Report of the

INDIGENOUS ENGAGEMENT

in Regulatory Matters Task Force

Approved by the Benchers
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Law Society
of British Columbia

INDIGENOUS ENGAGEMENT IN REGULATORY MATTERS TASK FORCE

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Preface

The Indigenous Engagement in Regulatory Matters Task Force ("Task Force") was created in response to the *Bronstein*[1] decision from 2021. The Task Force acknowledges that many people perceive the Law Society's penalty for Bronstein's misconduct as inadequate and unjust.

The Task Force sincerely regrets that the outcome of the decision has caused disappointment, grief, and anguish amongst the Tsilhqot'in people, in particular. The members of the Task Force all hold in common a commitment and desire to start the decolonization[2] and Indigenization[3] of the Law Society's regulation of the legal profession, so that the situation experienced by the Tsilhqot'in residential school survivors (Survivors) who were impacted by Bronstein and affected by the Law Society's processes never happens again.

The overarching theme of this report is the Law Society's need, and desire, to reconcile its processes with Indigenous legal principles. The Task Force understands that reconciliation requires ongoing transformation; the recommendations signal the beginning of transformation for the Law Society, not the end. Going forward, the Law Society commits to renewing the recommendations to reflect the Law Society's progress on reconciliation, input from ongoing Indigenous engagement, and emerging issues.

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1. *Bronstein (Re)* (https://canlii.ca/t/jg40s), 2021 LSBC 19 (CanLII) (*Bronstein*). Bronstein is no longer licenced to practice law in BC.

2. "Decolonization" is the removal or undoing of colonial elements. (What is Decolonization? What is Indigenization? (https://www.queensu.ca/ctl/resources/decolonizing-and-indigenizing/what-decolonization-what-indigenization)

3. "Indigenization" is the addition of Indigenous elements. *Ibid.*

Acknowledgements

The Law Society of British Columbia respectfully acknowledges that this review has taken place on the unceded ancestral territories of First Nations in what is now commonly known as British Columbia.

We express deep gratitude to all the individuals who took the time to respond to our questions, and provided valuable insights for the report.

We also thank Alice Joe for the graphic design of the report.

The report is dedicated to all who have been deterred from bringing complaints forward due to systemic barriers posed by the Law Society's processes, and to all who have been through the complaints process in the past, but did not experience it as welcoming or supportive, or did not receive outcomes that met their expectations.

Executive Summary

The decision in *Bronstein* revealed systemic issues with the Law Society's regulatory regime's ability to engage, address, and accommodate Indigenous complainants and witnesses, particularly Indigenous persons.

In response, the Task Force was created to review the Law Society's complaints, investigation, prosecution, and adjudication processes to ensure that these processes accommodate the full participation of Indigenous complainants and witnesses who may be experiencing marginalization or vulnerability.

The Task Force's key findings are that the Law Society is a colonial institution that relies on policies and processes that are inconsistent with Indigenous legal principles regarding dispute resolution. The Law Society needs to decolonize and Indigenize and build trust and relationships with Indigenous individuals, organizations, and communities. The Law Society must also continue its efforts to clarify and uphold standards of intercultural competence for lawyers, with a view to preventing harm to Indigenous clients.

What Happened?

From 2009 until February 2015, Stephen Bronstein, a non-Indigenous lawyer, acted for approximately 624 residential school survivors who made Independent Assessment Process (IAP) claims under the Indian Residential School Settlement Agreement. Bronstein's practice consisted almost exclusively of residential school claims from 2000 until 2017.

From September 2008 until July 2012, Bronstein contracted a paroled murderer, Ivon Johnny, to recruit Survivors and support them through the IAP. In 2009, a number of people, including Survivors and Native Courtworkers, began contacting Bronstein and his firm with concerns that Johnny was requesting money from Survivors' settlement funds. Bronstein failed to adequately investigate or address their concerns.

Ultimately, a complaint was made to the Law Society, and an investigation was launched. During its investigation of the complaint, the Law Society hired external counsel with a high level of Indigenous intercultural competence to consult with the Survivors, and offered to hold the hearing in Tsilhqot'in territory, which the Survivors declined. Eventually, the Law Society negotiated an agreement with Bronstein, in which the Lawyer:

- Admitted to: (i) failing to exercise due diligence prior to hiring the Contractor; (ii) inadequately investigating complaints that the Contractor was demanding money from Survivors; (iii) neglecting to inform or take instructions from certain clients; (iv) failing to advance certain claims in a timely manner; and (v) directing staff to affix clients' signatures to revised forms that the clients had not seen; and

- Consented to: (i) a one-month suspension; (ii) a practice review for his files opened after January 1, 2017; (iii) a written commitment to the Discipline Committee that he will not act for any "Sixties Scoop" claimants; and (iv) costs of $4,000.

Although the majority of the hearing panel accepted the consent agreement, Karen Snowshoe, the sole Indigenous panel member, dissented based on her view that the sanctions were too lenient.

At the time of Bronstein's citation[4], Law Society Rule 4-30 permitted a lawyer responding to a citation to submit a conditional admission of a discipline violation to the Discipline Committee, and to consent to the imposition of a specified disciplinary action (as negotiated between the lawyer and Law Society's discipline counsel). If the Discipline Committee accepted the proposal, it was required to instruct the Law Society's discipline counsel to recommend acceptance of the proposal to the hearing panel. Rule 4-31 required a hearing panel to either accept or reject the lawyer's conditional admission and the parties' proposed disciplinary action. If the panel rejected the conditional admission and proposed disciplinary action, it could not substitute a different determination or disciplinary action, but was required to advise the Discipline Committee of its decision and proceed no further with the hearing of the citation, at which point the Discipline Committee was required to instruct Law Society discipline counsel to set a date for the hearing of the citation. In *Bronstein*, the Discipline Committee and the majority of a hearing panel accepted Bronstein's conditional admission under Rule 4-31.

These rules were substantially amended in March 2021 to enable a hearing panel to impose a disciplinary action that is different from the consent agreement if the parties (i.e. discipline counsel and the respondent) are given the opportunity to make submissions respecting the disciplinary action to be substituted, or if the specified disciplinary action consented to by the respondent would be contrary to the public interest in the administration of justice.[5]

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4. Citations are allegations against a lawyer that are considered at a discipline hearing.

5. Rule 5-6.5(3). Conditional admissions made under Rule 5-6.5(3) may only be used against the respondent in a proceeding if accepted by a hearing panel (see Rule 5-6.6(2)).

Objective

The objective of this report is to identify systemic barriers experienced by Indigenous complainants and witnesses, and propose solutions to establish and maintain culturally safe and trauma-informed regulatory processes. The recommendations are also expected to benefit other complainants and witnesses who may be experiencing marginalization or vulnerability.

Approach

The Task Force applied a number of approaches to accomplish its work, including analyzing the *Bronstein* decision; reviewing the Law Society's processes; researching what other entities do with respect to Indigenous complainants and witnesses; consulting with Indigenous individuals and organizations and non-Indigenous service agencies that provide services to Indigenous individuals; and hosting a summit to receive feedback from consultation participants on draft recommendations.

The Law Society has yet to earn the trust of many Indigenous individuals and communities, so the Task Force was not able to engage with everyone who should have been consulted. The Task Force expects the Law Society to continue Indigenous engagement to inform the implementation and renewal of the recommendations.

What We Heard

Immediately following the *Bronstein* decision, Chief Joe Alphonse (Chair of the Tsilhqot'in Nation) expressed dissatisfaction on behalf of the many Tsilhqot'in citizens impacted by Bronstein's conduct:

> *The failure to appropriately condemn this misconduct is yet another injustice and stain on the handling of the victims and survivors of residential schools. Bronstein failed to protect his clients and created a situation of further victimization and trauma for survivors. This outcome makes a mockery of justice. Our people have been through enough without having to contend with further ignorance and failure of the Canadian legal system. This case needed further investigation into the serious claims being made about Ivon Johnny's intimidation and extortion of clients. It took a lot of courage for witnesses to come forward, and this is what they have to show for it – nothing. Bronstein basically got off with no repercussion. Once again the system has let us down.*[6]

Chief Joe Alphonse's statement is an important starting point for analyzing the systemic issues revealed by *Bronstein* for two key reasons: 1) the Contractor was a Tsilhqot'in citizen and therefore in closest proximity to the Tsilhqot'in Survivors, so the Tsihlqot'in Survivors were more likely to be impacted by the Contractor's conduct than other Survivors; and 2) the statement raises a number of concerns about the Law Society's processes. Chief Alphonse's statement must be understood within the broader context of the colonial oppression of Indigenous Peoples,[7] and Tsilhqot'in-specific experiences with colonial law.

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6. Tŝilhqotin Nation Condemns BC Law Society's Failure to Reprimand Lawyer's Misconduct in Residential School Claims (https://www.tsilhqotin.ca/wp-content/uploads/2021/06/2021-06-09-Ts%CC%82ilhqotin-Nation-Condemns-BC-Law-Societys-Failure-to-Reprimand-Lawyers-misconduct-in-Residential-School-Claims.pdf) (Chief Joe Alphonse).

7. "Indigenous Peoples" (uppercase "P") is a collective term referring to distinct social groups that share ancestral ties to specific territories, whereas "Indigenous people" (lowercase "p") is used to refer to Indigenous individuals.

Issue 1: Colonialism

With respect to colonial oppression of Indigenous Peoples, the colonial legal system is built on the twin myths of European superiority and Indigenous inferiority. Unlike other parts of Canada, Crown authorities signed very few treaties with the Indigenous Nations in British Columbia. Instead, colonial law was unilaterally imposed on Indigenous Peoples and territories, and suppressed existing Indigenous laws, customs, and governance.

The disputed legitimacy of colonial law within unceded Indigenous territories is an ongoing concern in the province. Colonial law has been (and continues to be) used to justify the subordination and assimilation of Indigenous people and the dispossession of their children, territories, and resources.[8] Violations of Indigenous rights have been authorized by colonial law and normalized within colonial society.[9] One consultation participant conveyed:

> *"The legal system has contributed to the genocide of Indigenous people, when you think about the laws that forced the transfer of Indigenous people's children, to the policies and laws and how all of that has contributed to where we are at now."*

As an influential entity within the colonial legal system, the Law Society acknowledges it has contributed to the perpetuation of colonialism.[10]

The Tsilhqot'in Nation is well-known for the Tsilhqot'in War against colonial expansion into Tsilhqot'in territory. The Tsilhqot'in War involved six Tsilhqot'in leaders who stood up against colonial violations of Tsilhqot'in law, killing 14 non-Indigenous surveyors who were trying to build a road from the coast into the interior through Tsilhqot'in territory.

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8. *Honouring the Truth, Reconciling for the Future Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (The Truth and Reconciliation Commission of Canada, 2015) (*TRC Summary Report*) at 202.

9. Expanding Our Vision - Cultural Equality and Indigenous Peoples' Human Rights (http://www.bchrt.bc.ca/shareddocs/indigenous/expanding-our-vision.pdf) (*Expanding Our Vision Report*) at 11.

10. For example, from 1918 until 1949, membership in the Law Society of BC was linked to registration on the provincial voters list, which effectively excluded Indigenous people with "Indian status" from practising law.

The Tsilhqot'in leaders were invited to discuss terms of peace, "and then in an unexpected act of betrayal, they were arrested, imprisoned and tried for murder,"[11] and sentenced to death. This injustice continues to impact Tsilhqot'in perceptions of the colonial justice system, of which the Law Society is a part.

The 1993 *Cariboo-Chilcotin Justice Inquiry*[12] (into the relationship between the Indigenous people and the justice system in the Cariboo-Chilcotin region) referenced the Tsilhqot'in War as a primary source of Tsilhqot'in distrust of the Canadian legal system. The Commissioner made a number of observations and recommendations that are relevant to the Task Force's work, including that "[Indigenous] people must be able to lodge complaints in a simple, understandable, and non-intimidating fashion" and be supported throughout the complaints process.[13] These recommendations from 1993 were not implemented, and in 2021 Tsilhqot'in complainants experienced systemic barriers to the Law Society's complaints and discipline processes. Given this context, Chief Joe Alphonse's exasperation is understandable. Indigenous people are frequently studied, but too often recommendations resulting from the studies are not implemented and do not lead to any noticeable changes for Indigenous people.

The devaluation of Indigenous people within the colonial legal system also has implications for Indigenous victims. As repeatedly demonstrated throughout the colonial justice system, Indigenous complaints are often not taken seriously or investigated thoroughly. For example, the *Missing and Murdered Indigenous Women's Inquiry* described "delayed, or a lack of, [police] responses to reports from Indigenous victims."[14] Another study found that where complaints are investigated, sanctions are absent or lower when an Indigenous person is the victim.[15] The low investigative efforts and sanctions have significant impacts on the level of distrust Indigenous people have with colonial systems. As one consultation participant explained:

> *"When [Indigenous people] make a complaint to the Law Society, their expectation is that they won't be taken seriously. Their expectation is that the dominant culture will steamroll them, and they won't have a chance. That expectation is honestly and rationally held."*

Moreover, the colonial perspective views Indigenous people as inherently deficient. This perception influences the colonial legal system, where Indigenous victims are often perceived as unreliable witnesses based on negative biases and assumptions about Indigenous people.[16] Blame for low investigation efforts and sanctions is accordingly deflected onto Indigenous witnesses. Ironically, Indigenous reluctance to engage in colonial legal processes contributes to the assumption that Indigenous witnesses are not reliable.[17] Colonial devaluation of Indigenous people is a systemic inequity that erodes Indigenous perceptions of, and engagement with, the colonial legal system.

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11. October 23, 2014, speech by Premier Christy Clark in the British Columbia Legislature.

12. Sarich, Anthony. *Report of the Cariboo-Chilcotin Justice Inquiry*, 1993 (*Cariboo-Chilcotin Justice Inquiry*), at 8.

13. *Ibid*, at 40.

14. National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (June 2019), vol. 1b (MMIW), at 154. See also *Expanding Our Vision Report, supra* note 9, at 24.

15. Victimization of First Nations people, Métis and Inuit in Canada (https://www150.statcan.gc.ca/n1/pub/85-002-x/2022001/article/00012-eng.htm), Aboriginal Victimization in Canada: A Summary of the Literature - Victims of Crime Research Digest No. 3 (https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd3-rr3/p3.html) (*Aboriginal Victimization Report*), and *MMIW (ibid)* at 153. The *Aboriginal Victimization Report* states: "there are higher rates of dismissed charges or not guilty outcomes when an Indigenous person is the victim." Although these examples arise in the context of criminal justice, the experiences and implications extend beyond criminal law.

16. Such negative biases and assumptions are often described as "high risk" factors.

17. *Aboriginal Victimization Report, supra* note 15.

Negative connotations regarding Indigenous reluctance to engage with colonial legal processes are evident in *Bronstein*, where the majority reasoned 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.*[18]

> *[If the conditional admission is rejected], there is a good or real possibility that the Respondent will face no discipline at all for his misconduct.*[19]

The dissenting panel member perceived this reasoning as a deflection of the blame for the low sanction onto the Indigenous witnesses who declined to participate in the Law Society's adversarial hearing process, rather than on the systemic issues and procedural barriers that deterred Indigenous participation.

A Task Force member observed that:

> *Passively accepting that Indigenous witnesses are unlikely to participate in formal complaints processes reinforces barriers to participation. The facts in Bronstein would have been difficult to prove without an admission because of the power imbalances between the Lawyer and the Survivors.*

The power imbalances occur on both the systemic and practical levels. At the systemic level, at a hearing into the conduct of a lawyer, the Law Society has the burden of proof to establish that the lawyer has engaged in professional misconduct, conduct unbecoming,[20] or is in breach of the *Legal Profession Act (Act)*, or the Law Society Rules (Rules). The Law Society decides whether and how to pursue the complaint, and the complainant's role is limited to providing information about the complaint. At the practical level, a lawyer likely has more familiarity and experience with legal processes than non-lawyer complainants.

Another aspect of the systemic imbalance is a colonial perception that Indigenous laws are inferior to colonial laws and that including Indigenous laws in colonial processes would deplete rather than enrich the colonial system. The Task Force advises that this perception should forever be laid to rest, and that the positive aspects of Indigenous laws should be incorporated into the Law Society's regulatory regime for the benefit of all complainants and witnesses.

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18. *Bronstein, supra* note 1, at para. 227.

19. *Ibid*, at para. 15.

20 "Conduct unbecoming" includes a matter, conduct, or thing that is considered (a) to be contrary to the best interest of the public or of the legal profession, or (b) to harm the standing [or reputation] of the legal profession. (Law Society Rules, section 1.)

Issue 2: Indigenous and Colonial Concepts

The Law Society's authority comes from colonial legislation, and Indigenous laws[21] are currently absent from the Law Society's regulatory regime. Previous reports have explored differences between Indigenous[22] and colonial worldviews, and the *Bronstein* matter provides tangible examples of some key concepts.

Indigenous perspectives are often described as "holistic" whereas colonial perspectives are described as "fragmented". Problems with fragmentation emerge in the Law Society's processes in a few ways:

i. In relation to jurisdictional fragmentation, the Law Society's authority comes from the *Legal Profession Act,* which grants the Law Society jurisdiction over lawyers and the practice of law. The Law Society's jurisdiction does not currently extend to non-lawyers (such as the Contractor). However, Chief Joe Alphonse's comment conveys an expectation that the Law Society could, and should, have investigated and sanctioned the Contractor's conduct. The Law Society could not directly investigate or sanction the Contractor, and was also limited in its ability to hold the Lawyer entirely responsible for the Contractor's conduct. This jurisdictional fragmentation of colonial law contrasts with the holistic ideals of Indigenous law. For example, the *Cariboo-Chilcotin Justice Inquiry* explains that Indigenous people may accept full responsibility (e.g. plead guilty) if they are remotely involved in an incident, even if they did not directly cause the harm at issue.[23] Chief Joe Alphonse's statement expresses an expectation that the Lawyer should be held accountable for the Contractor's conduct. In addition to jurisdictional fragmentation, this example also highlights colonial law's focus on the rights and responsibilities of individuals, in contrast to Indigenous law's focus on the rights and responsibilities at the collective level.

ii. The Law Society's complaints process is subdivided into different stages, including intake, investigation, citation, and hearing. Some of these stages also have additional "sub-stages." Taken together, complainants may view the various stages and sub-stages as complex, difficult to comprehend and navigate, and time-consuming, and may therefore be deterred from engaging with the processes.

iii. Subdivided processes may also pose additional barriers if complainants or witnesses are required to interact with different people and recall and repeat their experiences at each of the various stages. Such repetition is particularly problematic with respect to the recollection of traumatic experiences.

iv. Another issue with subdivided processes is that witness participation may be limited to providing specific information about particular allegations at certain stages of the process (e.g. during the investigation and hearing). This compartmentalized approach to evidence gathering may prevent witnesses from sharing all of the information they believe is relevant, including how they were impacted by the conduct at issue.

v. With respect to the hearing process, the Law Society has made specific efforts to emphasize the independence of tribunals as a separate decision-making body. Despite these efforts, the public (including Indigenous individuals) may continue to

perceive tribunals as connected with the Law Society. Given the current Tribunal Chair is a former president of the Law Society, the pool of tribunal hearing members includes Benchers, and it is customary for at least one Bencher to sit on each hearing panel, the separation may seem artificial.

vi. If there is a deficiency with any component of the fragmented colonial processes, Indigenous holistic worldview may see "such failure as a failure of the whole system, and not just a failure of an individual component." [24] Chief Joe Alphonse conveys this sentiment in his statement: *"Once again, the system has let us down."*

Colonial approaches to dispute resolution are often described as "adversarial" whereas Indigenous approaches may be described as "relational."[25] The adversarial approach involves opposing parties presenting their positions before an impartial decision maker, who attempts to determine the truth and pass judgment accordingly. The relational approach seeks to restore relationships that have been harmed by a dispute, and involves collaboration to determine an appropriate outcome. While the adversarial approach assumes conflict, the relational approach attempts to minimize it.

In *Bronstein*, the dissenting panel member described the "Law Society's current adversarial regulatory process as a barrier to the participation of vulnerable witnesses like the Respondent's former clients."[26] Previous reports have described how adversarial processes deter Indigenous participation. For example, the *Cariboo-Chilcotin Justice Inquiry* explained that Indigenous people perceive adversarial proceedings as:

> *"a contest in which there must be a winner and a loser, and where one party must denounce and degrade the other in order to prevail. Such a concept runs counter to their traditional values and understanding."*[27]

The adversarial system generally applies interrogation and cross-examination to establish facts and determine the truth of a matter. Many Indigenous understandings of truth include an underlying presumption that individuals are only able to report an event the way they experienced it; truth depends on perspective, so it is understood as a plural concept (i.e. "truths"). Indigenous people may have strong societal expectations that everyone will share their own truth without deception. Adversarial tactics for establishing a single truth in the colonial system are contrary to Indigenous concepts that accept plural truths. Indigenous people may be apprehensive of processes that involve interrogation or cross-examination to test their recollections of the truth from their perspective.

The adversarial process also involves a number of institutional formalities such as hierarchical relationships, strict adherence to timelines and processes, and the use of specialized language and formal attire. Such formalities may deter Indigenous participation.

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21. Law is intrinsically connected to the society, traditions, culture, and landscape from which the legal system has emerged. Indigenous laws are accordingly diverse.

22. Indigenous Peoples are diverse and dynamic, and their worldviews are not monolithic. However, previous reports have identified common aspects of Indigenous worldviews which the Task Force believes are relevant to this report.

23. E.g. *Cariboo-Chilcotin Justice Inquiry, supra* note 12, at 14-15.

24. *Ibid*, at 14.

25. The report uses "relational" instead of "restorative" because the term "restorative" is commonly associated with the criminal justice system. Use of the term "relational" is meant to avoid connotations of the criminal justice system with respect to the Law Society's processes.

26. *Bronstein*, *supra* note 1, at para. 414.

27. *Cariboo-Chilcotin Justice Inquiry, supra* note 12, at 14.

Issue 3: Trust and Relationships

In general (for Indigenous and non-Indigenous people alike), members of the public lack awareness about the Law Society's mandate and role and therefore do not engage with the Law Society's processes. Information about the Law Society's processes is primarily conveyed through its English text-based website, which likely deters people who a) lack the infrastructure to access the website, b) prefer verbal rather than textual communication, or c) use a primary language other than English.

As mentioned above, many Indigenous people do not trust the Law Society because it is a colonial institution within a legal system that has facilitated harms against Indigenous Peoples and territories.

A key factor in building trust and engagement with Indigenous people is the presence of Indigenous individuals within an organization. As one Indigenous consultation participant put it: "Where I don't see my people, I don't feel safe." Indigenous individuals often prefer to interact with people with similar lived experiences to their own. Legal Aid BC's report entitled *Building Bridges: Improving Legal Services for Aboriginal Peoples* found that:

> *[Indigenous clients] are uncomfortable with seeking help from [non-Indigenous people] because most of the times [non-Indigenous people] are not sensitive or aware of [Indigenous] history and culture, or do not fully understand their unique legal needs.*[28]

The Law Society is making progress on increasing Indigenous representation at the Bencher table, on committees and task forces, and in panels. The Law Society does not track the diversity demographics of its employees, but it seems that publicly self-identifying Indigenous employees are currently underrepresented as compared to the Indigenous population of BC. Intercultural competence training may help to increase empathy and understanding, but does not replicate the level of compassion gained through lived experiences.

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28. *Building Bridges: Improving Legal Services for Aboriginal Peoples* (https://legalaid.bc.ca/sites/default/files/2019-03/buildingBridges_en.pdf) at 8.

Issue 4: Preventing Harm

Task Force members and consultation participants emphasized that preventing harm is preferable to repairing it. The Law Society has a central role in preventing lawyers from harming their clients, including Indigenous clients. The Law Society is responsible for regulating the legal profession in BC, including setting and upholding standards for lawyer competence, investigating complaints against lawyers, and disciplining lawyers who breach the set standards of conduct. The Law Society also supports lawyers to achieve the set standards of competence and ethics.

Updates

The Law Society has already made some improvements since the *Bronstein* matter arose:

i. As mentioned above, Rules 4-30 and 4-31 were updated to enable a hearing panel to impose a disciplinary action that is different from the consent agreement.

ii. The Law Society has adopted an Indigenous framework of principles[29] to guide its application of the *Act*, Rules, *Code*, policies, procedures, and practices.

iii. An enhanced trauma-informed approach to receiving and investigating complaints has now been implemented, which includes contact with a trauma-informed staff member throughout the Law Society's processes for certain complainants in appropriate circumstances (e.g. complaints involving discrimination or sexual harassment).

iv. The Discipline Department has introduced a new Witness Accommodations and Considerations Policy, with a corresponding Information Sheet that describes a number of protective measures and supports for witnesses in the Law Society's hearing and review panel processes.

v. The Law Society has approved an alternative discipline process (ADP), which provides a less adversarial method of addressing alleged misconduct outside of the formal discipline stream. The ADP is currently limited to complaints in which a lawyer's health condition is a contributing factor. However, the ADP signals the Law Society's expanded focus on, and options for, individualizing the regulatory response — with a focus on support, treatment, practice interventions and other remedial measures — to address underlying health conditions, rather than imposing sanctions.

vi. There have been developments with respect to options for consent agreements, including pre-citation consent agreements, and administrative penalties (e.g. fines) for minor contraventions of certain Law Society Rules. Consent options are meant to facilitate lawyer admissions at an early stage, thereby avoiding the need for further escalation through the formal complaints process.

vii. All new hires to the Law Society are required to complete the Law Society's Indigenous Intercultural Course.

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29. Truth and Reconciliation Advisory Committee Indigenous Framework Report (https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/reports/IndigenousFramework.pdf).

Recommendations

The Task Force's Terms of Reference frame the primary issue as the need to accommodate Indigenous complainants and witnesses in the Law Society's processes. However, the Task Force understands there is a deeper issue regarding the disputed legitimacy of the imposition of colonial law in Indigenous territories without Indigenous consent.[30]

Canadian society is becoming increasingly aware of its colonial origins, and the need to reconcile with Indigenous Peoples. In 2019, British Columbia introduced the *Declaration on the Rights of Indigenous Peoples Act (DRIPA)* to align its laws with the United Nations Declaration on the *Rights of Indigenous Peoples (UNDRIP).* One of the actions specified in the *DRIPA* Action Plan is for the Province to: *"implement improvements to public…complaints processes…and new models for including Indigenous laws in complaints resolution."* The Task Force believes that aligning the Law Society's processes with *UNDRIP* principles is key to increasing Indigenous access to and engagement with these processes.

Colonial laws have been, and continue to be, used to oppress Indigenous people in Canada. The Law Society acknowledges the oppressive role that the legal system plays in the lives of Indigenous people that results in ongoing disparities between Indigenous people and broader Canadian society. The Law Society is in the early stages of its efforts toward reconciliation with Indigenous people. The Task Force's recommendations are meant to further advance reconciliation by identifying actions for the Law Society to reduce systemic barriers and improve Indigenous access to the Law Society's processes. Fundamental changes will be required to build the level of trust that is necessary for Indigenous complainants and witnesses to feel safe in approaching the Law Society and engaging with its processes.

The Task Force makes the following recommendations for decision by the Benchers:

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30. For example, see: John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v British Columbia*", (1999) 37 Osgoode Hall LJ 537-596

Recommendation 1.0

The Law Society should decolonize its institution, policies, procedures, and practices.

Recommendation 1.1: The Law Society should encourage individuals at all levels of the organization to self-reflect on and remove their colonial biases, attitudes, and behaviours that are based on perceptions of Indigenous people and laws as deficient.

Recommendation 1.2: The Law Society should retain an Indigenous expert to identify and remove unnecessary colonial principles from the Rules, *Code*, policies, procedures, and practices, and should support the provincial government's efforts to remove unnecessary colonial principles from the *Act*.[31]

Recommendation 1.3: The Law Society should identify and remove unnecessary adversarial aspects of its processes.

i. The Law Society should make it as easy as possible for lawyers to apologize without fear of further sanctions, including by increasing opportunities for consent agreements and alternative discipline processes.

ii. The Law Society should support the use of victim impact statements more often in appropriate circumstances.

iii. The Law Society should adopt alternative options for giving evidence, such as the use of video-conferencing, privacy screens, victim impact statements, and an inquisitive model of questioning (e.g. where a panel member instead of an opposing lawyer poses questions to witnesses).

Recommendation 1.4: The Law Society should review its processes and practices with a view to increasing efficiencies in the resolution of complaints.

Recommendation 1.5: The Law Society should minimize unnecessary formalities within its processes and practices, such as specialized language, hierarchical seating arrangements, formal dress codes, and colonial symbols.

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31. Because the Law Society is a creation of British Columbia's colonial laws, the Law Society cannot completely divorce itself from its colonial legal structures and requirements. It can, nevertheless, take measures to identify and remove unnecessary colonial principles that impede Indigenous access to the Law Society's processes.

Recommendation 2.0

The Law Society should Indigenize its institution, policies, procedures, and practices.

> *"Integrating Indigenous laws and protocols and processes into the existing process... needs to be in conjunction, consultation, and engagement with First Nations or Indigenous communities and it needs to be done in a respectful manner."*[32]

Recommendation 2.1: The Law Society should apply the Indigenous Framework[33] in its application of the *Act*, Rules, *Code*, policies, procedures, and practices.

i. The Law Society should ensure that all Law Society representatives receive training on the Indigenous Framework and its application in relation to the *Act*, Rules, *Code,* policies, procedures, and practices.

Recommendation 2.2: The Law Society should uphold its prior commitments to increase Indigenous representation throughout the organization, including at the governance, leadership, and staff levels.

i. Given the current perceived underrepresentation of Indigenous individuals at the staff level, the Law Society should develop an Indigenous recruitment strategy to hire, promote, and support the retention of more Indigenous staff throughout the Law Society, including in executive leadership roles.

ii. The Law Society should create an organizational culture that supports the inclusion and success of Indigenous representatives at all levels of the organization.

Recommendation 2.3: The Law Society should engage with Indigenous individuals, including Indigenous lawyers and legal academics, to incorporate Indigenous legal principles into the Law Society's processes and practices.

Recommendation 2.4: The Law Society should continue adapting its processes to incorporate flexible, culturally relevant, and trauma-informed options and resources for Indigenous complainants and witnesses.

Recommendation 2.5: The Law Society should develop a process for investigating and addressing systemic issues that may be affecting Indigenous legal clients on a broad scale, rather than relying on individuals to bring forward complaints.

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32. Consultation participant.

33. Indigenous Framework, *supra* note 29.

Recommendation 3.0

The Law Society should build trust and relationships with Indigenous individuals, organizations, and communities.

> *"Trust and accountability comes back to relationships, connecting words to actions, collaborative processes, and having conversations."* [34]

Recommendation 3.1: The Law Society should raise awareness throughout the province about the Law Society's role and the services it provides, including supports and options available to Indigenous complainants and witnesses.

i. The Law Society should ensure that a variety of communications tools are used, such as pamphlets, social media, in-person conversations, and videos.

ii. The Law Society should provide clear, plain language information about:

   a. the standards of conduct that clients should expect from their lawyers, including specific examples of the types of conduct and circumstances that may warrant a complaint against a lawyer;

   b. how to make a complaint, steps involved, anticipated timelines, and possible outcomes; and

   c. all supports that are available for Indigenous complainants and witnesses in the Law Society's processes.

Recommendation 3.2: The Law Society should prioritize hiring an Indigenous "navigator" to guide Indigenous complainants and witnesses through the Law Society's processes.[35]

Recommendation 3.3: The Law Society should create a safe atmosphere for Indigenous individuals, including in the institution's organizational, physical, and digital spaces.

Recommendation 3.4: The Law Society should develop connections with support agencies to identify potential resources and opportunities to assist Indigenous complainants and witnesses.[36]

Recommendation 3.5: Subject to guidance from the Tsilhqot'in Nation's Chief, the Law Society should continue its efforts to make amends with the Tsilhqot'in Survivors for the outcome of the *Bronstein* decision having caused disappointment, grief, and anguish amongst the Tsilhqot'in people, and to engage with the Tsilhqot'in Survivors on how the Law Society's processes could be improved.

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34. Consultation participant.

35. The "navigator" should serve as a central contact person assigned across all stages of a file.

36. These connections may be helpful in circumstances where the Law Society is not the appropriate entity for dealing with the complaint.

Recommendation 4.0

The Law Society should be more proactive in the prevention of harm to the public, particularly Indigenous individuals.

Recommendation 4.1: The Law Society should clarify competency requirements in the Law Society's *Code of Professional Conduct* to specifically include intercultural competence.

Recommendation 4.2: The Law Society should ensure Practice Advisors are equipped to provide practice support materials, resources, and guidance on intercultural competency and trauma-informed legal services.

Recommendation 4.3: The Law Society should ensure that lawyers have access to resources, leading practice guides, and educational opportunities with respect to the provision of interculturally competent and trauma-informed legal services to Indigenous clients.

Recommendation 4.4: The Law Society should consult with Indigenous legal organizations to consider ways to identify lawyers who can demonstrate high levels of intercultural competence and positive professional engagement with Indigenous clients.

Recommendation 5.0

The Law Society should implement the recommendations.

Recommendation 5.1: Once the Task Force completes its mandate, the Law Society must ensure that there is effective oversight of the implementation of its recommendations.[37]

Recommendation 5.2: To optimize implementation, an implementation plan that identifies immediate steps to be taken in the first six months following the approval of the recommendations should be developed.

i. The Law Society should update the implementation plan annually, and track progress in its annual report.

Recommendation 5.3: In collaboration with Indigenous individuals and organizations, the Law Society should develop evaluation mechanisms to collect, review, and evaluate data regarding the experiences of Indigenous complainants and witnesses, taking privacy considerations into account.

Recommendation 5.4: The Law Society should annually assess whether revised processes and policies are working well, and make appropriate adjustments as necessary.

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37. The provincial government's move to modernize legal regulation may affect oversight of the recommendations in the future, but the Task Force believes that immediate oversight by the Law Society's Truth and Reconciliation Advisory Committee would be most effective.

Appendix A: Terms of Reference

Indigenous Engagement in Regulatory Matters Task Force

TERMS OF REFERENCE

Preamble

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

Mandate

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

Composition

The Task Force shall consist of seven members.

Meeting Practices

The Task Force shall operate in a manner that is consistent with the Benchers' governance policies.

The Task Force shall meet as required.

Quorum is four members of the Task Force (Rule 1-16(2)).

Accountability

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

Reporting Requirements

The Task Force will deliver its report containing any recommendations for future action to the Benchers within 12 months from the date on which its work plan is delivered.

Duties and Responsibilities

1. Following its appointment, the Task Force will prepare a work plan which will be provided to the Benchers at their September 2021 meeting, outlining the anticipated scope of the review, including interviews and any anticipated research, and the procedures to be undertaken to gather information to complete its work. The work plan would also include any proposed changes or additions the Task Force, after consultation with the Truth and Reconciliation

Advisory Committee, would recommend with respect to their mandate.

2. Consult with key stakeholders, including Law Society staff, members of the Law Society Tribunal, members of the Truth and Reconciliation Advisory Committee, Indigenous leaders, and any others that the Task Force considers necessary for the purpose of preparing its report.

3. Conduct research into the engagement, accommodation, and participation of Indigenous people in regulatory processes in other professions and jurisdictions.

4. The Task Force should include the following in developing any recommendations:

    a. An analysis of the effects on Indigenous complainants and witnesses of the processes used to gather, assess, introduce, and submit evidence during investigations and hearings;

    b. An analysis of the nature and goals of proceedings that involve Indigenous people and Indigenous communities;

    c. Consideration and comparison of the differences that exist between Indigenous perspectives regarding conflict resolution, and the conventional approach of the Law Society and the Law Society Tribunal to investigation, discipline, and adjudication;

    d. Consideration of how to incorporate Indigenous perspectives into Law Society complaints, investigation, discipline, and Tribunal processes and procedures;

    e. An assessment of intercultural competence and trauma-informed practices at the Law Society, and identification of opportunities for training and development;

    f. Consideration of the use of interculturally competent and trauma-informed expertise by Law Society staff, the Tribunal and outside counsel; and

    g. Identification of actions to prevent, and remedial measures to address, the impacts of members' misconduct on Indigenous complainants, witnesses, and communities.

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

Staff Support

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Report of the

INDIGENOUS ENGAGEMENT

in Regulatory Matters Task Force

Law Society
of British Columbia

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