice Shulman also referenced the use of Form Fillers in relation to the unauthorized practice of law at paras. 71 through 73:

> Prohibitions against the unauthorized practice of law for the protection of the public, and are even more important in the context of the Settlement Agreement, where claimants are recovering from traumatic experiences and are more likely to be in a vulnerable position as a result.
>
> The Law Society of Upper Canada has created "Guidelines for Lawyers Acting in Cases Involving Claims of Aboriginal Residential School Abuse", which reflect the unique and sensitive situation of representing claimants in the IAP. The Adjudication Secretariat has also published a document entitled "Expectations of Legal Practice in the IAP", outlining the appropriate conduct of lawyers in the particular context of the IAP.
>
> The guidelines and rules specific to representing claimants under the Settlement Agreement, in conjunction with the rules and laws governing the practice of law generally, suggest that courts should be especially concerned with Form Fillers engaging in unauthorized practice in the representation of claimants in the IAP. I find that assisting claimants with their applications under the Settlement Agreement and giving them advice on the IAP is the role of claimants' counsel. Consequently, agreements whereby Form Fillers purport to provide such services are contracts to engage in the unauthorized practice of law. To the extent that the services promised by Form Fillers are properly characterized as legal services, such agreements are contrary to public policy and *void ab initio*.

[333] The Hearing Committee of *the Law Society of Saskatchewan* stated in *Merchant* at paragraph 38 that, "the whole premise of the system of adjudication and court supervision that was put in place under the IRSSA was that claimants are a vulnerable group in need of special protection."

[334] In 2012, the IRSSA court-monitor initiated an investigation into the Respondent Steven Bronstein relating to alleged harassment of claimants by a form filler

employed by Bronstein's law firm, the provision or facilitation of loans to claimants, as well as the quality of legal services provided. In *Fontaine v. Canada (Attorney General)*, 2016 ONSC 5359 (the "*Keshen* Decision"), Justice Perell provides an overview of the Court Monitor's involvement at paras. 24 through 27:

> Around the same time as Justice Brown was making an order in the Blott Affair, the Monitor brought an RFD with respect to the conduct of Mr. Stephen Bronstein and his law firm, Bronstein & Company. This law firm had represented over 1,400 individuals making claims under the IAP. The Bronstein Affair RFD also concerned the conduct of Ivon Johnny, a form filler employed by the firm. The Monitor requested, by way of an RFD, that the court order an investigation of Bronstein, and Justice Brown did order an investigation.
>
> In the Bronstein Affair RFD, in January 2013, Justice Brown enjoined Mr. Johnny from any involvement with the IRSSA, and on February 22, 2013, Bronstein, the Monitor, and Canada all agreed to a consent order under which Mr. Bronstein agreed to subject the firm's IAP practice to a review by the Monitor.
>
> Under the consent order, Mr. Bronstein and his firm agreed to provide the Monitor with disclosure about its IAP practice. Mr. Bronstein agreed to attend an interview with the Monitor. The firm also consented to being required to retain a practice advisor. Mr. Bronstein was to meet with this advisor to establish a practice plan to complete the remaining IAP claims in a manner consistent with best practices for handling IRS claims.
>
> The consent order was complied with and after disclosure and the interviews, the Monitor identified several issues with Bronstein's IAP practice that still concerned it. The Monitor brought another RFD about these matters, which RFD led to a sequence of hearings in 2014.

[335] On May 1, 2015, in the *Merits* Decision, Justice Brown held that Bronstein's conduct fell below the standard expected of legal professionals representing clients in the IAP, but that Bronstein's conduct does not require that he be removed from participation in the IAP. The court required Bronstein to continue participating under supervision, and to pay the reasonable costs of the Monitor's investigation.

[336] The sixth investigation involves lawyer Douglas J. Keshen and allegations around the use of form fillers, providing some clients with interest-free advances and assisting a few clients in obtaining advances from third-party lenders pursuant to

directions to pay. The allegations were unproven. Of note are Justice Perell's comments about the context within which Mr. Keshen's investigation arose.

[337] In his decision around costs of June 20, 2016, the *Keshen* Decision, Justice Perell found that Douglas J. Keshen and his former law firm, Keshen & Major Barristers and Solicitors, ("Keshen") had been "caught up in one of the after-tragedies of the Indian Residential Schools Settlement Agreement." Justice Perell went on to say, "It is an appalling truth, but some lawyers hired to assist the survivors of the Indian Residential Schools disgraced themselves and the legal profession by further victimizing their Aboriginal clients in a variety of ways." Justice Perell then went on to outline the *Blott* Affair and the *Bronstein* Affairs as providing context for his analysis of the *Keshen* case.

[338] The *Keshen* case was significant in a number of ways including being the cause of the Law Society of Ontario initiating a Review Panel to examine the Law Society's regulatory and hearing process in relation to Indigenous persons, complaints and issues. On May 24, 2018, the Review Panel published its report in which it outlined the following nine recommendations:

GENERAL

Recommendation 1

The Law Society:

1. must make an organizational commitment to establish and maintain a culturally competent regulatory process; and

2. should consider establishing a new office to support the work that the Law Society undertakes pursuant to its mandate when that work involves Indigenous communities and to create a culturally safe environment.

COMMUNICATION AND ENGAGEMENT

Recommendation 2

Where complainants are members of Indigenous communities:

1. information about the Law Society, its regulatory process and the role of complainants must be available and communicated in an understandable and culturally appropriate way; and

2. depending upon the stage of the complaint matter at the Law Society, communications should include discussion of the issue of remedy from the complainant's perspective (using the complainant vs prosecutorial lens), including the concept of restoration and how that intersects with the Law Society's regulatory mandate.

Recommendation 3

The Law Society must do more to engage with Indigenous people in their community to:

1. express the Law Society's commitment to create a trusting relationship, to enable the Law Society to meet its regulatory mandate in ways that respect the culture of the community;

2. explore opportunities to partner and build mutually respectful relationships with individuals, organizations and institutions to help the Law Society advance its commitment, and build trust in the community; and

3. explore ways to increase access to justice, including considering the need to develop a cultural liaison with the public.

SPECIFIC PROFESSIONAL REGULATION FUNCTIONS

Recommendation 4

The Professional Regulation Division should:

1. be appropriately resourced to ensure timely, efficient and effective operation of regulatory functions;

2. build its capacity to develop formal policies and procedures that flow from decisions of the Tribunal (following all levels of appeal) that raise important regulatory policy issues;

3. formulate a plan for the investigation of "major cases" to assist in the management of investigations;

4. support prosecutors in developing and refining the skills required to manage and prosecute major cases; and

5. ensure all staff have available the necessary mental and emotional supports when working with complainants that are survivors of trauma. This may include but not be limited to the Members Assistance Program.

Recommendation 5

The Law Society should:

1. take the necessary steps to ensure that anyone who investigates complaints at the Law Society involving Indigenous licensees or complainants, in addition to required investigatory experience and skills, is culturally competent to perform these investigations and has the necessary resources available to engage appropriately with members of the Indigenous communities in this process; and

2. explore ways to incorporate principles of Indigenous Legal Systems into

    a. dispute resolution resources available to Law Society investigators, which may be applied in appropriate cases, and

    b. prosecutorial and dispute resolution resources available to Law Society prosecutors, which may be applied in appropriate cases.

Recommendation 6

The Professional Regulation Division should create the required permanent internal structures and supports to appropriately manage investigations and prosecutions of licensees who are the subject of complaints from Indigenous people and of Indigenous licensees. These structures and supports should extend to other divisions at the Law Society to the extent that processes related to investigations and/or prosecutions intersect with them.

Recommendation 7

The Law Society Tribunal and the Tribunal Committee should explore, with the assistance of Indigenous experts, how to incorporate Indigenous Law principles within its adjudicative and dispute resolution processes and apply them in the appropriate case.

Recommendation 8

Law Society Tribunal adjudicators should receive ongoing training in the history of Indigenous Law in Canada, Indigenous methods of dispute resolution, Indigenous ceremony and protocols, the Independent Assessment Process and other relevant related topics.

OTHER LAW SOCIETY FUNCTIONS

Recommendation 9 – Practice Supports

> The Law Society should ensure that guidance and education is available for lawyers and paralegals who serve Indigenous clients who have experienced trauma arising from the Indian Residential School experience, the Sixties Scoop or the Day Schools settlement to assist in their competent representation of these individuals.

[339] The full Executive Summary, including recommendations and discussion, is contained in Appendix B of this decision.

[340] The seventh investigation involves Evatt Anthony Merchant (Tony Merchant). In October 2016, a complaint was filed with the Law Society of Saskatchewan alleging that Mr. Merchant was guilty of inappropriate conduct involving a "threatening" letter pressuring a residential school survivor to use her settlement money to pay unrelated legal bills. A hearing was held on July 12, 2019, and by way of decision dated September 26, 2019, the Law Society found Mr. Merchant guilty. By way of decision on September 28, 2020, the Law Society of Saskatchewan issued Mr. Merchant an eight-month suspension. The Law Society committee that delivered the penalty said Mr. Merchant's knowing the woman to be a member of a vulnerable group was an aggravating factor.

[341] Of additional assistance in terms of understanding the context of expectations of IAP counsel across Canada is the Law Society of Nunavut's Notice to the Profession issued in February 2013. This Notice speaks to unauthorized practice of law in Nunavut and the duties and responsibilities of lawyers acting on IAP claims. The Notice highlights the vulnerable nature of IAP claimants and the importance of lawyers demonstrating certain professional competencies. The Notice references concern about the behaviour of certain lawyers towards their clients. The intention of the Notice was to send a clear message about practising law in Nunavut and to set out the Law Society's politic and position with respect to this matter. The Notice to the Profession is contained in Appendix A.

[342] I will now provide an analysis of the *Ogilvie* factors.

Nature, gravity and consequences of the misconduct

[343] I agree with the majority decision that the nature, gravity and consequences of the Respondent's misconduct is serious. I also agree that the misconduct involved some of the most highly vulnerable members of society.

Failure to exercise due diligence regarding Mr. Johnny

[344] The first misconduct involves failure to exercise due diligence regarding Ivon Johnny. Specifically, in or around 2008, the Respondent failed to properly investigate or otherwise exercise due diligence regarding the background, qualifications and suitability of Mr. Johnny prior to employing him to work with and have unsupervised access to the Respondent's clients.

[345] Further, between November 2009 and August 2012, the Respondent failed to adequately address, respond to or investigate complaints made about his employee, Ivan Johnny, including that Mr. Johnny demanded payment of money from clients without justification, demands that were sometimes accompanied with threats.

[346] In considering this issue, the majority states, "The Respondent's use of a form filler to assist clients in completing an IAP application form was not in itself inappropriate."

[347] While the use of a "form filler" may not in itself be inappropriate, the Respondent's employment of Mr. Johnny as a form filler and relying on Mr. Johnny as a primary contact in the communities is concerning on many levels.

[348] First, it deviates from the norms of practice for IAP lawyers and their staff. As mentioned above, there is widespread judicial recognition of the IAP as a discrete area of practice involving inherent vulnerability of claimants. The unique nature of these claims highlights the duty of legal counsel to provide the utmost sensitivity and care in order to prevent claimants being exposed to further harm and/or re-victimization.

[349] Even before the IAP Chief Adjudicator published Expectations for IAP lawyers and their staff, most lawyers representing survivors of Indian Residential Schools understood the highly sensitive nature of the claims and the need for a trauma-informed practice, which included taking the time (often numerous meetings) in order to develop a rapport of trust and care. Most counsel knew that the better prepared the claimant was and the further along they were in their healing journey, the less risk there was of re-traumatization and/or re-victimization.

[350] Due to the trauma that flowed from childhood sexual and/or serious physical abuse, claimants were offered health support, prior to and on the day of their hearing. Recalling traumatic and painful events in front of an adjudicator was a daunting prospect, which often could be lessened with the support of competent counsel.

[351] Counsel played an integral role in preparing the claimant to testify before an IAP adjudicator. Most lawyers took great care in the handling of IAP claimants and their files. Lawyers understood the need to develop a positive and trusting relationship with their client in order to (1) capture the claimant's experiences as accurately and fully as possible in the IAP application; and (2) ultimately prepare their clients to testify about the most intimate experiences at a hearing.

[352] Here, I note the importance of an accurately completed IAP application. If an adjudicator found inconsistencies between a claimant's application and their verbal testimony, this could impact the claimant's credibility and reliability, the basis for proving a claim.

[353] In terms of the lack of trust many claimants held prior to entering the IAP, the *Guide for Lawyers Working for Indigenous Peoples*, at page 22, speaks to the issue of Indian Residential School survivors' ongoing mistrust of the legal system, and the professionals who work within it:

> As the law has developed in Canada, many Indigenous peoples have grown to distrust Canadian legal systems and the professionals working within them. From Indigenous perspectives, the law was only designed and meant to be enforced against Indigenous peoples, and never designed or meant to serve them. One need only review the disproportionately high levels of Indigenous children and families involved with Child and Family Services, or the overrepresentation of Indigenous peoples in the criminal justice system and in our jails and prisons, as examples of the consequences of a lack of cultural competency. The history and impact of attempts at colonialization, the dispossession of land and forced relocation, including the Indian Residential School System, form a demonstrable basis for the distrust.

[354] In addition to a lack of trust in the legal system, and those working in it, claimants often feared being re-victimized and/or re-traumatized. Most held deep seated shame about the childhood abuse that they suffered. And for those who reported the abuse, most were met with disbelief and were further punished for their reports. The effect of not being believed often resulted in further trauma, further shame and a fear of ever disclosing the abuse again.

[355] It is within this context that the Respondent's case squarely sits. Rather than providing the utmost sensitivity and care to vulnerable clients (and offering them protection from harm), the Respondent did the opposite. The Respondent not only exposed his clients to harm through the hiring of (and unsupervised access to) Mr.

Johnny, the Respondent's office provided little to no assistance when clients phoned his office to report harassment and/or threats of extortion by Mr. Johnny.

[356] The Respondent's misconduct involving Mr. Johnny was egregious. The consequences of the misconduct resulted in some of the most highly vulnerable members of society being subjected to continued harm and exploitation, in a process whose aim was to provide the utmost sensitivity, care, protection from harm, healing and reconciliation.

[357] And while I appreciate the Respondent may have a sincerely-held belief that his misconduct was unintentional, I think that, in all of the circumstances, his misconduct is better characterized as wilful blindness. In coming to this conclusion, I have considered what would reasonably be expected of a competent lawyer in a similar situation. In the context of a highly specialized area of law involving inherently vulnerable clients, it is reasonable to expect that the Respondent should have been aware that his law practice was putting vulnerable clients at risk of harm through the hiring of Mr. Johnny and lack of ongoing supervision. And given that the Respondent had been immersed in the highly specialized area of law since 1999, he would have had ample opportunities to digest the message of the courts, the Canadian Bar Association and various law societies around the professional obligations of lawyers representing a class of vulnerable claimants.

Inadequate client service

[358] The second misconduct involves inadequate client service. Between March 2007 and January 2014, in the course of representing clients in relation to Indian Residential School claims, the Respondent failed to serve his clients in a conscientious, diligent, and efficient manner so as to provide the quality of service at least equal to that which would be expected of a competent lawyer in a similar situation. Specifically, the Citation reads in part:

(a) The Respondent failed to properly document important communications regarding legal matters, including contact and attempted contact with or from clients, and failed to direct staff to do the same

(b) The Respondent failed to maintain office staff and facilities adequate to his practice;

(c) The Respondent failed to answer communications that required a reply within a reasonable time;

(d) In relation to one or more of the 17 clients identified in Appendix A to the Citation, the Respondent improperly delegated duties to non-lawyers by allowing them to do one or more of the following:

(i) explain the Contingency Fee Agreement to clients, expressly or impliedly advise the clients to sign, and take the clients' signature on the same.

[359] The Respondent's failure to provide adequate client service must also be considered in the context of the unique nature of a law practice comprising particularly vulnerable individuals where the rules of professional conduct require the utmost sensitivity and care when offering legal services.

[360] In terms of the Respondent's failure to maintain office staff and facilities adequate to his practice, the Respondent failed to provide the quality of service at least equal to that which would be expected of a competent lawyer in a similar situation. As noted above, most IAP lawyers ensured they had adequate office staff and facilities to ensure their clients received the necessary support, attention and care throughout the adjudication process (pre-hearing, hearing, and post-hearing).

[361] In terms of the Respondent's failure to answer communications that required a reply within a reasonable time, again, we must consider the context. The Respondent's practice primarily comprised vulnerable individuals who required the utmost sensitivity and care in the handling of their cases. In this regard, the Respondent fell well below the competency expected of counsel handling similar cases. Most counsel in the IAP understood the necessity of creating a practice where clients felt a positive rapport of trust with their counsel and staff.

[362] In this case, the Respondent created a practice where neither he nor his staff responded to a pattern of client calls between November 2009 and February 2012, reporting threats of extortion at the hands of Mr. Johnny.

[363] The third issue of inadequate client service involves the Respondent improperly delegating duties to a non-lawyer by allowing them to explain the contingency fee agreement to clients, expressly or impliedly advise the clients to sign, and take the clients' signature on the same. This is concerning on many levels. First, the Respondent was in essence outsourcing his role, which was to meet with claimants, conduct an interview, complete the application, read the completed application to the claimant and have the claimant attest to the accuracy of the application. As indicated below, the consequences of an inaccurate IAP application could impede the success of a claim if issues of inconsistency arose between the information

contained in the claimant's IAP application and their testimony before an adjudicator.

[364] The Respondent's outsourcing of his duties also raises the issue of unauthorized practice. In the *Manitoba Form Fillers* case, Justice Shulman stated at paragraph 71:

> Prohibitions against the unauthorized practice of law are for the protection of the public, and are even more important in the context of the Settlement Agreement, where claimants are recovering from traumatic experiences and are more likely to be in a vulnerable position as a result.

[365] In terms of the Respondent's inadequate client care, the Respondent ultimately failed to serve his clients in a conscientious, diligent and efficient manner so as to provide the quality of service at least equal to that which would be expected of a competent lawyer in a similar situation. And although there were no witnesses in this case, I can infer that the Respondent's misconduct has contributed to further harm to his clients and an increased level of distrust of the legal system and the professionals working in it.

Improper use of declarations

[366] The third misconduct involves the Respondent instructing his staff to attach his clients' signed Declarations to subsequently created IAP application forms. I agree with the majority characterizing this as comparable to revising an affidavit after it has been sworn and reusing the original signature page instead of swearing or affirming the revised affidavit.

[367] Between approximately September 2008 and October 2011, in the course of representing some or all of the 17 clients identified in Appendix A to the Citation, the Respondent appended, or directed his staff to append, declarations to Independent Assessment Process applications that stated, "Where someone helped me with the Application, that person has read to me everything they wrote and I confirm it is true" and that were signed by the clients prior to the applications being completed. The applications had been prepared by him or his staff and not read to the client.

[368] The importance of a properly executed IAP application form is integral to the success of a claim. It requires a lawyer to interview a claimant, complete the application and then, after reading everything to the claimant, having the claimant sign attesting to the truth of what the application contains. As indicated above, if there is inconsistency between the signed application and what the claimant

testifies to, this could undermine the claim by raising issues of credibility and reliability. In other words, an adjudicator could find that the claimant is neither credible nor reliable based on the inconsistency between the information contained in the application and the claimant's testimony at hearing.

[369] During final submissions, this was often the argument that Canada's representatives would put forth for a claim to be denied. The final consequence of a denied claim would mean no monetary compensation for the claimant and no fees for their counsel. The non-monetary consequences of a denied claim could be devastating for a claimant – there could be confusion about why their IAP application was inaccurate and there could be further feelings of shame and mistrust of the legal system.

Age and experience

[370] The Respondent was called to the BC Bar in 1998. In 1999, the Respondent began his practice of representing Indian Residential School survivors.

[371] While the Respondent was a relatively new call when he started working with IRS clients, he focused his practice on IRS claims for approximately eight years before the IAP Chief Adjudicator and court-monitor detected issues with the Respondent's practice.

[372] Again, as indicated above, starting in 1999 the Respondent had been immersed in a highly specialized law practice that involved highly vulnerable claimants. With his level of experience, the Respondent should have been aware of his professional obligations to provide the utmost care and protection from further harm including re-victimization.

Character and professional conduct record of the respondent

[373] The Respondent has no professional conduct record, which is a mitigating factor.

[374] In terms of character, acknowledgement of professional misconduct is generally favourable. In this case, I attach little weight to the Respondent's acknowledgement of his misconduct. This is due to the acknowledgment only arising in the context of proposed disciplinary actions, which are highly lenient and will have little impact on the Respondent.

[375] In assessing the Respondent's character, I have considered that he forms part of a group of seven court-led investigations across Canada involving IAP claimants being put at risk of harm. These investigations all form part of what Justice Perell

described as, "the after-tragedies of the Indian Residential Schools Settlement Agreement," at paragraph 1 of the *Keshen* Decision. Justice Perell went on to say, "It is an appalling truth that some lawyers hired to assist the survivors of the Indian Residential Schools disgraced themselves and the legal profession by further victimizing their Aboriginal clients in a variety of ways." That the Respondent remains part of a group that leaves a black stain on a process whose aim was healing and reconciliation is not indicative of good character.

[376] In assessing character I also consider Justice Brown's comments about the Respondent and his inability to remediate his law practice without significant court intervention, the *Merits* Decision. At paragraph 127, Justice Brown further stated:

> … Bronstein established a practice that exposed its clients to harm. Further, when he was made aware of this harm, Mr. Bronstein failed to implement adequate measures in response. Finally, Bronstein only moved to revise his practice in the course of 2 years of investigation and several applications: that is, the record suggests that without the Monitor's investigation and this court's involvement, Bronstein's practice would still fail to meet IAP best practices and its clients would still be at risk.

[377] Finally, Justice Brown spoke to there being no exoneration of the Respondent's firm. At paragraph 5, Justice Brown stated, "… there is no exoneration of Bronstein: the evidence convinces me that were it not for the intervention of the Monitor and this court, Bronstein would not have reached these acceptable standards."

Impact upon the victim

[378] In this case, we do not have the benefit of the victims' (the Respondent's clients) testimony. One can draw the inference though, that the impact of the Respondent's misconduct was not favourable. First, the Respondent's clients were highly vulnerable. Second, the Respondent, through his practice and conduct, created a situation where his clients had unsupervised access to an employee with a violent past and about whom a number of clients complained of extortion. Third, when his clients contacted the Respondent's office to report extortion and threats by Mr. Johnny, the Respondent failed to properly investigate the complaints, thereby contributing to his clients' harm.

[379] The Respondent's misconduct put his clients at risk of re-victimization and/or re-traumatization. The misconduct also likely added to mistrust in the legal system and the professionals who work within it. The following passage by the

Honourable Murray Sinclair, speaks to the issue of Indian Residential Schools survivors' mistrust:

> Thousands upon thousands of Indigenous children were wrongfully imprisoned in institutions in this country without having been convicted of anything beyond being Aboriginal. And that raises the very same issues about one's sense of justice and sense of injustice about our legal system and those who have been wrongly convicted feel about our system and the lack of trust that … we have in the exercise of discretion, the lack of trust that we have in police officers, in defence counsel, the legal aid system, judges, the courts, it's the very same comments and the very same feelings that we have been hearing from the survivors of residential schools to this point in time.[1]

[380] In the end, the Respondent's misconduct most likely caused further harm to individuals who were highly vulnerable, many of whom had not yet recovered from traumatic childhood abuse.

Advantage gained

[381] Through his professional misconduct, the Respondent gained financial advantage at the expense of over 600 vulnerable clients. The Respondent did so by charging clients contingency fees of up to 30 per cent for claims that involved low risk (of not recovering compensation). The financial gain was compounded by failing to maintain adequate staffing and also outsourcing part of his work to form fillers.

Number of times the offending conduct occurred

[382] The Respondent represented over 600 Indian Residential School survivors. During its investigation, the Law Society reviewed a sample of 30 files involving the IAP clients and found 17 client matters where misconduct was at play. During the Respondent's hearing, the Panel asked the Law Society's counsel whether he was confident that there were no more clients in respect of whom the Respondent could have been cited for misconduct. In other words, how can we be sure the 17 clients do not represent the "tip of the iceberg", given the Law Society's limited investigation? In response, Law Society counsel indicated he was certain that the number did not go beyond the 17 clients cited.

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[1] Murray Sinclair, "Not One of Us: Wrongly Accused and the Role of Bias" (Presentation delivered at Innocence Canada Conference Back to the Future: Looking Back to the Past to Change the Future 23 November 2013) online: vimeo.com/96210810

[383] The day after the hearing, Law Society counsel wrote to the Hearing Panel, by way of the Hearing Administrator, indicating that the statement he made about "being certain" the misconduct was limited to 17 clients, was inaccurate. Counsel advised that he could not be certain as the Law Society limited its investigation to a sampling of 30 of the Respondent's files.

[384] Based on Law Society limiting its sampling to only 30 of the Respondent's file during investigation, we know that the Respondent's professional misconduct involved a limited number of cases. We do not, however, know the extent of which the Respondent's clients were impacted by his misconduct. Given that the Respondent had over 600 clients and given that the investigation was limited, we cannot know the number of times the offending conduct occurred, unless the Law Society were to broaden the scope of its investigation.

Acknowledgement of the misconduct

[385] The majority states that a significant factor in assessing whether the proposed disciplinary action falls within the range of fair and reasonable outcomes is that the Respondent is prepared to make a conditional admission of the misconduct.

[386] In this case, I find the Respondent's acknowledgement of the misconduct to be a neutral factor. This is due to the Respondent's acknowledgment only arising within the context of conditional admissions to proposed disciplinary actions, which are highly lenient (and will have little-to-no negative impact).

Prospects of remediation or rehabilitation

[387] The purpose of professional discipline is not punitive. Disciplinary sanctions are largely intended to be corrective with the objective of bringing out change in behaviour, in order to induce the individual who has been found guilty of misconduct to examine their behaviour and to change it to align better with public expectations of professional people.

[388] I have considered all the circumstances in this case and find the Respondent's prospects of rehabilitation to be low-to-moderate. First, after the Respondent's practice was put under the direction of the Court-Monitor and a practice advisor in 2014, the Court Monitor remained unsatisfied with the Respondent's revision of his practice.

[389] Second, it was only after the Court intervened a second time that the Respondent took measures to revise his practice. Again, I reference Justice Brown's finding that, were it not for the intervention of the monitor and the court, the Respondent

would still have failed to meet (IAP) best practices and his clients would still be at risk.

[390] Finally, I note that Justice Brown found that the Respondent's revising his practice did not mean he was exonerated.

Collateral sanctions or penalties

[391] The only other collateral sanctions or penalties the Respondent has faced is a court order to pay costs of $1,250,000. I consider these costs as a neutral factor in this case. The costs were justified and reasonable in the case given the high level of court resources involved in the investigation of the Respondent's misconduct. The Respondent's payment of costs in that case has no bearing on my assessment of the appropriateness of disciplinary actions in this case.

[392] The overriding policy issue here is that the assessment of appropriate disciplinary actions 1) should ensure that the public is protected from acts of professional misconduct; and 2) does not undermine public confidence in the legal profession.

Impact of the proposed penalty

[393] I am unaware of the nature of the Respondent's current practice and therefore cannot comment entirely on the impact of the proposed disciplinary actions. I can say, however, that the proposed actions are unlikely to have significant impacts on the Respondent. The Respondent's career was based on advancing over 600 IAP cases, from which he likely gained a substantial monetary sum. In this regard, I am unaware that the Respondent is currently engaged in the practice of law.

Specific and general deterrence

[394] In *Merchant* at paragraph 59, the Hearing Committee describes aptly the purpose of specific and general deterrence:

> Deterrence is another consideration this Hearing Committee must keep in mind. The idea of specific deterrence speaks to the effort that must be made to arrive at a penalty that will bring home to the member that the impugned conduct should not be repeated, and that will induce the member to reflect on the expectations of the legislature, the judiciary, the profession and the public of how lawyers should conduct themselves. The concept of general deterrence calls on a disciplinary tribunal to consider what signal a particular penalty will send to other lawyers, and how it might influence their adherence to the *Code of Professional Conduct*.

[395] Just as the proposed disciplinary actions will unlikely result in a significant impact on the Respondent, it is equally unlikely that the proposed disciplinary actions will result in specific deterrence. Most importantly, however, is the issue of general deterrence, which ties into public confidence in the Law Society's disciplinary, investigative and tribunal processes. Considering all the circumstances in the case, the public, including members of our profession will likely view the proposed disciplinary sanctions as insignificant (i.e., a "light" sentence or "slap on the hand"). This message is not one that the Law Society should be proud of.

Range of disciplinary actions from previous cases

[396] The Respondent committed misconduct by failing to exercise due diligence regarding Mr. Johnny, by attaching previously signed Declarations to revised IAP application forms, and by providing inadequate service to a number of clients. There are previous discipline cases that deal with individual cases of one of these three types of misconduct, but none considers all three at once. Further, there are very few cases that deal with the types of misconduct within the context of a highly discrete area of law such as the IRSSA.

[397] In her decision the *Levesque* Decision, Justice Saunders emphasized the distinctive nature of the IRSSA process, at paragraph 16:

> The process whereby these complicated, long-standing and culturally significant claims have been settled, and the settlement administered, is *sui generis* … . In my view, this appeal is but another marker of unique proceedings that have led to this landmark resolution.

[398] Not only did the Respondent's misconduct take place within a *sui generis* process (the IAP), there were relatively few court and law society investigations to draw upon in determining a range of disciplinary actions. This should not prevent the Panel, however, from considering the consistent way in which the courts have taken a national approach to administering the Settlement Agreement, including the IAP. Through the administrative protocol, the system of reference to supervising judges, and the cross-referencing of cases from one jurisdiction to another, it can be seen that the courts have tried to develop consistency in the way the Settlement Agreement is administered. Not all procedural and legal distinctions between provinces can be eliminated, but the supervising judges have not favoured the creation of a province-specific approach over all.

[399] What is clear from this national approach (the seven court-led investigations involving IAP counsel) is that the courts were consistent in their recognition that, 1) IAP claimants are a class of highly vulnerable individuals; 2) the class requires

court protection; and 3) IAP lawyers have a professional obligation to provide the utmost sensitivity and care in the handling of IAP claims.

[400] What is also clear is that there was national consistency with the court-led investigations (and associated law society investigations) in terms of the resulting sanctions imposed on IAP lawyer misconduct. The sanctions were significant and included, among other things, removal from practice, significant periods of suspension, and disbarment.

[401] In this case, the Law Society must ensure that its disciplinary process and associated sanctions reflect a consistent national approach to matters of national interest. This is a case involving issues of historical, political and legal importance. The Respondent's misconduct must always be considered within the context of a Settlement Agreement that only arose due to Indigenous children falling victim to the implementation of laws and policies, the goal of which was cultural genocide and assimilation. Each IAP claimant was a survivor of laws and policies, which remain today as a black stain in Canadian history.

Consultation with the Tsilhqot'in Nation

[402] I will not repeat much of what the majority states on this issue except to say that, during its investigation and prior to the hearing, the Law Society met with representatives of the Tsilhqot'in National Government, its Chief and some of the Respondent's former clients. Law Society counsel indicates that the Tsilhqot'in community had little interest in a restorative process or a Law Society hearing to be held in the Williams Lake area. Counsel also indicated that the Respondent's former clients have no interest in testifying at a contested hearing.

[403] While I cannot guess as to the reasons the Tsilhqot'in government and community have little interest in participating in this matter, I note that their decision does not surprise me, given all the circumstances. First, the Ontario Law Society's Review Panel Report highlights the lack of trust that Indigenous peoples historically have in a legal system, within which this Law Society operates as an institution.

[404] The Truth and Reconciliation Commission Report also speaks to this issue of mistrust. The Report speaks to the need for lawyers, judges and others in legal professions to acknowledge the institutional and systemic cultural biases historically perpetuated through the legal system. It also calls for legal professionals to become more culturally competent in Indigenous cultures, with a view to implementing cultural changes within legal systems. Specifically, the report states, in *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, at p. 202:

> … Canada's laws and associated legal principles fostered an atmosphere of secrecy and concealment. When children were abused in residential schools, the law, and the ways in which it was enforced (or not), became a shield behind which churches, governments, and individuals could hide to avoid the consequence of horrific truths. Decisions not to charge or prosecute abusers allowed people to escape the harmful consequences of their actions. In addition, the right of Aboriginal communities and leaders to function in accordance with their own customs, traditions, laws and cultures was taken away by law. Those who continued to act in accordance with those cultures could be, and were, prosecuted. Aboriginal people came to see law as a tool of government oppression.

[405] The *Guide for Lawyers Working for Indigenous Peoples*, addresses the legal systems' failure of understanding Indigenous peoples at pp. 21-22:

> **2.2.3 The *consequences* of a lack of understanding of Indigenous cultures**
>
> The formal state legal system is a cultural institution that is informed by the dominant cultural behaviour, attitudes and values which are perpetuated by its participants. The cultural backgrounds of many lawyers and judges often are not representative of Canadian society.
>
> Understanding the cultural underpinnings of Canada's legal history is important because legal professionals, historically, were deliberate in which cultures they sought to promote and which cultures they attempted to eradicate. Whether consciously or unconsciously, within today's context, lawyers, judges, and others in legal professions still develop, implement and enforce laws drawing from their cultural frames of reference.
>
> As the law has developed in Canada, many Indigenous peoples have grown to distrust Canadian legal systems and the professionals working within them. From Indigenous perspectives, the law was only designed and meant to be enforced against Indigenous peoples, and never designed or meant to serve them. One need only review the disproportionately high levels of Indigenous children and families involved with Child and Family Services, or the over-representation of Indigenous peoples in the criminal justice system and in our jails and prisons, as examples of the consequences of a lack of cultural competency. The history and impact of attempts at colonialization, the dispossession of land and forced

> relocation, including the Indian Residential School System, form a demonstrable basis for the distrust.
>
> These unacceptable trends will continue unless lawyers, judges and others in legal professions acknowledge the institutional and systemic cultural biases historically perpetuated through the legal system, and become more culturally competent in Indigenous cultures, with a view to implementing cultural changes within legal systems.
>
> [emphasis in original]

[406] Second, the Law Society has been part of a legal system that caused specific historical harm to the Tsilhquot'in peoples. Here, I reference the former B.C. Supreme Court Chief Justice Matthew Begbie who was responsible for the hanging of six Tsilhquot'in Chiefs in 1864. Justice Begbie is commonly referred to as the "Hanging Judge." In 2014, the British Columbia government exonerated the Tsilhquot'in leaders for any crime or wrongdoing. Until fairly recently, a statue of Justice Begbie stood at the entrance of the Law Society building in Vancouver. As of this day, the Begbie statue sits in the Law Society basement and remains a source of contention between Indigenous and non-Indigenous members of the profession and the public.

[407] Third, the Respondent's former employee, Ivon Johnny exposed many Tsilhquot'in peoples to harm. Mr. Johnny is a convicted murderer and is historically connected to the territories of the Tsilhquot'in peoples. Further, it is unknown whether Mr. Johnny is currently completing his sentence in a federal penitentiary or whether he has been released. If Mr. Johnny has been released, it would not come as a surprise that the Respondent's former clients and the broader Tsilhquot'in nation may be reluctant to participate in a Law Society process where potential witnesses would not be offered protection from further harm.

[408] Given all of these factors, I consider the Tsilhquot'in communities' lack of participation in this matter to be a neutral factor.

Proving the case and vulnerable witnesses

[409] The Law Society submits that this case would be difficult to prove at a hearing without the testimony of the Respondent's former clients.

[410] The Law Society further submits that the public interest is not always best served by an adversarial regulatory approach that requires former clients to testify, particularly when the former clients are vulnerable persons who would have to

testify about sensitive matters. In support of this, the Law Society referenced the *Keshen* matter and resulting Ontario Law Society Review Panel Report.

[411] The Law Society counsel highlighted these two issues in support of why this Hearing Panel should accept the proposed disciplinary actions.

[412] I have carefully reviewed and considered the Ontario Law Society's "Report of the Review Panel on Regulatory and Hearing Processes Affecting Indigenous Peoples," dated May 24, 2018. This report was the culmination of a process to examine the way the Law Society and its Tribunal address regulatory matters involving Indigenous persons, complaints and issues.

[413] I do not see the report as discouraging vulnerable persons from testifying in Law Society regulatory and hearing processes. My interpretation of the Review Report recommendations is quite the opposite. At page 6, under Recommendation 5, the report states that there are approaches and processes that may be *options* to the Law Society's adjudicative adversarial model, which would allow for the safe participation of vulnerable persons. The Report further states that *options to the adversarial model* should be explored for matters involving Indigenous complainants or Indigenous members of the Law Society.

[414] If the parties view the Law Society's current adversarial regulatory process as a barrier to the participation of vulnerable witnesses like the Respondent's former clients, then the issue is one of access to justice – a public interest issue, which the Law Society needs to immediately address.

[415] My recommendation is that the Law Society immediately engages a Review Panel to examine the way in which it (the Law Society) and its Tribunal address regulatory matters involving Indigenous persons, complaints and issues. This would be a meaningful step towards ensuring that the Law Society's regulatory processes are accessible to all members of the public it serves, including the vulnerable and marginalized.

[416] In terms of establishing alternative processes to allow for vulnerable persons to participate in its regulatory process, the Ontario Law Society Review Panel provided the following recommendations:

(a) Law Society services are provided to members of Indigenous communities in a culturally sensitive manner – this includes knowledge of Indigenous ways of knowing, Indigenous Legal Orders, values and interests, and the sensitive history of Residential School abuses that has had a multi-generational impact on the physical, emotional, mental and

spiritual conduction of First Nation, Inuit and Metis communities and individuals;

(b) Law Society processes are accessible to vulnerable and marginalized complainants who may have difficulty trusting the system in which the Law Society operates as an institution;

(c) Anyone involved (Law Society staff, legal counsel, Tribunal members) with a complaint involving Indigenous Peoples or an Indigenous licensee is culturally competent and has the necessary resources to engage appropriately with members of the Indigenous communities in the regulatory and hearing process; and

(d) Anyone involved with a complaint involving Indigenous Peoples or an Indigenous licensee (Law Society staff, legal counsel, Tribunal members) is trauma-informed, meaning the recognition and understanding of trauma translating into responses to an individual that integrates knowledge about trauma in practices, procedures and settings.

[417] The Respondent's case and the above recommendations highlight the need for the Law Society to ensure its regulatory processes are responsive to highly sensitive and complex cases like the case at hand. As indicated above, the Law Society's creation of barriers to the participation of vulnerable and marginalized persons in its regulatory process goes against the public interest.

RECOMMENDATIONS TO INCREASE ACCESS TO JUSTICE FOR VULNERABLE AND MARGINALIZED PERSONS

[418] There are a number of ways the Law Society could take immediate action to ensure that its regulatory processes are accessible to all members of the public it serves.

[419] First, as indicated above, I recommend that the Law Society engage a Review Panel to examine the way in which it (the Law Society) addresses regulatory matters involving Indigenous persons, complaints and issues.

[420] Second, I recommend that the Law Society take action to ensure that its regulatory processes are accessible to vulnerable and marginalized complainants who may have difficulty trusting a legal system within which the Law Society operates as an institution.

[421] Third, I recommend that the Law Society take steps to ensure that anyone dealing with the Respondent's case, or similar cases, is culturally competent, trauma-

informed and has the requisite level of knowledge and expertise in Indigenous culture, history and law to deal with complex and highly sensitive nature of these unique type of cases. These requirements would apply to Law Society staff, investigators, internal and external legal counsel, and Tribunal members. Further, the Law Society should take steps to ensure that any of these disciplinary process participants are free of real or perceived conflicts as they relate to Indigenous peoples. As an example, Law Society retaining external counsel who has historically advocated against Indigenous interests may not be ethical or in the public interest.

[422] Fourth, I recommend that the Law Society increase accessibility to vulnerable and marginalized witnesses through offering trauma-informed and culturally-safe alternatives to its standard adversarial investigative and hearing process. Examples of alternatives include:

(a) permitting a witness to testify with a support worker nearby;

(b) permitting a witness to testify outside the hearing room by closed circuit television or behind a screen;

(c) allowing a victim's statement (done currently by affidavit) in certain cases to be admitted as evidence for the truth of its content; and

(d) requiring the cessation of any part of an examination or cross-examination of a witness that is, in the opinion of the adjudicator, abusive, repetitive or otherwise inappropriate.

[423] With its current adversarial process, the Law Society has created a barrier for vulnerable and marginalized complainants to participate in its regulatory process. The Law Society has then relied on this barrier in its argument of why this matter should not go to a hearing, and why this Panel should accept a grossly inadequate disciplinary proposal. This is akin to a criminal case where an accused is "let off" because the process has not provided safe access for a vulnerable and marginalized victim to testify. It is also akin to a case of child abuse where, due to a vulnerable child being unable to face their abuser in court, is thereby denied participation in terms of providing crucial evidence.

[424] As indicated above, the Law Society has a number of options that it can immediately implement in order to allow the safe participation of vulnerable witnesses like the Respondent's former clients, as well as potential intervenors like the Tsilhquot'in Peoples and/or other Indigenous nations, communities or organizations.

[425] If the majority of this Hearing Panel had rejected the proposed sanctions and ordered the matter proceed to a hearing, regardless of the outcome, the Law Society would have elicited public confidence in its regulatory process (and the administration of justice) knowing that it has done everything in its power to ensure a place for the safe participation of vulnerable and marginalized persons, like the Respondent's former clients. Even with no sanction at the end of a hearing process, the Law Society would still have gained much in terms of amending its processes to allow for: 1) the safe participation of vulnerable witnesses; 2) a fulsome investigation; and 3) the ability for a Hearing Panel to hear evidence from key witnesses, including former Independent Assessment Process staff who investigated complaints relating to the Respondent's employee Ivon Johnny.

RECOMMENDATION REGARDING COMPREHENSIVE REVIEW OF DISCIPLINARY PROCESS

[426] The case at hand is of equal complexity and uniqueness as the *Keshen* case. If the Law Society is unable to take immediate and practical steps to ensure that all members of the public have safe access to its regulatory process then I recommend that the Law Society takes immediate steps to undertake a comprehensive review of its regulatory processes as it relates to access to justice and being responsive to all members of the diverse public it serves. Specifically, the Law Society may wish to adopt some of the recommendations contained in the Ontario Law Society's Review Report, including:

(a) making an organizational commitment to establish and maintain a culturally competent regulatory process;

(b) developing formal policies and procedures that flow from decisions of the Tribunal that raise important regulatory policy issues;

(c) formulating a plan for the investigation of "major cases" like the case at hand;

(d) developing permanent internal structures and supports to appropriately manage investigations and prosecutions of lawyers who are the subject of complaints from Indigenous people and of Indigenous lawyers;

(e) ensuring the appointment of qualified Indigenous adjudicators who are Indigenous or who have experience with Indigenous legal issues and/or Indigenous communities;

(f) developing guidelines for the composition of Tribunal hearing panels convened to hear conduct applications based on complaints from Indigenous people or where the respondent is Indigenous, together with the process considerations this may involve;

(g) committing to providing Law Society Tribunal adjudicators with ongoing training in the history of Indigenous Law in Canada, Indigenous methods of dispute resolution, Indigenous ceremony and protocols, the Independent Assessment Process and other relevant related topics;

(h) ensuring that guidance and education is available for lawyers and paralegals who serve Indigenous clients who have experienced trauma arising from the Indian Residential School experience, the Sixties Scoop or the Day Schools settlement to assist in their competent representation of these individuals;

(i) revising the *Code of Professional Conduct* to include the representation of vulnerable clients, such as Residential School Survivors; and

(j) establishing minimal recognized competencies for lawyers representing Indigenous clients.

[427] In this era of Indigenous truth and reconciliation, nation-wide protests of racial inequality and discrimination, and public cries for access to justice, the Law Society must do better in terms of ensuring its regulatory processes are responsive and accessible to the most vulnerable and marginalized members of the public, including the Respondent's former clients.

[428] If the Law Society is unable to ensure the safety and protection of the most vulnerable and marginalized members of society within its regulatory processes, the public will surely call into question the Law Society's ability to self-regulate in a way that is fair to all members of the public it serves to protect

[429] I will now outline my analysis of the final *Ogilvie* factor.

Public confidence in the integrity of the profession including public confidence in the integrity of the disciplinary process and the administration of justice

[430] The final *Ogilvie* factor I have considered is public confidence in the integrity of the profession including public confidence in the integrity of the disciplinary process and the administration of justice.

[431] In terms of context, I reiterate the need to consider the unique nature of the Respondent's client base and legal practice, which gave rise to his misconduct. The context includes historical truths about the legal profession being complicit in the enforcement of laws and policies that allowed for the creation and operation of 139 Indian Residential Schools across Canada between 1887 and 1996, and the forced removal of approximately 150,000 Indigenous children from their homes.

[432] The context also includes the Respondent's clients who are all survivors of sexual abuse and/or serious physical abuse, among other things, experienced as children while residing at these schools. The Respondent's clients represent some of the most vulnerable and marginalized members of our society.

[433] The context further includes the Respondent forming part of a group of six counsel across Canada who exposed vulnerable IAP claimants to further harm and re-victimization. These are individuals who chose to participate in the process, whose spirit and intention was healing and reconciliation.

[434] The context includes the Law Society being a colonial institution operating in a legal system that has been complicit in direct historical harms to Indigenous peoples and nations throughout B.C., including the Tsilhquot'in Nation and peoples.

[435] Finally, the context includes the Law Society's commitment to Truth and Reconciliation with Indigenous Peoples, which includes implementing the Truth and Reconciliation Commission's Calls to Action.

[436] In addition, on June 4, 2020, a few weeks after this Panel met, the Law Society President issued a statement about racial injustice, acknowledging the frustration, profound sorrow and, in some instances, outrage experienced by many, but especially of those Black, Indigenous and racialized people who face the effects of racism, intolerance, systemic discrimination and unconscious bias in their daily lives. The President went on to highlight that our justice institutions exist to serve the public interest and that we must find ways to build and maintain public confidence it the administration of justice. Specifically, the President said:

> As members of the legal profession, we enjoy certain power and privileges that correspondingly invoke a responsibility to address hardships and inequality. We take an oath to uphold the rule of law and the rights and freedoms of all persons. As gatekeepers to the justice system, we must never lose sight of the fact that our justice institutions exist for the public whose interests we serve. We must be vigilant in our commitment to protect people who encounter unequal treatment and institutional biases

> because of their individual characteristics. We must find ways to build and maintain public confidence in the administration of justice, ensuring we stay true to our oath.

Finally, the President stated that we must continue to take a hard look at our institutions and our actions to ensure we are doing all we can to reduce and eradicate racial injustice.

[437] It is within all of this context that the joint proposal Law Society counsel and the Respondent's counsel is concerning. The Respondent's misconduct resulted in harm to some of the most vulnerable and marginalized members of our society. The courts and other law societies have recognized that this particular class of people are inherently vulnerable and require court protection, as well as the utmost sensitivity and care by lawyers. Instead of providing the utmost care and offering protection, the Respondent did the opposite by exposing his clients to further harm and re-victimization.

[438] The Law Society's inability to fairly sanction a lawyer for this type of egregious misconduct would most likely call into question the public's confidence in its regulatory process and its ability to act in the public interest, especially as it pertains to protecting the most vulnerable and marginalized members of society. It would also call into question the Law Society's commitment to protecting people who encounter unequal treatment and institutional biases because of their individual characteristics.

CONCLUSION

[439] My conclusion is that the proposed disciplinary actions do not fall within the range of fair and reasonable sanctions, in all the circumstances. In coming to this determination, I have considered numerous factors.

[440] I give significant weight to the nature and gravity of the misconduct, which I determined to be egregious.

[441] I have considered the age and experience of the Respondent and I determined that, given his immersion in a highly specialized area of law for over ten years, he should have known better.

[442] I have determined that the likely impact on the victims in this case was serious.

[443] I have determined that the Respondent gained significant financial advantage as a result of his misconduct.

[444] The number of times the offending conduct took place was numerous.

[445] I have also determined that, although the Respondent admits to the misconduct, he only does so in the context of proposed disciplinary actions that are woefully inadequate, akin to a "light" or insignificant level of sanction. In this regard, I also determined that the impact of the proposed penalty is likely to have little impact on the Respondent. It will serve neither as specific nor general deterrence.

[446] I have also considered the range of penalties imposed in similar cases and found that, because these type of IAP cases are *sui generis* in nature and are few across Canada, we must assess what penalty is fair and reasonable in light of how courts and other law societies have handled cases involving lawyer misconduct arising from IAP claim.

[447] I have considered the consultation with the Tsilhquot'in Peoples and, for the reasons stated above, consider it to be a neutral factor.

[448] I have also considered the parties' submission that the Law Society is unlikely to prove its case if it goes to a hearing, resulting in no sanction for the Respondent. In response to this, I have outlined a series of recommendations that support the Law Society taking immediate actions to ensure that, on a go-forward basis, its discipline process is culturally competent, trauma-informed and allows options for the safe participation of vulnerable and marginalized individuals like the Respondent's former clients, and members of the Tsilhquot'in Peoples. This would address immediate access to justice issues, which this case highlights, as well as bolster public confidence in the Law Society's ability to adapt itself by responsive to highly unique, complex and specialized cases like the Respondent's.

[449] I have considered all of the above factors in assessing the ultimate issue in this case – would a fair-minded person, with an understanding of the unique and highly specialized law practice of representing IAP clients, find the proposed disciplinary actions fair and reasonable? My finding is no. Considering all the circumstances, the proposed disciplinary actions are grossly inadequate.

DEFERENCE

[450] I agree that in certain cases, giving a degree of deference to a proposal made under Rule 4-30, furthers the public interest, including:

(a) It encourages settlements by providing the parties with a substantial degree of certainty, without which a respondent (in particular) may be reluctant to forego a contested hearing;

(b) It allows the parties to craft creative and fair settlements, including where potential weaknesses in the Law Society's case make a finding of professional conduct less than certain;

(c) It reduces the time and cost required to conduct a hearing, thus promoting the efficient use of limited resources, and may also operate to spare a respondent's former clients or other witnesses the sometimes very significant emotional strain that can arise from having to testify regarding private matters; and it ensures that lawyers who commit professional conduct receive disciplinary sanctions that are fair and reasonable in the circumstances.

[451] In this case, however, I do not find that deference is owed. The proposal made under Rule 4-30 does not serve the public interest. Had the proposal been within a range of fair and reasonable disciplinary actions, I agree that deference would be owed, thus saving time and cost of going to a hearing with witnesses who may be unsure of testifying.

[452] In this case, however, the time and cost of proceeding to a hearing are warranted in order to best serve the public. Rule 4-30 was not intended to capture proposals that do not fall within the range of fair and reasonable disciplinary proposals. The effect of giving deference to the proposal undermines the public interest in terms of allowing parties to negotiate a course of discipline that neither serves the public interest nor acts as a deterrent.

APPENDIX A

1.2 The Law Society of Nunavut's Duty of Vigilance

Reproduced below is the *Guidance for Lawyers Acting for Survivors of Indian Residential Schools* (Resolution 07-09-M, The Canadian Bar Association, February 2007) (The Guidelines). The Law Society of Nunavut endorses The Guidelines. It has and will continue to act with vigilance in matters involving the practice of law in IAP claims.

Guidance for Lawyers Acting for Survivors of Indian Residential Schools

WHEREAS former students of Indian residential schools need legal assistance that is sensitive to their vulnerability and the potential for further trauma when they address memories of abuse and neglect;

WHEREAS the identities of former students are publicly available without their consent;

WHEREAS Indian Residential Schools Resolution Canada, the Chief Adjudicator for the ADR process established to address abuse claims, and Canadian Bar Association members have raised concerns about the conduct of, and seemingly excessive fees charged by, a small minority of lawyers acting for former students, and the potential for that conduct to tarnish the reputation of the legal profession generally;

WHEREAS in 2000, the Canadian Bar Association recognized the emerging problem and urged law societies in each province and territory to adopt guidelines for lawyers who act (or seek to act) for former students of Indian residential schools;

WHEREAS the law societies of Upper Canada, Northwest Territories and the Yukon have endorsed the Canadian Bar Association model guidelines;

WHEREAS in 2006, the Government of Canada designated at least $1.9 billion for "common experience" payments to all former students;

WHEREAS many former students have claims in addition to the common experience payments for sexual and serious physical abuse suffered;

WHEREAS Courts in some jurisdictions that have considered the Settlement Agreement have remarked upon the conduct of counsel acting for former students in those approvals;

BE IT RESOLVED THAT the Canadian Bar Association:

1. renew its call for law societies to adopt model guidelines for lawyers acting for former students of Indian residential schools;

2. urge the law societies to be particularly vigilant in monitoring the conduct of those lawyers, given the imminent release of significant funds for common experience payments to address remaining claims of former students of Indian residential schools; and

3. inform the Assembly of First Nations, the Congress of Aboriginal Peoples, the Inuit Tapirisat of Canada and other national Aboriginal organizations of these initiatives.

APPENDIX B

EXECUTIVE SUMMARY

REPORT OF THE REVIEW PANEL ON REGULATORY AND HEARING PROCESSES AFFECTING INDIGENOUS PEOPLES

Introduction

On June 28, 2017, Law Society Treasurer Paul Schabas announced the creation of the Review Panel to examine the way in which the Law Society and its Tribunal address regulatory matters involving Indigenous persons, complaints and issues. The review was prompted by the Law Society's experience in *Law Society of Upper Canada v. Keshen* (Keshen) which raised questions about the Law Society's regulatory and hearing process in relation to Indigenous persons, complaints, and issues. The Review Panel has completed its work under its Terms of Reference and has prepared a series of recommendations for Convocation's consideration and approval.

Overview of the Review Panel's Work

The Review Panel's process included an educational component, review of key resources and presentations by and interviews with several experts from the Indigenous community, the Chair and Vice Chair of the Law Society Tribunal and a number of Law Society Professional Regulation Division staff.

The work of the Review Panel was carried out alongside the mandate of the Independent Reviewer. Former Assembly of the First Nations National Chief Ovide Mercredi was appointed as the Independent Reviewer to engage with the First Nations community in Treaty 3 and Nishnawbe Aski Nation treaty territories in Northern Ontario. The experiences of First Nations in the north that Mr. Mercredi shared with the Review Panel and the valuable perspective and key insights he offered were crucial to forming the recommendations in this report.

In September 2017, the Treasurer, members of the Review Panel and staff attended a community meeting in Sioux Lookout. The Review Panel met the Leadership of a number of First Nations in the north, Elders and Residential School Survivors, listened to their views and their stories, and conveyed the message from the Law Society that it is committed to the work for which the Review Panel was established.

Summary of the Keshen Prosecution

Based on complaints received in 2013 and 2014 about Mr. Keshen in representing clients in connection with Independent Assessment Process ("IAP") applications to the Indian Residential Schools Adjudication Secretariat pursuant to the Indian Residential Schools Settlement Agreement, a new investigation team was formed under the direction of the Executive Director of the Law Society's Professional Regulation Division, called the First Nations, Métis and Inuit (FNMI) Team. This team was assigned the Keshen complaints and over the course of the investigation, the Law Society dealt with 57 individual complaints through the work of 19 Law Society Professional Regulation Division staff and three outside prosecutors.

The investigation resulted in the authorization of two Notices of Application containing allegations connected with 34 complainants. The Notices alleged that Mr. Keshen, among other things, did not serve his clients properly, assigned tasks to staff that he should not have, took clients' money from his trust account to pay his fees without sending a bill, charged unfair legal fee and did not handle settlement monies correctly.

The conduct hearing began in Kenora on June 27, 2016 and continued over 25 hearing days until February, 2017, when the prosecution closed its case and filed two replacement Notices to significantly reduce the number and nature of the original allegations. A re-evaluation of the case by the Professional Regulation Division of the Law Society in March 2017 concluded that a settlement was appropriate in all the circumstances. The conduct hearing was converted to an Invitation to Attend pursuant to s. 36 of the *Law Society Act*, with Mr. Keshen agreeing to attend on both April 25, 2017 in the presence of the Elders and again on July 4, 2017 before the Hearing Panel.

Report of the Independent Reviewer

Mr. Mercredi explained his work as the Independent Reviewer as fulfilling a quiet non-judgemental role that required a compassionate and interested listener, engaging with the Leadership and Elders of First Nations communities, and talking to victims of process, including Residential School Survivors. While he was specifically required to focus on the Keshen matter and on the future of First Nations-Law Society of Ontario relationships, the range of issues brought to his attention went deep into the impact of the Residential Schools on personal lives (families and communities), the shortcomings of the Indian Residential Schools Settlement Agreement (processes and mechanisms) and the Law Society's regulatory and hearing processes.

In a series of recommendations, which the Review Panel report indicates by way of recommendation that the Law Society should accept, Mr. Mercredi urges the Law Society

to focus on the need to become culturally competent, to support broader change in the interests of Indigenous communities and to support healing strategies for Survivors.

The Recommendations

GENERAL

Recommendation 1

The Law Society:

1. **must make an organizational commitment to establish and maintain a culturally competent regulatory process; and**

2. **should consider establishing a new office to support the work that the Law Society undertakes pursuant to its mandate when that work involves Indigenous communities and to create a culturally safe environment.**

To ensure Law Society services are provided to members of Indigenous communities specifically, and in a culturally sensitive manner, staff dealing directly with members of Indigenous communities should have a sufficient understanding of Indigenous culture, beliefs and values, which will engender appropriate communication and interaction. This requires knowledge of Indigenous ways of knowing, Indigenous Legal Orders, values and interests, and the sensitive history of Residential School abuses that has had a multi-generational impact on the physical, emotional, mental and spiritual condition of first Nation, Inuit and Métis communities and individuals. This responsibility to enhance competence also includes knowledge of the historical and contemporary impacts of colonization on Indigenous communities.

The Review Panel received valuable insights from Terry Swan, who is a Cree/Saulteaux/ Métis and currently the Team Lead, Family Information Liaison Unit within the Indigenous Justice Division of the Ontario Ministry of Attorney General. She spoke of the path to “cultural safety”, which begins with cultural awareness, where the differences between what the institution represents and the Indigenous community are respected, which leads to cultural knowledge, or learning, and cultural competence. The path eventually leads to cultural safety for both the institution and members of the Indigenous community – it is a framework that captures the relationship between legal services and Indigenous experiences of colonization, discrimination and marginalization, and is sensitive to the traumatic repercussions on multiple generations.

A commitment to developing cultural awareness must involve engagement with the necessary Indigenous experts. This engagement could be led by a new office within the

Law Society, with the appointment of an Indigenous person with the right skills and talents to provide leadership in understanding and responding to Indigenous peoples' experience with the Law Society.

COMMUNICATION AND ENGAGEMENT

Recommendation 2

Where complainants are members of Indigenous communities:

1. **information about the Law Society, its regulatory process and the role of complainants must be available and communicated in an understandable and culturally appropriate way; and**

2. **depending upon the stage of the complaint matter at the Law Society, communications should include discussion of the issue of remedy from the complainant's perspective (using the complainant vs prosecutorial lens), including the concept of restoration and how that intersects with the Law Society's regulatory mandate.**

Engagement with members of Indigenous communities should take into account the needs of the complainants and the likelihood that some may be vulnerable and marginalized in society. Some complainants will have difficulty trusting the system in which the Law Society operates as a legal institution and will have challenges interacting with it. It is also recognized that some complainants perceive or experience a power imbalance as a client in a solicitor-client relationship, which may be replicated in the Law Society's complaints and discipline process, where the complainant is not a party to the proceeding, has no formal role in the disposition of a case and remains unrepresented.

Law Society staff should ensure that they are accessible to complainants and that clear lines of communication exist with a person at all times identified as a contact for any inquiry or question. Complainants should be informed about and consulted as much as possible on the progress of the complaint. Communications should be respectful and must not result in further trauma to the complainant and should take into account special needs that may be presented.

Communication at all stages of the matter should be timely and effective. This also involves being clear with the complainant at all stages about what the Law Society can and cannot remedy and explaining the steps and important decisions points.

Recommendation 3

The Law Society must do more to engage with Indigenous people in their communication to:

1. **express the Law Society's commitment to create a trusting relationship, to enable the Law Society to meet its regulatory mandate in ways that respect the culture of the community;**

2. **explore opportunities to partner and build mutually respectful relationships with individuals, organizations and institutions to help the Law Society advance its commitment, and build trust in the community; and**

3. **explore ways to increase access to justice, including considering the need to develop a cultural liaison with the public.**

To continue the important dialogue that began in September 2017, the Law Society must engage with Leadership, Elders and other Knowledge Keepers to learn and transform the Law Society's regulatory processes in matters involving Indigenous communities.

In considering ongoing issues, the Law Society should consider, where appropriate:

a. retaining local counsel who is culturally competent from an Indigenous community for the purpose of assisting the Law Society in communicating information to complainants and to ensure over regular periods of time that the complainants' understanding remains accurate and current, and
b. providing funding for independent counsel, perhaps by augmenting the scope of the services of existing legal clinics, to assist complainants in understanding the scope of the Law Society's jurisdiction and to offer advice and, if appropriate, legal assistance, in disputes.

The proposals above may be effective in addressing the obligation to assist in complainants' understanding of the Law Society.

SPECIFIC PROFESSIONAL REGULATION FUNCTIONS

Recommendation 4

The Professional Regulation Division should:

1. **be appropriately resourced to ensure timely, efficient and effective operation of regulatory functions;.**

2. **build its capacity to develop formal policies and procedures that flow from decisions of the Tribunal (following all levels of appeal) that raise important regulatory policy issues;**

3. **formulate a plan for the investigation of "major cases" to assist in the management of investigations;**

4. **support prosecutors in developing and refining the skills required to manage and prosecute major cases; and**

5. **ensure all staff have available the necessary mental and emotional supports when working with complainants that are survivors of trauma. This may include but not be limited to the Members Assistance Program.**

The ability to develop policies and procedures as described in Recommendation 4 will enable consistent, informed application of relevant principles, including Indigenous Law principles. The Review Panel's view is that there is an opportunity to examine policy-making that will embrace Indigenous Law principles.

With respect to management of major cases, elements of such an approach might include the following:

a. Defining a "major case", which would involve consideration of such factors as the complexity of the issues, the volume of complaints, the resources needed to properly manage the case and risk to the public;
b. Considering how to improve the current model to facilitate early communication and consultation between investigators and prosecutors to promote the efficient use of investigative and prosecutorial resources; and
c. identifying the exceptional administrative and personnel needs associated with major cases, and the related resources, and recommendations as to how they should be managed to guide future investigations.

Aspects of a major case plan may include observing established processes and protocols, including those related to the responsibility of the team lead, decision-making and communication.

With respect to supports for prosecutors, these measures should include educational opportunities to prosecutors in the management and prosecution of major cases and encouraging prosecutors to increase their experience level with larger cases through exploring secondments to other prosecutorial offices.

Recommendation 5

The Law Society should:

1. **take the necessary steps to ensure that anyone who investigates complaints at the Law Society involving Indigenous licensees or complainants, in addition to required investigatory experience and skills, is culturally competent to perform these investigations and has the necessary resources available to engage appropriately with members of the Indigenous communities in this process; and**

2. **explore ways to incorporate principles of Indigenous Legal Systems into**

    a. **dispute resolution resources available to Law Society investigators, which may be applied in appropriate cases, and**

    b. **prosecutorial and dispute resolution resources available to Law Society prosecutors, which may be applied in appropriate cases.**

First steps should be to enrich the education of staff with initial training, and ensure appropriate resources are offered to the relevant staff. This may involve working with Indigenous community partners, like the Indigenous Advisory Group and others.

Terry Swan referred to becoming "trauma-informed" and approaching matters from this perspective. She advised that the recognition and understanding of trauma translates into responses to the individual that integrates knowledge about trauma in practices, procedures and settings.

The Honourable Leonard S. Mandamin, a judge of the Federal Court and an Anishnaabe member of the Wiikwemkoong Unceded Indian Reserve on Manitoulin Island, Ontario, who met with the Review Panel, spoke of his work that led to applying restorative justice principles. Justice Mandamin referenced the Law Reform Commission of Canada 1996 publication *Bridging the Cultural Divide: a report on Aboriginal people and criminal justice in Canada / Royal Commission on Aboriginal Peoples,* and its discussion of "creating conceptual space" for Indigenous systems of justice.

The Review Panel believes there are approaches and processes that may be options to the Law Society's adversarial adjudicative model. They should be explored for matters involving Indigenous complainants or Indigenous licensees at the Law Society.

Delia Opekokew, a lawyer and a member of the Canoe Lake First Nation in Saskatchewan, met with the Review Panel and discussed her experiences as a Deputy

Chief Adjudicator in the IAP process. Her advice was to ensure that the environment for questioning a Survivor is sensitive to their experience. She also stressed the need for appropriate supports for those staff directly involved with Survivors as complainants and witnesses.

Professor Jeffrey Hewitt, a Cree, spoke with the Review Panel about the Law Society's processes and Indigenous Law. In his view, trying to apply Indigenous law within the Law Society will not fix anything if the underlying architecture of the Law Society's structure does not change. In determining that change, an examination and the process of change is part of the longer term decolonization work for the Law Society and it is important to include, through both recognition and structure, Indigenous legal orders.

Recommendation 6

The Professional Regulation Division should create the required permanent internal structures and supports to appropriately manage investigations and prosecutions of licensees who are the subject of complaints from Indigenous people and of Indigenous licensees. These structures and supports should extend to other divisions at the Law Society to the extent that processes related to investigations and/or prosecutions intersect with them.

Despite all of the efforts taken and unique processes instituted by the Law Society to deal with the numerous complaints received from Survivors, there were gaps in approaches, coupled with several staff changes at key critical stages and an aggressive timeline for completion of the investigation, which added to an already complex file.

A required level of knowledge and expertise in Indigenous culture to deal with demanding investigations and the unique circumstances of Indigenous complainants is necessary. The Review Panel believes the Law Society should explore the following:

a. Specialized teams that are appropriately trained;
b. Comprehensive professional resources across departments covering a range of topics and subjects;
c. Established advisory channels with the Indigenous community in ways that respect the principles of fairness and independence of the Law Society's regulatory process; and
d. Personal resources for both the Law Society staff and Indigenous complainants or licensees for required support.

In cases involving vulnerable complainants where actual harm is capable of resulting from their appearance as witnesses, the Law Society should consider a specialized analysis that is aimed at determining whether the public interest requires that vulnerable complainants appear as witnesses, which would include consideration of a fully informed consent. Further, the Law Society should take into account the possibility that further counselling after the hearing may be required and recognize the potential cost of that assistance.

A fully informed consent may require retaining independent counsel for the witness who can provide neutral explanations and independent advice, both for the benefit of the witness and the protection of the Law Society.

Recommendation 7

The Law Society Tribunal and the Tribunal Committee should explore, with the assistance of Indigenous experts, how to incorporate Indigenous Law principles within its adjudicative and dispute resolution processes and apply them in the appropriate case.

The Review Panel believes the Tribunal should learn from the experience in the Keshen case and determine the most effective method of including Indigenous perspectives in the adjudicative process.

Law Society Tribunal Chair David Wright advised the Review Panel that, for example, the current *Rules of Practice and Procedure* adopted by Convocation provide that the civil rules of evidence apply to Tribunal proceedings. However, as a policy discussion, the application of the *Statutory Power and Procedures Act* (SPPA) specifically and the proceedings of other adjudicative tribunals might be an appropriate subject of further study.

Consideration should be given to developing practice directions on what is currently permissible within the Law Society Tribunal Hearing Division Rules of Practice and Procedure. This may include, for example,

a. permitting a witness to testify with a support worker nearby;
b. permitting a witness to testify outside the hearing room by closed circuit television or behind a screen;
c. allowing a victim's statement (done currently by affidavit) in certain cases to be admitted as evidence for the truth of its content; and

d. requiring the cessation of any part of an examination or cross-examination of a witness that is, in the opinion of the adjudicator, abusive, repetitive or otherwise inappropriate.

The Review Panel also suggests that the availability of independent counsel for complainants should be explored.

The Review Panel noted that the Federal Court Practice Guidelines for Aboriginal Law Proceedings provide that, for cross-examination of Elders, "The special context of the testimony of Elders suggests that alternative ways of questioning on cross-examination should be explored in appropriate cases." In referencing these Guidelines, Justice Mandamin described circumstances where the adjudicator, rather than the examining counsel, asks the questions of the Elder where circumstances may warrant such an approach.

The Tribunal should determine how to ensure the appointment to the Tribunal of otherwise qualified adjudicators who are Indigenous or who have experience with Indigenous legal issues and/or the Indigenous communities. The Tribunal should also consider the merits of a guideline for the composition of Tribunal hearing panels convened to hear conduct applications based on complaints from Indigenous people or where the licensee is Indigenous, together with the process considerations this may involve.

Recommendation 8

Law Society Tribunal adjudicators should receive ongoing training in the history of Indigenous Law in Canada, Indigenous methods of dispute resolution, Indigenous ceremony and protocols, the Independent Assessment Process and other relevant related topics.

The Tribunal should consider the merits of a competency matrix for trainers for adjudicators on Indigenous Law, dispute resolution processes and protocols and customs that may be relevant to the Tribunal process.

As the design and implementation of training for adjudicators is one of the responsibilities of the Tribunal Chair, the Law Society should refer this issue to David Wright for review and implementation.

OTHER LAW SOCIETY FUNCTIONS

Recommendation 9 – Practice Supports

The Law Society should ensure that guidance and education is available for lawyers and paralegals who serve Indigenous clients who have experienced trauma arising from the Indian Residential School experience, the Sixties Scoop or the Day Schools settlement to assist in their competent representation of these individuals.

The Review Panel believes there is merit to including additional commentary in the *Rules of Professional Conduct* and *Paralegal Professional Conduct Guidelines* in relation to the representation of vulnerable clients, such as Residential School Survivors, and recommends that the competence rules be reviewed for this purpose. The Law Society should review the *Guidelines for Lawyers Acting in Aboriginal Residential School Cases* and revise them accordingly as required to ensure they are current and cover the broad scope of representation of those from Indigenous communities who may seek legal assistance as a claimant.

The Law Society should also explore partnering with other organizations who have the knowledge and experience to help frame guidance, act as referrals for resources for lawyers or contribute to targeted continuing professional development programs to assist lawyers and paralegals who may serve these clients.