



**Tab 2**

**Report to Convocation  
May 24, 2018**

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**Review Panel on Regulatory and Hearing Processes  
Affecting Indigenous Peoples**

**Review Panel**

Dianne Corbiere (Chair)  
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**Independent Reviewer**

Ovide Mercredi

**Purpose of Report: Decision**

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## 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 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.**

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.

For Decision

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

### Motion

1. That Convocation approve the recommendations set out in this report to incorporate Indigenous perspectives in the Law Society's regulatory and hearing processes, in keeping with the Law Society's commitment through the Indigenous Framework adopted by the Law Society to work within its mandate on Indigenous issues and the relationship with the Indigenous community.

### Introduction

2. On June 28, 2017, Law Society Treasurer Paul Schabas announced the creation of a 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 Panel was charged with identifying issues and making recommendations on opportunities for inclusion of Indigenous perspectives in Law Society processes. The Terms of Reference for the Review Panel are set out at [Tab 2.2.1](#).
3. The Review Panel's Terms of Reference note that the experience of the Law Society in *Law Society of Upper Canada v. Keshen* (Keshen) raised questions about the Law Society's regulatory and hearing process in relation to Indigenous persons, complaints, and issues. The Law Society recognized that it needed to learn from this experience and reform its processes to accommodate the unique historical and cultural circumstances of Indigenous Peoples and Indigenous approaches to conflict resolution.
4. This report summarizes the work the Review Panel has undertaken since June of 2017 and sets out its recommendations.
5. Upon approval of the recommendations in this report, the activities related to implementation of the recommendations will move to Law Society operations under the oversight of the Chief Executive Officer, who will ensure appropriate engagement with relevant Law Society committees and partner groups, including the Indigenous Advisory Group, and report to Convocation on outcomes as matters progress.

### Overview of the Review Panel's Work

6. The Review Panel met on 20 occasions beginning in the summer of 2017 through to May 2018, and by the fall of 2017 had formulated a work plan, as requested by the Treasurer. The work plan established a robust and effectual review process that included an

educational component, review of key resources and presentations by and interviews with a wide range of individuals, including 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. A list of those interviewed by the Review Panel and with whom the Review Panel consulted is at **Tab 2.2.2**.

7. The Review Panel is grateful to these individuals who made time to speak with the Review Panel and share their information, thoughts and views with honesty and candour. Their contributions were vital to the Review Panel's work and assisted in framing a number of the recommendations.
8. The work of the Review Panel was carried out alongside the mandate of the Independent Reviewer, the mandate for whom is set out separately in the Review Panel Terms of Reference. Former Assembly of 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. A map of the First Nation treaty territories is at **Tab 2.2.3**.<sup>1</sup> Mr. Mercredi was able to listen and learn from the experiences of First Nations in the north and share this with the Law Society. He attended many of the Review Panel meetings, providing a valuable perspective and key insights that assisted the Review Panel. The information he obtained and relayed to the Review Panel was crucial to forming the recommendations in this report. The Review Panel is deeply indebted to Mr. Mercredi for his contribution to its work.
9. An important event in the work of the Review Panel occurred on September 20, 2017 when the Treasurer, members of the Review Panel and three Law Society senior staff attended a community meeting in Sioux Lookout. This meeting was arranged through the efforts of Mr. Mercredi. This was a first opportunity for the Review Panel to meet with the Leadership of a number of First Nations in the north, Elders and Residential School Survivors, listen to their views and their stories, and convey the message from the Law Society that it is committed to the work for which the Review Panel was established. It was an opportunity for the Law Society to learn about how, as a regulator, it needs to become more culturally competent on Indigenous histories, cultures and affairs, including the impacts of settlor/colonial systems on Indigenous Peoples, This learning will ensure that the Law Society can appropriately address regulatory matters that arise from these communities and the lawyers who serve them.
10. The Review Panel is grateful to Chief Clifford Bull of the Lac Seul First Nation for the gracious welcome extended to the Law Society attendees. The Review Panel also benefited greatly from the comments of Ogichidaa Francis Kavanaugh, Grand Council

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<sup>1</sup> For more general information about treaties with First Nations in Ontario, see also <https://www.ontario.ca/page/treaties>.

Treaty #3 and Derek Fox, Deputy Grand Chief, Nishnawbe Aski Nation, and all of the other participants who were generous with their time and spoke with candour and pain about their experiences with the Law Society, the Indian Residential Schools Agreement and Mr. Keshen.

11. The Review Panel recognized that the outcome of the Law Society's conduct application against Mr. Keshen was regrettable for the complainants. It exposed gaps and failings by the Law Society as it related to the Residential School Survivors and the Indigenous community as a whole. Many of the Law Society staff involved in the Keshen case, based on the interviews conducted by the Review Panel, expressed this sentiment, having invested significant time and effort in the investigation and prosecution, including engagement with the Survivors in the process.
12. As articulated by Review Panel member Kathleen Lickers, a lawyer and a Seneca from the Six Nations of the Grand River, "the Keshen matter illustrates a particular paradigm at the Law Society that calls for change."
13. The Review Panel believes the recommendations in this report for Convocation's approval will be the catalyst for that change.

#### **Summary of the Keshen Prosecution**

14. As stated, the experience of the Law Society in the Keshen case raised questions about the Law Society's regulatory and hearing process in relation to Indigenous persons, complaints and issues. To provide additional context, the following summarizes the Law Society's investigation and prosecution of Mr. Keshen.
15. In 2013 and 2014, the Law Society began to receive complaints from clients whom Mr. Keshen had represented in connection with Independent Assessment Process ("IAP") applications to the Indian Residential Schools Adjudication Secretariat pursuant to the Indian Residential Schools Settlement Agreement.
16. In November 2013, through the office of the Executive Director of the Law Society's Professional Regulation Division, a team was created in response to this specific development called the First Nations, Métis and Inuit (FNMI) Team. It was a multi-departmental group of staff that received specialized training and other supports for its work on the Indigenous complaints relating to Mr. Keshen, which were assigned to this team for investigation.
17. Complaints to the Law Society are instructed for investigation within the Professional Regulation Division when information is presented that suggests a licensee may have engaged in professional misconduct. Following investigation, where the complaints are of a sufficiently serious nature, information about the conduct issues is prepared for review by the Law Society's Proceedings Authorization Committee, which makes decisions on

the appropriate regulatory action. Among the actions the Committee may authorize is a conduct application for a discipline hearing before the Law Society Tribunal.

18. The investigation eventually resulted in the authorization by the Proceedings Authorization Committee of two Notices of Application containing allegations connected with 34 complainants. They were issued on June 10, 2015 (LCN 64/15) and November 20, 2015 (LCN116/15) respectively. The allegations were that Mr. Keshen, among other things:
  - a. did not serve his clients properly;
  - b. assigned tasks to staff that he should not have;
  - c. took clients' money from his trust account to pay his fees without sending a bill;
  - d. charged unfair legal fees; and
  - e. did not handle settlement monies correctly.
  
19. The Law Society's conduct hearing began in Kenora on June 27, 2016 and continued over 25 hearing days until February, 2017. On February 16, 2017 (day 22), the prosecution closed its case, filing two replacement Notices to significantly reduce the number and nature of the original allegations. The remaining three hearing days were devoted to the commencement of the defence case, including evidence relevant to an abuse of process motion filed in late January 2017.
  
20. To summarize the Law Society's operational commitment over the course of the Keshen case, the Law Society dealt with 57 individual complaints through the work of 19 Law Society Professional Regulation Division staff and three outside prosecutors. The main investigative work spanned the period from late 2013 to the late summer of 2015 and transitioned between two investigation team leads and five different investigators, some of whom assisted the prosecutors in the lead up to and following the commencement of the conduct hearing in June 2016. Over the course of the hearing, the responsibility for the prosecution was with a team of two prosecutors, who then handed the file to a second team of two prosecutors in the fall of 2016 (one internal counsel and one external counsel). A change in external counsel on that team was the result of a judicial appointment. That team subsequently withdrew as prosecutors in March 2017. A third prosecutor (external counsel) acted for the remainder of the case.
  
21. 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 the circumstances and a resolution proposal was accepted by the Tribunal on April 25, 2017. 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. He also agreed to the following additional terms:
  - a. A formal undertaking to cooperate with a practice review and a spot audit;
  - b. A commitment to take additional CPD courses in the area of practice and records management;

- c. Participation in between one and three circles to be funded by the Law Society focusing on restorative justice to be organized and conducted by leaders and Elders in the communities in which he practised;
- d. A withdrawal of his motion alleging abuse of process by the Law Society; and
- e. An agreement not to request costs.

### **Report of the Independent Reviewer - Ovide William Mercredi**

My work as the Independent Reviewer was essentially fulfilling a quiet non-judgemental role that required a compassionate and interested listener. My role was about gathering information, going to the Leadership and Elders of First Nations communities, and talking to victims of process, including Residential School Survivors. While I 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 my 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.

My work allowed for many Keshen complainants and other Residential School Survivors to tell their full stories in a safe, supportive and respectful manner. Their experiences in Residential Schools hurt them deeply and such wounds remain for many as regress, doubts and ongoing challenges. The nature and scope of the Indian Residential Schools Settlement Agreement and the applications to the Indian Residential Schools Adjudication process did little to satisfy the individual hopes for closure and settlement. The majority of the individual interviewed believe, and for good reasons, that the awards they received were very low and did not compensate them based on their stories.

The healing journey has been part of their story; a journey begun by many returning to their homelands, learning their languages, having families and trying to normalize their daily living. They wanted healing and closure! They wanted to share their LIFE STORIES without feeling like a loser or a criminal, feelings that brought to the forefront by foreign and often adversarial processes. Most Residential School Survivors felt that they were not heard and accepted. It was not easy for them to disclose deep wounds, especially the sexual assault and abuses they experienced in Residential Schools.

Unfortunately, for the Keshen complainants and other Residential School Survivors who were unhappy with their lawyers, the hurt and regrets have been compounded. Where are the reports from the lawyer explaining what was done for their client? Where are the letters explaining the award granted and the breakdown for legal fees and costs? They want to know the answers - answers no Independent Reviewer can provide. Can the Law Society of Ontario provide them with the answers? They

are waiting. In speaking with the Survivors, I dealt with a lot of emotion. They felt betrayed by their lawyer. It also appeared that they did not understand the Law Society's process. Many of them think they went to court when attending before the Law Society Tribunal.

In terms of Law Society process, when a complaint is made, the Law Society needs to determine the competence of the lawyer conducting the investigation to do it. To discover all information, there needs to be engagement with the complainant in their own language and full knowledge of their culture. Investigations need to be done in a manner that allows the complainant to tell their story fully.

The Law Society needs to decide how to conduct interviews arising from complaints properly, understanding protocol, to make sure Indigenous perspectives are part of the process. The Law Society also needs to take into account Indigenous notions of conflict resolution (non-adversarial). The part of the problem for the Tribunal is the adversarial nature of the process and no representation for the complainant. Perhaps there is another way of settling complaints against lawyers. This is why there is a need to speak with the Leadership, Elders and others in the communities.

Ideas need to be developed to address the competence of the complainants themselves to understand what is going on and level of literacy in First Nations communities. There were very few supports and where there were supports, the Survivors used them very heavily. There is a need understand who the client is, their capacity and knowledge in relation to these processes.

While the hope remains that the Law Society of Ontario will radically alter its understanding of First Nations histories, cultures, societies, customs, traditions, world views and internal sovereignty, the time for reform is present and imminent. The days of the *status quo* or business as usual will not lead to reconciliation nor will the relationship with First Nations be provided the requisite priority and appropriate actions and responses.

The complainants against Keshen, Residential School Survivors in general, and the administration of justice as it impacts on First Nations in Ontario requires the immediate attention, action, cooperation, and support of the entire legal profession.

To do less than what justice demands be done will be seen as not just as a lost opportunity, but as another betrayal of the ideals of social justice in Canada. Going forward for the Law Society of Ontario, as a self-governing professional body, will mean recognizing First Nations as self-governing Nations who have a right and duty to protect their members and citizens from destructive colonialism and the vestiges of colonial powers still exercised by the Canadian State and other institutions within Canada.



The Law Society needs to determine how it can best support the Indigenous communities. The following are some proposals that can be pursued:

- Annual or semi-annual Law Society meetings with Indigenous communities in Ontario, to engage and discuss matters of mutual interest between the Law Society and the communities;
- Providing legal supports to Indigenous communities as outlined in Recommendation 3 of the Review Panel report, as part of engagement and in keeping with the access to justice focus of the Law Society; and
- Considering how the Law Society can support funding similar to that provided through the now dissolved Aboriginal Healing Foundation, to support Survivors and their families and, in partnership with Indigenous communities, pursuing healing initiatives.

## RECOMMENDATIONS

1. Given the gap between the Settler Society and Indigenous Nations and people, the Law Society of Ontario needs to become more proactive in reconciliation work directed towards building capacity on Cultural Competency for lawyers in general and for lawyers practicing with Indigenous clients in particular.

Cultural Competency means knowing and understanding the historical relationships, the impact and legacy of colonialism, the results of Federalism, the *Indian Act* and Residential Schools, the vision of the Treaties and the lack of implementation of Treaty Rights, the evolution of Canadian law as it relates directly to Indigenous Peoples and with a greater focus on Indigenous laws, traditions, customs, ceremonies, worldviews, cultures and societies. Knowing your clients, to properly represent them, is always a pre-requisite to professional conduct and standard of care. For lawyers from mainstream society, as members of the majority, and as products of Canadian society, they more or less have Cultural Competency to represent non-Indigenous clients but the same cannot be said concerning Indigenous Nations and people.

2. Knowing and being supportive of Indigenous Nations' rights and freedoms, and their quest for belonging in their Homelands, including their aspirations for a better relationship with Canadians and Canada, the Law Society of Ontario, as a powerful and significant institution for law reform, the rule of law, and the administration of justice, has a major obligation, if not an inherent duty, to become a strong advocate for fundamental reforms that will perfect Canada and restore the rightful inheritance of Indigenous Nations to self-determination.
3. Belonging to a multi-cultural Country does not mean automatic harmony between distinct peoples and cultures within Canada; therefore, direct measures and actions are required to address racism, prejudice and discrimination in this country, a human condition that is not the natural

consequence of being a human being but the result of ignorance, fear, hatred or crime. The Law Society of Ontario and the lawyers in this Province need to become more aware of the negative impacts of prejudice, discrimination and racism on Indigenous people, especially now given the ever increasing urban populations of Indigenous people. Lawyers and the Law Society need to become anti-racism advocates as part of their Cultural Competency in an increasingly pluralistic country.

4. Knowing that Canada has responded to the crimes of the Residential Schools, albeit under pressure and inadequately, the Law Society of Ontario needs to call upon the Federal Government to undertake an immediate review of the adequacy, strength and weakness of the Indian Residential Schools Settlement Agreement, with a particular attention to the cap on awards and the role of the Independent Assessment Process and the role of lawyers in that regard.
5. Residential School Survivors continue to advocate for their healing as individuals, families and communities. Their cry for help is worthy of immediate support and action from lawyers and the Law Society of Ontario. When I spoke to Treasurer Paul Schabas about the mandate of the Review Panel and my role, I made it clear that the affected people should have some sort of remedial measures available to them, and this is critical. Some of these people are the most vulnerable in society. We need to begin the process of how the Law Society and Indigenous communities are going to work together. The Aboriginal Healing Foundation closed on September 30, 2014, and thereby, by government neglect, was unable to continue to support important community-based healing initiatives aimed at resolving the individual and collective trauma of the abuses experienced at Residential Schools. The Law Society of Ontario needs to call upon the Federal Government to re-instate a properly funded Healing Foundation.
6. Canadians in general abhor poverty and inequality with regard to income or wealth distribution in their country. Unfortunately for Indigenous people, their poverty remains out of mind and out of sight for the most part. However, the lack of jobs, wealth generation or even a subsistence economy within most Indigenous communities renders Indigenous Nations dependent upon government funding to address social issues and problems like poor housing, poor health and emergencies like the diabetes epidemic and recurring youth suicides. While slow and sporadic gains are being made in addressing Indigenous poverty within Canada, help from other than government sources are needed to accelerate the rise from poverty. The Law Society can help by creating a funding opportunity and mechanism for its members to make charitable donations to support the healing call by Residential School Survivors, their families and communities.

## **The Recommendations**

### **RECOMMENDATION WITH RESPECT TO THE INDEPENDENT REVIEWER'S REPORT**

**The Law Society should accept the Independent Reviewer's Recommendations, which include recommendations that align with others in this report (Recommendations 1 and 3), and commit to determining actions that should be taken with respect to Recommendations 2, 4, 5 and 6 of the Independent Reviewer.**

### **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 who 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 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.**

## **Discussion of 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.**
22. As an organization, the Law Society needs to demonstrate competence in working effectively across cultures.
23. To ensure Law Society services are provided competently 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.

24. The loss of culture, language and mutually respectful relationships between Indigenous and non-Indigenous communities has led to social challenges for Indigenous people, which can impact interaction with an organization like the Law Society. The Law Society needs to gain a meaningful understanding of the issues affecting Residential School Survivors, other vulnerable Indigenous peoples and Indigenous peoples generally. 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.
25. Sensitivity to the emotional, spiritual and intellectual needs of complainants who are Residential School Survivors or other vulnerable Indigenous peoples is required. Many survivors have had control taken from their lives and were child victims of physical, psychological and sexual abuse. The Law Society must also recognize and respect that, for complainants, interaction with the organization and its complaints and hearing processes is quite unfamiliar to them and can be exceptionally stressful and difficult.
26. The Law Society has the opportunity to transform itself as an institution to become more relevant and more competent in its work on matters involving Indigenous communities. Beyond the matter of Residential Schools, the Law Society anticipates that other issues may arise (i.e. Day Schools, Day Scholars and the Sixties Scoop cases). Also, Indigenous communities suffer ongoing trauma from Residential Schools and colonization. The First Nations Child and Family Caring Society of Canada case before the Canadian Human Rights Tribunal, for example, illustrates how Residential Schools continue to have an ongoing impact on Indigenous peoples and intergenerational trauma.<sup>2</sup>
27. The Review Panel received valuable insights from many experts with whom the Review Panel consulted. 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, works to compliment the work of the National Inquiry into Missing and Murdered Indigenous Women and Girls. She advised that in recognizing that there are power differentials between the Law Society and Indigenous community members who may seek to complain about a lawyer or paralegal, the Law Society needs to understand the path to “cultural safety”.
28. The path 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

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<sup>2</sup> The case may be accessed at <https://www.canlii.org/en/ca/chrt/doc/2016/2016chrt2/2016chrt2.html?autocompleteStr=caring%20soci&autocompletePos=1>

safety for both the institution and members of the Indigenous community who are interacting with the institution. The path to cultural safety 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.

29. A commitment to developing cultural awareness and the ability to provide competent services for Indigenous peoples must involve engagement with the necessary Indigenous experts. This engagement could be led by a new office within the Law Society. The office may include the appointment of an appropriate Indigenous person with the right skills and talents to provide leadership in understanding and responding to Indigenous peoples' experience with the Law Society. The office could play a key role in advising on how Law Society programs and services can become inclusive and responsive to the needs of Indigenous communities and their members while similarly raising the competencies of the profession. This office could also be mandated with strengthening relationships between the Indigenous community and the Law Society. Indigenous community outreach in Ontario and the north would be an important part of this office.
  
30. The Law Society has begun work to create cultural awareness through the adoption of the Indigenous Framework in June 2017 as a critical first step. The Framework is at [Tab 2.2.4](#). While much work needs to be done, the Review Panel was encouraged by the progress that has been made to date on implementing the various components of the Framework in partnership with the Law Society's Indigenous Advisory Group (IAG), the Indigenous Bar Association and other stakeholders such as The Advocates Society. Most importantly, some of these components relate directly to the recommendations in this report. In particular,
  - a. The Law Society is exploring multi-day cultural competence training for benchers and staff using Indigenous methodologies;
  - b. The Law Society has expressed interest in working with the IAG and other partners in developing CPD programs to meet the new CPD requirements on equality, diversity and inclusion required by 2020;
  - c. The Law Society through bencher Dianne Corbiere is participating in the Federation of Law Societies working group examining responses to the TRC Calls to Action as part of a commitment to reconciliation;
  - d. The Law Society will be updating its *Practice Guidelines for Lawyers Acting in Cases Involving Claims of Aboriginal Residential School Abuse*;
  - e. The Law Society's Senior Indigenous Counsel, Darcy Belisle, has engaged in Law Society Divisional training initiatives for Law Society staff on Indigenous cultural competence;
  - f. Several members of the Review Panel and members of senior staff attended a three-day Indigenous Law Camp in September 2017, led by Professor John Borrows, who is Anishinabe/Ojibway and a member of the Chippewa of the Nawash First Nation in Ontario and Canada Research Chair in Indigenous Law at the University of Victoria Law School; and

- g. In partnership with the Indigenous Bar Association and the Law Society, The Advocates' Society has developed the *Guide for Lawyers Working with Indigenous Peoples* as a resource for litigators working with Indigenous peoples. The Guide includes important historical and cultural elements that provide context for the professional relationships among Indigenous persons, their lawyers and other participants in the justice system
31. The Review Panel believes that for the Law Society, success will be achieved when the Indigenous communities see their identity, culture and laws - their "faces" – reflected and respected in the Law Society and its processes. This transformation, which should align with the commitment to reconciliation, is understood as a long term goal that begins with a vision for the Law Society towards change and is followed by a set of principles that will guide the organization.

## **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.**
32. 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.
  33. The hesitation to complain or difficulty in complaining to an authority like the Law Society for some Indigenous people may be a function of culture and an inability of the Law Society to make itself accessible. The fact that some complainants have been marginalized in society means they will have difficulty trusting the system in which the Law Society operates as a legal institution and will have challenges interacting with it. This distrust may arise from the historical experience of Indigenous people where such institutions and their real and perceived authority were used as a means to colonize Indigenous lands, resources and communities.
  34. It is also recognized that some complainants perceive or experience a power imbalance as a client in a solicitor-client relationship, especially where the complainant is emotionally and/or physically vulnerable. In the Law Society's complaints and discipline process,



without additional steps, the complainant is not a party to the proceeding, has no formal role in the disposition of a case and remains unrepresented. A complainant may also not have the means to hire counsel to help them engage with the process. This experience may in fact contribute to a further imbalance as a systemic issue.

35. Because of these and other factors, Law Society staff, which includes any external parties who may be retained or engaged, 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. Law Society staff who work directly with complainants must appreciate the need for the utmost sensitivity in dealings with those complainants who are Residential School Survivors or other vulnerable Indigenous peoples. Communications should be respectful and must not result in further trauma to the complainant. Community support should always be an option for complainants to access throughout the process with the Law Society.
36. Special communication needs and challenges may be presented, such as language barriers, cultural barriers and limited access to telephone service. The services of interpreters may be necessary. In some cases, the integrity of the investigation process on a complaint matter may require that the complainant communicate with the Law Society in their own language, if the complainant so desires. This allows the complainant to tell their story in a way that respects their sharing of information and that will benefit the Law Society in obtaining the information it needs to effectively investigate the matter.
37. Written communications to Indigenous complainants should be provided in an understandable and accessible format and reasonable efforts should be made to follow up to ensure understanding. In this respect, the Law Society should explore creating a lexicon that includes culturally appropriate terms and phrases, and engage with the Leadership, Elders and others in the Indigenous community in this initiative.
38. Communication at all stages of the matter should be timely and effective. This also involves being clear with the complainant about what the Law Society can and cannot remedy and, depending on the circumstances, involving the complainant in the approach to gathering information relevant to the complaint, if appropriate, and explaining the steps and important decisions points. This is especially important at the Law Society Tribunal hearing level if the complainant is to be a witness.

### **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.**
39. As noted earlier in this report, at the suggestion of the Independent Reviewer and with the agreement of the Chiefs and Elders of Lac Seul First Nation, Review Panel members attended a meeting in Sioux Lookout near the beginning of the Review Panel's mandate, in September 2017. This was an important gathering for the community and an invaluable learning experience for the Review Panel.
40. The Law Society made a commitment at that gathering to work towards a better regulatory process for Indigenous complainants and better relationships with Indigenous communities. This is a long term commitment.
41. 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. Meetings should take place at appropriate times in the community and at a minimum should involve the Treasurer and others at the Law Society who are in positions to commit to and lead change. In this engagement, the initial approach should be the Law Society's request to be informed, educated and gain understanding. It is hoped that this will set the stage for an open dialogue about the Law Society's obligation to the community as a public interest regulator.
42. In considering ongoing issues, the Review Panel sees a role for the Law Society within its duty to facilitate access to justice to ensure a clear understanding of the Law Society's process and to offer valuable assistance to Indigenous complainants apart from any engagement in individual complaints investigations or prosecutions. In this respect, 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.
43. These are two examples of potential enhancements to the Law Society's engagement with Indigenous complainants in ways that respect language and culture, with the assistance of those who immediately understand Indigenous culture, language and history.

44. The proposals above may help to address the circumstances that arose in the Keshen case. The Review Panel heard that the process of the Tribunal's hearing and cross-examination in particular was extremely difficult for the complainants who became witnesses in the proceedings. In many instances, the process aggravated the trauma they had previously experienced as residential school survivors. Their interactions with the Law Society at the intake, investigative and hearing stages led to their belief that the Law Society intended to help them. The gulf between their hope for assistance and the reality of the true nature of the proceedings left some of the complainants re-traumatized and with a deep resentment of the process and the Law Society.
45. At least three factors contribute to consideration of a different approach to complainants like those involved in the Keshen case:
- a. the complainants were all members of northern First Nations communities, which created logistical challenges for the Law Society based in Toronto and more importantly for the complainants in remote communities;
  - b. the complainants were also Residential School Survivors, which required an approach that would ensure cultural safety; and
  - c. the Law Society had already expressed a commitment to improve the quality of justice for Indigenous peoples, as part of its Indigenous Framework initiative, in keeping with the TRC Calls to Action.
46. As such, the two proposals outlined above may be effective in addressing the obligation to assist in complainants' understanding of the Law Society and the Tribunal's process. The hope is that this becomes a practical implementation of the continuing policy objectives that support engagement with Indigenous communities, advanced by the Law Society through practical solutions tailored to the communities' legal needs. The office described in Recommendation 1 would assist in this regard.

## **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.**

47. The Professional Regulation Division (“PRD”) of the Law Society is a large department which performs a crucial function in the regulation of lawyers and paralegals. The PRD Executive Director’s responsibilities are extensive and significant in the context of the public interest obligations of the Law Society. The Executive Director’s professional judgment must be exercised in a way that meets the Law Society’s professional regulatory objectives and ensures the integrity of the process that accomplishes that goal.
48. Through this recommendation, the Review Panel acknowledges the efforts currently being made by the CEO to ensure that the Executive Director is given the required support, staff and financial resources to perform her functions to meet the standard required and expected of the Law Society in addressing complaints, including those that require disciplinary measures.
49. The ability to develop policies and procedures as described in Recommendation 4 will enable consistent, informed application of relevant principles, including Indigenous Law principles. For example, the Review Panel discussed the 2013 Law Society Tribunal case involving First Nations lawyer Terence Robinson<sup>3</sup>, in which the discussion of Gladue principles<sup>4</sup> as applicable to the case came at the request of the Hearing Panel. The matter was concluded at the Law Society Tribunal’s Appeal Panel which upheld the application of Gladue principles. In the Review Panel’s view, there is an opportunity to integrate the application of Gladue principles as part of regulatory policy. This approach aligns with the views of the Law Society Tribunal Chair, David Wright, discussed later in this report.
50. With respect to management of major cases, an important feature of planning as described is communication and consultation. It is understood that there needs to be early

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<sup>3</sup> Mr. Robinson pled guilty to a criminal charge of aggravated assault. At his discipline hearing, he agreed that the facts underlying his conviction amounted to conduct unbecoming a lawyer. The Hearing Panel imposed a two-year suspension as a penalty. He appealed this penalty with the primary ground of appeal being the application of Gladue principles. The Appeal Panel granted the appeal and substituted a penalty of 12 months suspension which was already served at the time the appeal was heard. The case may be accessed at <https://www.canlii.org/en/on/onlst/doc/2013/2013onlsap18/2013onlsap18.html?autocompleteStr=robinson&autocompletePos=1>

<sup>4</sup> The Gladue Sentencing Principles arose from the 1999 decision of the Supreme Court of Canada *R. v. Gladue*. The case dealt with section 718.2(e) of the *Criminal Code* and provided that when courts are addressing the detention of an Aboriginal person at the bail, sentencing or appeal stages, a court is required to take into account circumstances facing Aboriginal people and must consider all appropriate options other than jail.

communication and consultation between investigators and prosecutors. The challenge is designing and supervising a process in which limited discipline resources are applied to the highest priority files, and doing so in a way that empowers investigation staff and complements their skill set. Creating the appropriate plan will avoid situations in which, for example, work is shifted from investigations to discipline, or where work is duplicated in a way that may undermine the efforts of Investigation managers.

51. 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, the time needed to complete the investigation 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.
  
52. Based on information the Review Panel received, the following would be important aspects of a major case plan:
  - a. Planning the approach to the case, including appropriate timelines, assignments and required resources;
  - b. Establishing procedures, processes and protocols;
  - c. Observing established processes and protocols, including
    - i. the overall responsibility of the team lead,
    - ii. responsibility of the team lead for decision-making,
    - iii. when decision-making must be elevated, and
    - iv. reporting requirements, and varying from them only in exceptional circumstances and with full knowledge of the reasons for doing so;
  - d. Regular updates to all staff involved on the progress of the case, including updates on specific challenges; and
  - e. Regular communication and updates with the complainant(s).
  
53. With respect to supports for prosecutors, these measures should include the following:
  - a. Providing educational opportunities to prosecutors in the management and prosecution of major cases, such as exploring attendance at courses in this area conducted by the Ministry of the Attorney General of Ontario or by the Public Prosecution Service of Canada; and
  - b. Encouraging prosecutors to increase their experience level with larger cases through exploring secondments to other prosecutorial offices, such as the Crown Law Office – Criminal, or the office of the Crown Attorney in Toronto, perhaps with a corresponding exchange to maintain the number of prosecutors in both offices.

54. The Review Panel heard comment on information “silos”, which was language used by some of the Law Society staff interviewees to describe a source of difficulty they experienced in managing their responsibilities in the Keshen matter. Relevant information within the Professional Regulation Division (PRD) should be shared and processes instituted to do so in an effective and appropriate way to eliminate unhelpful “information silos”.
55. The Law Society should also consider a review of current policies restricting the dissemination of useful information among the PRD and other Divisions, including, for example, Practice Audits. There may be many legitimate reasons for not sharing certain types of information between departments. However, current policies should be reviewed to ensure that there continues to be a sound public interest rationale for a department to decline to provide or receive pertinent information from another department. This will contribute to a better understanding of the basis for any restriction.

## **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.**
56. First steps should be to enrich the education of staff with initial training, and ensure appropriate resources are offered to the relevant staff. This will involve engagement with the Equity and Indigenous Affairs Committee and should involve working with Indigenous community partners, like the Indigenous Advisory Group and others. It is also recognized that competency of the Law Society staff to engage in this way is not accomplished at any one point in time. It is a continuum of learning - a “journey”.
57. Ms. Swan noted that empathy for the circumstances of Survivors drives cultural safety, described earlier in this report. Achieving cultural competency in this progression to cultural safety involves a number of important steps for those working with Survivors, including:
- a. understanding complex trauma;
  - b. understanding institutional trauma;
  - c. employing grounding techniques for the Survivors, where, for example, they are given the opportunity to have whomever they wish as support in the room; and

- d. making sure that appropriate breaks are taken when working closely with the Survivors and their issues.
58. Ms. Swan also 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.
59. In terms of the integration of Indigenous Law principles into common law practices and procedures, resources are available to the Law Society, including the processes applied in the Independent Assessment Process (IAP)<sup>5</sup> and procedures in the Federal Court Practice Guidelines for Aboriginal Law Proceedings.<sup>6</sup> The Law Society should consider how to adapt and incorporate them in its own regulatory process to improve the manner in which these types of complaints are investigated and prosecuted.
60. The Review Panel was privileged to meet with The Honourable Leonard S. Mandamin, a judge of the Federal Court and an Anishinaabe member of the Wiikwemkoong Unceded Indian Reserve on Manitoulin Island, Ontario. Justice Mandamin was involved in the initiative that resulted in the Federal Court Guidelines. Prior to his appointment to the Federal Court, he was a Provincial Court judge in the Calgary Criminal Division of the Provincial Court of Alberta and presided in the Tsuu T’ina Court which involved a First Nation peacemaker justice initiative and in the Siksika Court at Siksika which also involved traditional First Nation mediation.
61. Justice Mandamin described the touchstones that guide his approach to his First Nations legal work. The first is continuity – ongoing involvement in the community to create relationships, understanding the community, working so that the members of the community understand each other and ensuring good communications within the community. The second is hearing and understanding – making sure people have an opportunity to be heard in the process but also ensuring that as part of being heard, they are being understood. The third is fairness – ensuring that whomever is mediating or deciding a dispute, fairness operates for both or all sides of the matter.
62. In relaying 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*

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<sup>5</sup> The Indian Residential Schools Adjudication Secretariat published “Expectations of Legal Practice in the IAP” which sets out detailed guidance, stated to supplement the specific rules and guidance in Law Society rules. The Expectations appear in a comprehensive Desk Guide for Legal Counsel Practising in the IAP at <http://www.iap-pei.ca/media/information/publication/pdf/pub/desk-guide-v6-eng.pdf>

<sup>6</sup> [http://cas-cdc-www02.cas-satj.gc.ca/fct-cf/pdf/Aboriginal%20Law%20Practice%20Guidelines%20April-2016%20\(En\).pdf](http://cas-cdc-www02.cas-satj.gc.ca/fct-cf/pdf/Aboriginal%20Law%20Practice%20Guidelines%20April-2016%20(En).pdf)

*on Aboriginal Peoples*, and its discussion of “creating conceptual space” for Indigenous systems of justice. He also described in some detail the processes used in the Tsuu T’ina Court and in the Siksika Court.

63. The Review Panel believes these are examples of 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.
64. The Review Panel also received information on the importance of the right process. 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, and that questions that relate to their experience as a Survivor be asked in a gentle way.
65. Law Society prosecutors should also have prior knowledge of the traumatic material likely to be heard in certain proceedings, and the benefit of a pre-determined plan to remain as healthy and committed as possible throughout the duration of the proceedings. Ms. Opekokew, in relaying her experience as an adjudicator in the IAP, stressed the importance of self-awareness of the effect of hearing the Survivors’ stories. Supports for those staff directly involved with Survivors as complainants and witnesses should be made available through the Law Society.
66. The Review Panel under Recommendation 1 refers to the visioning exercise for the Law Society to begin the journey to transformative change. This was part of the advice received from Professor Jeffery Hewitt, a Cree, who spoke with the Review Panel about the Law Society’s processes and Indigenous legal orders (in particular Cree and Anishinaabe).
67. In Professor Hewitt’s view, the Law Society has rules and regulations applying to legal practitioners that should be rigorously enforced. These rules and processes should not be suspended or varied from a misguided sense of moral righteousness when dealing with those from the Indigenous community who intersect with those processes. 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, the questions of why and for whom the Law Society exists are key. Professor Hewitt stated that 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.**

68. The Review Panel is aware that a special First Nations Inuit and Metis (FNMI) team was established within the Professional Regulation Division as an attempt to deal in a co-ordinated way with the numerous complaints the Law Society was receiving from First Nations Residential School Survivors in 2013. The team included staff from various departments within the Division based on the skills the skills and expertise required to deal with the complaints. A number of unique processes were instituted and resources and supports provided over the course of the Keshen investigation and prosecution.<sup>7</sup>

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<sup>7</sup> These supports and resources included the following:

- Extensive resource materials about the IAP, IRSSA, Apology, IRSSA Agreement, Schedule “D”, Financial Administration Act, decisions of the IRS Supervising Judges were prepared by the Executive Director’s Office and shared with team members;
- An educational brochure and video prepared by the Indian Residential School Adjudication Secretariat “Telling your Story” was provided to team members assigned to the Keshen complaints;
- Important IRSSA decisions were brought to attention of team on an ongoing basis
- IRS Health & Cultural Support Workers were available to Survivors and their families during all aspects of our complaint and investigative processes. (e.g. interviews, witness preparation, and at the hearing)
- NAN Legal designated and made available one of its Victim Witness staff to all Law Society Survivor witnesses
- The Division arranged for a male and female Elder from the Treaty #3 territory to be present at each day of the hearing
- Interpreters, drawn from and recommended by the Indigenous community, fluent in the first language and culturally appropriate and respectful of the language, were made available during investigative meetings and interviews
- The Professional Regulation Division arranged for lawyers to give independent legal advice to survivor witnesses re: confidentiality etc.
- NAN Legal agreed to offer legal services to any Law Society complainant Survivor
- Aboriginal Legal Services upon request made legal assistance available to Survivor complainants
- Lawyers were retained to meet with and provide legal advice to Survivor complainants prior to testifying in the proceedings
- A 1-800- number was offered as a direct line to Intake staff person who was member of the dedicated team; this number was for Indigenous people alone. IRS Health Support Workers agreed to share the number with Survivors and Indigenous people
- The Compensation Fund Department set up a 1-800 number that Indigenous people could use that would provide direct access to counsel who was a member of the Team, available to assist them in making an application and to answer questions; a simplified application form was developed that was prepopulated with a synopsis of the investigation that the Indigenous claimant could look at, review, agreed, modify or augment

69. However, there were gaps in approaches, despite efforts that were well-intentioned, which may have exacerbated the difficulties some complainants were experiencing in understanding the Law Society role and processes. An aggressive timeline for the investigation and a number of staff changes at crucial stages of the investigation and prosecution were elements added to an already complex process.
70. Based on information received from Law Society staff in the course of its review, the Review Panel recognized that the Law Society was doing its best to address a unique situation in processing and investigating complaints. However, the Law Society was not able to rely on any established culturally-informed process for working with and supporting complainants who were Residential School Survivors from northern First Nations communities or dealing with the complexity of the issues that were presented by the community members.
71. 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 Law Society needs learn from the efforts it undertook to establish these and other procedures as process standards within the Division.
72. 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.
73. For example, it may be appropriate to explore establishing a specialized support unit for victims who are complainants. The role of the team would be to provide information generally about the Law Society process and make referrals for counselling or other support resources.
74. 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. This analysis may include:
  - a. identifying with precision the nature of the true harm sought to be addressed through the use of the regulatory hearing process;

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- The Compensation Fund department reviewed and revised its forms to use plain language and developed an information sheet specifically for the Indigenous applicant.

- b. considering whether the public interest requires a regulatory hearing to address that harm, given that there is a potential for adverse impact upon vulnerable witnesses at both the investigative and hearing stages;
  - c. if a hearing is necessary, ascertaining whether the presentation of the case could be configured in such a way as to avoid the appearance of vulnerable witnesses; and
  - d. if the public interest required that vulnerable witnesses appear, determining whether alternate methods are available through which their evidence could be presented to minimize the adverse effects arising from their appearances.
75. If the Law Society is not required to compel a witness because they voluntarily choose to testify<sup>8</sup>, the Law Society should ensure that the consent of the witness to appear is fully informed and that the process is fully understood. Further, as a component of the assessment of whether vulnerable witnesses should be requested to testify in a conduct hearing, the Law Society should take into account the possibility that further counselling after the hearing may be required and recognize that it should share in the potential cost of making that assistance available.
76. A fully informed consent would ensure that the witness has an adequate understanding of the purpose of the hearing, the true jurisdictional scope of the Tribunal and the Law Society, the issues raised in the allegations, the general function of witnesses and the areas in which the witnesses can be expected to be examined in chief and cross-examined. In certain cases where the complainant is a client of the lawyer appearing before the Tribunal, this advice should include an explanation of the potential nature of the cross-examination by the lawyer or their counsel, which may include other matters disclosed within the solicitor-client relationship.
77. Providing this advice may require retaining 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. In the Keshen case, the Law Society hired independent counsel to be available to Survivor witnesses to give them independent legal advice. The advice was limited to whether or not they wished to give evidence and protecting the confidentiality of the witnesses' identity and evidence. Independent counsel was not otherwise involved in the prosecution.
78. Generally, procurement processes and protocols should be established for the retention of external counsel, where required, who are engaged to work on files involving Indigenous complainants or Indigenous licensees, to ensure appropriate competencies for this work.

## **Recommendation 7**

**The Law Society Tribunal and the Tribunal Committee should explore, with the assistance of Indigenous Law experts, how to incorporate Indigenous Law principles**

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<sup>8</sup> This was the case in the Keshen matter.

**within its adjudicative and dispute resolution processes and apply them in the appropriate case.**

79. The following excerpt from the oral reasons for decision of the Law Society Tribunal Hearing Panel<sup>9</sup> concluding the Keshen prosecution describes the Hearing Panel's approach to its adjudicative process in this case:

[17] Within the limits of the process we have to follow under the law and considering the rights of the parties to the hearing – the Law Society and Mr. Keshen -- we tried to incorporate Anishinaabe culture and values into the process. We arranged the hearing room in a circle and made sure the circle had a central place for community members attending. We have valued the openings, closings, smudging and advice from Elders and the support and advice from health support workers. We tried to ensure that to the extent possible we engaged with community members present on a personal level, avoiding discussions about the subject of the hearing. The panel was honoured to attend a sweat lodge in the evening after one of our early hearing dates.

[18] We are grateful for the willingness to teach us about and allow us to participate in your culture, history and traditions and your understanding when we made mistakes. We tried very hard to learn, to listen in a good way to the Elders and to the witnesses and the submissions. We know, though, that the hearing did not meet what many of you were hoping for.

[19] We have tremendous respect for the residential school survivors who told us their stories during the hearing. We come away with a deeper understanding of the terrible impact of residential schools on those forced to attend them and on their families and communities. We saw how that impact continues throughout survivors' lives and in many generations. We were struck by the courage of those survivors in putting their stories down on paper as part of the hearing process and we heard how, for many, Canada's legal processes did not bring the closure and healing they were hoping for. We reflected on how important it is for those representing Indigenous peoples to understand, and have the trust and confidence of those communities. We recognize that the process of being examined and cross-examined and questioned by us in this hearing was often stressful and difficult.

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<sup>9</sup> The entire reasons may be found on CanLII at [https://www.canlii.org/en/on/onlst/doc/2017/2017onslth90/2017onslth90.html?searchUrlHash=AAAAQA\\_Ga2VzaGVuAAAAAAE&resultIndex=1](https://www.canlii.org/en/on/onlst/doc/2017/2017onslth90/2017onslth90.html?searchUrlHash=AAAAQA_Ga2VzaGVuAAAAAAE&resultIndex=1)

[20] We recognize that overall, this Tribunal's hearing did not give many complainants and the communities affected the answers they were hoping for. From our perspective as the adjudicators, it seemed that in many ways that came from the adversarial process, with the parties' roles built on the criminal law model. It appeared to leave many witnesses feeling they couldn't tell their stories the way they wanted to and that it was held in a way disconnected from Anishinaabe culture. We often wished we could adapt the process to something that would allow the survivors to tell their stories in a more meaningful way for them. That was hard given the legal constraints and that the issues in the hearing were mostly about whether Mr. Keshen did things wrong and should be punished and whether the Law Society had been fair to him.

[21] We have seen in this process how important it is that administrative tribunals that serve Indigenous people and communities build the trust of those communities. Although we have done some work in this, including a recent training session for all adjudicators at our Tribunal, we recognize as individuals, as adjudicators of the Law Society Tribunal and decision makers in the Canadian justice system that we have more learning and thinking to do in this regard. We see how those involved in the administration of justice need to pay much more attention to how we serve Canada's Indigenous peoples.

80. As indicated above, the Tribunal Panel recognized that it has more learning and thinking to do to build trust with Indigenous communities.

81. As the above excerpt indicates, a number of steps were taken during the hearing process in the Keshen case, some arranged by the Law Society Tribunal, to accommodate complainants and adopt special processes for this hearing.<sup>10</sup> The Review Panel believes

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<sup>10</sup> These steps included the following (some already referred to earlier in this report):

- The hearing took place in Kenora (and the panel offered to hold hearings in other communities).
- A room was provided at the hearing site for survivors to meet with health support workers.
- Many witnesses had a health support worker or other support person sit next to them during testimony.
- Elders were present throughout the hearing, conducted openings, closings and smudging throughout the day for all participants, provided support to witnesses on request and feedback to the panel.
- The Law Society retained counsel to advise survivors on confidentiality issues, and all survivors were given the option to have their names, testimony and exhibits referring to them not public, which most accepted.
- The room was arranged in a circle rather than a traditional courtroom style.
- The panel asked participants not to stand when the panel entered and left the room and the lawyers not to stand when making submissions/questioning witnesses.

the Tribunal should build on this experience and institutionalize certain features of this approach for cases involving Indigenous complainants or Indigenous licensees who are the subject of a complaint that results in a hearing before the Tribunal.

82. The Tribunal should determine the most effective method of including Indigenous perspectives in the adjudicative process. This will involve understanding the nature of dispute resolution systems of Indigenous people and determining how they may be applied within the current more adversarial approach to Law Society discipline.
83. As the Review Panel learned, this is a crucial point to understand. It is not within the Indigenous community's cultural norms to enter into an adversarial exercise. This type of process to resolve disputes is not aligned with Indigenous culture, ways of knowing or values. As such, the Law Society needs to determine a different approach and how Indigenous perspectives can be included and reconciled in the Law Society's hearing process. The wisdom of experience shared by Justice Mandamin and summarized in the discussion under Recommendation 5 is relevant here.
84. The Review Panel received the advice of the chair of the Law Society Tribunal, David Wright. He indicated that on a go forward basis, the Law Society needs to approach solutions in a spirit of reconciliation. For example, he indicated that the Law Society needs to explore the Indigenous legal principles that would advance the Law Society's learning about alternatives to the classic litigation model and the approaches that might be adapted in the hearing process. Mr. Wright indicated that 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, discussed below, and the proceedings of other adjudicative tribunals might be an appropriate subject of further study.

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- The Tribunal sat late or started early and took extended breaks to accommodate witness requests and schedules. Scheduling of particular witnesses was flexible.
  - On several occasions the Tribunal purchased food for witnesses. For one survivor witness, the panel funded transportation home as the witness had no other way to get home.
  - The panel asked and reframed questions from lawyers to witnesses to ensure understanding, plain language and reduce the adversarial tone.
  - The panel and clerks wore casual attire and encouraged counsel to do the same, upon request of community members/Elders.
  - For one witness, the panel chair sat next to the witness at her request.
  - The panel attended a sweat lodge, upon request of community members/Elders.
  - The panel consulted with Elders, health support workers and experts on process.
  - Before the settlement was reached, the Tribunal raised with the parties the possibility of Elder assistance to the panel in deliberations (submissions were to be made later). Elders were consulted in deliberations about the joint submission with consent of the parties, and participated in the invitation to attend process.

85. Mr. Wright advised that the Tribunal, through the Tribunal Committee, is working on a new set of rules and practice directions to be presented to Convocation that will be more flexible, user-friendly and plain language.
86. In the spirit of this ongoing work, consideration should be given to developing practice directions that make clear what is currently permissible within the Law Society Tribunal Hearing Division Rules of Practice and Procedure, but which may not be widely understood. 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.
87. The Tribunal Committee should also explore the possibility of a rule that would permit the appointment of a lawyer to cross-examine a witness if the subject licensee at the hearing is unrepresented.
88. Mr. Wright advised that testifying by video is already proposed in the new draft rules for the Tribunal (to be reported to Convocation later this year) and is part of current practice. Written evidence-in-chief is permitted in the often-used ability to call a witness's evidence-in-chief by affidavit.
89. Mr. Wright also advised that subsection 23(2) of the SPPA allows a Tribunal to "reasonably limit further examination or cross-examination of a witness where it is satisfied that the examination or cross-examination has been sufficient to disclose fully and fairly all matters relevant to the issues in the proceeding." The ability to use this and other sections of the SPPA that allow for departures from the civil rules of evidence will be a decision for Convocation. In that respect, the Tribunal Committee may wish to consider whether the current Rules that apply the civil rules of evidence and thereby exclude the SPPA evidence provisions should continue.
90. Earlier in this report, the Review Panel noted that in the Law Society's process, the complainant is not a party to the Tribunal proceeding and is not represented. David Wright advised that he saw no impediment, other than funding, to Indigenous complainants having independent counsel available to advise them throughout the hearing process. The Review Panel understands that any funding for counsel for complainants or respondents should be the responsibility of the Law Society, and not the Tribunal, to protect the

Tribunal's impartiality and neutral role.<sup>11</sup> The Review Panel suggests that the availability of counsel as described should be explored.

91. With respect to applying procedures that integrate Indigenous traditions and beliefs, Mr. Wright's advice was that this could be implemented within the Tribunal process. His view was that the appropriate process would be best implemented after extensive consultation and under the leadership or co-leadership of Indigenous lawyers and paralegals, and other relevant stakeholders. The Tribunal pre-hearing process is highly flexible and the proposals for the new rules promote flexibility in process and responsiveness to individual cases. The Review Panel recognizes that it is important to have clear statutory and rule authority for processes that are implemented.
92. As noted earlier, resources are available to the Law Society, including the processes applied in the Independent Assessment Process and procedures in the Federal Court Guidelines. The Law Society should consider how to adapt and incorporate these processes in its own hearing process to improve the manner in which these types of cases are heard.
93. For example, the Federal Court Guidelines 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. This exploration should be done on consent of the parties or on direction of the Case Management Judge." 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. Another example may be the use of an independent examiner who, with the consent of both parties, would examine the witness and provide the evidence through an affidavit or oral testimony.
94. Mr. Wright advised that he saw no impediments to exploring how such practices could be incorporated in the Tribunal processes. He indicated that the Tribunal's protocols and policies should respond to the particular issues involving Indigenous peoples that can arise in different Tribunal cases - Indigenous lawyers and paralegals as respondents, Indigenous complainants who are represented by lawyers and paralegals as individuals, and Indigenous governments and communities as complainants about the legal services they received. Given the fact that the Gladue principles have been recognized as applying to penalty at the Tribunal, Mr. Wright believes it is essential that best practices for applying Gladue in the professional regulatory context be part of any policy.

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<sup>11</sup> In another context, in certain circumstances, the Law Society will cover the cost of counsel in capacity proceedings, where external counsel is appointed for the licensee by the Proceedings Authorization Committee under [By-Law 11](#)



95. 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. This would involve the Tribunal Chair in establishing criteria and recruiting the right members. This may evolve to take the form of an 'expert panel' within the Tribunal from which adjudicators with relevant experience may be assigned to hearings.
96. The Tribunal should also consider the merits of a guideline for the composition of Tribunal hearing panels convened to hear conduct applications relating to complaints from Indigenous people or where the licensee is Indigenous. In this respect, consideration will be required of the nexus between the current process to select panels and the experience and competence required, and how to address discretionary powers and codification of the process around the selection of panel members, with fairness as the overarching principle to be observed.

### **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.**

97. There are a number of efforts that could be undertaken to ensure competency among adjudicators for these matters.
98. 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.
99. 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.
100. The Review Panel notes that, as noted earlier, under the Indigenous Framework approved by Convocation in June 2017, Law Society staff and benchers are to have the opportunity to access cultural competency training within the Law Society that includes unconscious bias, the history and legacy of Residential Schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous Laws, Aboriginal-Crown relations and basic cultural protocols.

## **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 and in particular individuals who have experienced trauma arising from the Indian Residential School experience, the Sixties Scoop or Day Schools to assist in their competent representation of these individuals.**

101. While the Law Society's *Rules of Professional Conduct* and *Paralegal Rules of Conduct* provide comprehensive guidance on competence in legal practice, the Review Panel believes there is merit to including additional commentary in the rules in relation to the representation of vulnerable clients, such as Residential School Survivors, and recommends that the competence rules be reviewed for this purpose.
102. As stated previously, in 2003, the Law Society created *Guidelines for Lawyers Representing Residential School Claimants*<sup>12</sup>, updated recently to reflect changes in the Rules of Professional Conduct more generally. The Law Society should review the Guidelines 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.
103. 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 continuing professional development programs to assist lawyers and paralegals who may serve these clients. A recent example, as noted earlier in this report, is the Guide for Lawyers Working with Indigenous Peoples which is a joint project of The Advocates' Society, the Indigenous Bar Association the Law Society.
104. The Review Panel also notes, as mentioned earlier, that the IRS Adjudication Secretariat has published expectations for legal professionals representing claimants in the IAP process in its Desk Guide for Legal Counsel Practising in the IAP.
105. With respect to CPD, the Review Panel also believes the Law Society should explore targeted CPD offerings that would be mandatory for lawyers who are representing these affected clients.

### **Concluding Comments**

106. As the Review Panel concludes its work, it offers the recommendations in this report in support of the Law Society's commitment to the First Nations communities in Northern Ontario to listen, learn and engage in respectful and ongoing dialogue. This will help to

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<sup>12</sup> Passed by Convocation on October 23, 2003; amended February 23, 2012; amended October 2015.

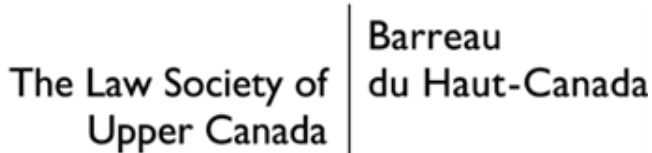
make the Law Society an organization that is responsive to Indigenous communities and how they and the Law Society may interact.

107. As noted in this report, the Law Society will achieve success in its journey to become culturally competent when the Indigenous communities see their identity, culture and laws as part of the Law Society and its processes. This is central to the Law Society's ongoing commitment to reconciliation. The vision for change described earlier in this report will be advanced through the principles that underlie the recommendations, which focus on processes and procedures that are inclusive of Indigenous perspectives.
108. The Review Panel will be returning to Sioux Lookout with the Treasurer in mid-June 2018 to meet once again with the Leadership of a number of First Nations in the north, Elders and Residential School Survivors and to present this report. The Review Panel looks forward to this second opportunity to visit the community and listen to the views and stories of those in attendance. The hope is that the Review Panel can convey the message that the report represents the Law Society's commitment to becoming a more culturally competent organization on Indigenous histories, experiences, cultures and affairs, in an effort to build mutually respectful relationships with Indigenous communities.



Tab 2.2.1

## REVIEW PANEL TERMS OF REFERENCE



### OFFICE OF THE TREASURER

#### MEMORANDUM

**TO: ALL BENCHERS**  
**FROM: TREASURER**  
**DATE: JUNE 27, 2017**  
**RE: REVIEW PANEL ON REGULATORY AND HEARING PROCESSES AFFECTING INDIGENOUS PEOPLES**

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The experience of the Law Society of Upper Canada in *Law Society of Upper Canada v. Keshen* (“Keshen”) raised questions about the Law Society’s regulatory and hearing process in relation to Indigenous persons, complaints, and issues. We need to listen and learn from our historical experiences in dealing with Indigenous issues and review and reform our processes to accommodate the unique historical and cultural circumstances of Indigenous peoples and Indigenous approaches to conflict resolution.

I am therefore today establishing a Review Panel to undertake an immediate review of the way in which the Law Society and its Tribunal address regulatory matters involving Indigenous issues. The review is intended to identify issues and make recommendations on opportunities for inclusion of Indigenous perspectives.

**The Review Panel shall consist of:**

Dianne Corbiere, Bencher, Co-Chair  
Julian Falconer, Bencher, Co-Chair<sup>1</sup>  
Robert Burd, Bencher  
Teresa Donnelly, Bencher  
Isfahan Merali, Bencher  
Kathleen Lickers, Co-Chair of the Indigenous Advisory Group  
Elder Advisor Myeengun Henry, Co-Chair of the Indigenous Advisory Group

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<sup>1</sup> Mr. Falconer served as Co-Chair until March 2018.

**The mandate of the Review Panel is as follows:**

The review of the Law Society's complaints, investigation, prosecution and adjudication processes will include:

- an analysis of the effects on Indigenous complainants of the processes used to gather, assess, introduce and submit evidence during investigations and hearings;
- consideration of the nature and goals of prosecutions that involve Indigenous people and Indigenous communities;
- consideration of the differences that exist between Indigenous perspectives regarding conflict resolution, and the traditional approach of the Law Society and the Law Society Tribunal to investigation, discipline and adjudication
- how to incorporate Indigenous perspectives into Law Society complaints, investigation, discipline and Tribunal processes and procedures;
- consideration of cultural competence at the Law Society, and opportunities for training and development;
- consideration of the use of expertise on Indigenous issues by Law Society staff, the Tribunal and outside counsel, and opportunities to enhance the use of expertise where required;
- consideration of the Law Society's approach to regulating licensees in rural or remote communities, with particular focus on those who serve Indigenous communities or address Indigenous legal issues; and
- identification of proactive and possible remedial measures to address the impacts of licensee misconduct on Indigenous complainants and their communities.

In conducting its review, the Review Panel will conduct interviews with key stakeholders, including Law Society staff and members of the Law Society Tribunal (in a manner consistent with its independence). Within eight weeks of its appointment, the Review Panel, and the Independent Reviewer described below, will each prepare a Workplan, both of which will be provided to me, outlining the anticipated scope of their work, including interviews, and the procedures to be undertaken to gather information to complete their work.

To the extent that there are other major issues that arise as the review is conducted, the Review Panel will identify these to me for consideration as additions to its Terms of Reference, or for further examination in another context.

## **Recommendations**

The Review Panel will prepare a written report containing its recommendations for future action to me within six months from the date on which the Workplan is provided to me.

## **Independent Reviewer**

Based upon consultations with the Law Society's Indigenous Advisory Group, I will also be appointing an Independent Reviewer, Ovide Mercredi, former National Chief of the Assembly of First Nations.

### Objective

Following the experience in the *Keshen* matter, there is an immediate need to hear directly from the complainants and Indigenous community stakeholders in an objective and neutral environment. It will also be necessary to learn from their experience in guiding best practices which the Independent Reviewer can help define in consultation with the complainants and other experts. The Independent Reviewer will be supported by the Indigenous Advisory Group wherever necessary.

### The mandate of the Independent Reviewer

The mandate of the Independent Reviewer will be to work in tandem with the Review Panel and meet with complainants and residential school survivors, community stakeholders and other experts to provide guidance on a way forward for the Law Society to improve its processes and relations with Indigenous communities. The work of the Independent Reviewer in accordance with his Workplan will be based on the guidance and advice received from the community consultations and our Indigenous Advisory Group.

**Tab 2.2.2**

## **LIST OF PARTICIPANTS IN REVIEW PANEL MEETINGS**

### **Experts**

Jeffrey Hewitt - Assistant Professor, University of Windsor, Faculty of Law

The Honourable Justice Leonard Mandamin – Judge of the Federal Court

Delia Opekokew - Barrister & Solicitor, Toronto

Terry Swan - Team Lead, Family Information Liaison Unit within the Indigenous Justice Division of the Ontario Ministry of Attorney General

### **Law Society of Ontario Tribunal**

David Wright - Chair

Christopher Bredt – Vice-Chair, Appeal Division

### **Law Society of Ontario Staff (Professional Regulation Division)**

Allane Andrusko

Graham Hanlon

Susan Heakes

Maria Loukidelis

Janice Laforme (on secondment)

Renae Oliphant

Emma Seth

Cheryl Smith

Curtis Smith

### **Former Law Society of Ontario Staff**

Lisa Freeman

Karen Manarin

Janice Walker

### **External Counsel**

Sacha Paul, Partner, Thompson Dorfman Sweatman LLP, Winnipeg



# FIRST NATIONS AND TREATIES



**First Nations - Grid Coordinates - Reserves or Settlements**

<b>Aamjiwnaang</b> - M8 - Sarnia 45	<b>Albany</b> - E2 - Fort Albany 67	<b>Alderiville First Nation</b> - L10 - Alderiville First Nation, Sugar Island 37A	<b>Algonquins of Pikwaganonang First Nation</b> - J11 - Pikwaganonang	<b>Algonquins of the Trent Waters</b> - F3, F4 - Onabrug 63A, B	<b>Mississauga Cree</b> - H7 - Mississauga Cree	<b>Mississauga of the Credit</b> - M9 - New Credit 49A	<b>Misissaugas of Scouog Island First Nation</b> - K10, L10 - Islands in the Trent Waters 36A, Mississauga of Scouog Island	<b>Misissaugas of New Credit</b> - M9 - New Credit 49A	<b>Misissaugas of the Credit</b> - M9 - New Credit 49A	<b>Misissaugas of the Credit</b> - M9 - New Credit 49A	<b>Misissaugas of the Credit</b> - M9 - New Credit 49A
<b>Algonquins of the Trent Waters</b> - F3, F4 - Onabrug 63A, B	<b>Algonquins of the Trent Waters</b> - F3, F4 - Onabrug 63A, B	<b>Algonquins of the Trent Waters</b> - F3, F4 - Onabrug 63A, B	<b>Algonquins of the Trent Waters</b> - F3, F4 - Onabrug 63A, B	<b>Algonquins of the Trent Waters</b> - F3, F4 - Onabrug 63A, B	<b>Algonquins of the Trent Waters</b> - F3, F4 - Onabrug 63A, B	<b>Algonquins of the Trent Waters</b> - F3, F4 - Onabrug 63A, B	<b>Algonquins of the Trent Waters</b> - F3, F4 - Onabrug 63A, B	<b>Algonquins of the Trent Waters</b> - F3, F4 - Onabrug 63A, B	<b>Algonquins of the Trent Waters</b> - F3, F4 - Onabrug 63A, B	<b>Algonquins of the Trent Waters</b> - F3, F4 - Onabrug 63A, B	<b>Algonquins of the Trent Waters</b> - F3, F4 - Onabrug 63A, B

**DISCLAIMER / INFORMATION NOTE**

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**Legend**

- ◆ Settlements
- ◆ See First Nations List
- Provisional Algonquin Settlement Area
- First Nation Reserves
- Trans Canada
- Other Highway
- Canada - USA Border
- Provincial Border



# Law Society of Upper Canada Draft Indigenous Framework

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**Draft Date: December 2, 2016  
May 1<sup>st</sup> 2017 (revised)  
June 5th 2017 (revised)**

**Prepared by the Policy Secretariat  
and the Indigenous Advisory Group**

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COMMISSION OF CANADA (TRC) FINAL REPORT, SEPT 2 2016	

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<sup>1</sup> These Terms of Reference are subject to amendment as of June 5th

## BACKGROUND

1. The Law Society of Upper Canada (Law Society), as a regulator of all lawyers and licensed paralegals in the province of Ontario, pursuant to its legislative mandate under the *Law Society Act R.S.O. 1990, Chapter L.8* (the *Act*) must have regard to the following duties:
  - To maintain and advance the cause of justice and the rule of law;
  - To act so as to facilitate access to justice for the people of Ontario;
  - To protect the public interest;
  - To act in a timely, open and efficient manner; and
  - Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized
2. In 2000, consistent with the duties encoded in the *Act*, the Law Society established a standing committee of Convocation called the Equity and Aboriginal Issues Committee (now the Equity and Indigenous Affairs Committee or EIAC)<sup>2</sup>, to develop policies, programs and initiatives to best serve and promote an inclusive profession. Subject to Convocation's approval, the EIAC's mandate is to develop policy options for the promotion of equity and diversity having to do in any way with the practice of law in Ontario or provision of legal services in Ontario and for addressing all matters related to Indigenous peoples and French-speaking peoples. As a best practice, the EIAC consults with Indigenous peoples, Francophone citizens and other communities in the development of such policy options.
3. As part of the Law Society's efforts over the years to consult with Indigenous peoples, a number of working groups and strategies have been established including Rotiio>taties<sup>3</sup> in 1998.
4. Rotiio>taties was an independent board of Elders, Indigenous lawyers<sup>4</sup>, community representatives and law students who advised various bodies, including the Law Society, on Indigenous issues arising in law and the legal profession. The membership of Rotiio>taties changed over the years until its eventual transition to an Aboriginal Working Group.

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<sup>2</sup> By motion of February 9, 2017, EAIC amended its name to the Equity and Indigenous Affairs Committee.

<sup>3</sup> Meaning "continuously working" in the Mohawk language.

<sup>4</sup> At the time Rotiio>taties was created, paralegals were not yet licensees within the profession.

5. In 2009 Convocation approved the *Final Report of the Indigenous Bar Consultation* which identified a number of recommended actions the Law Society could undertake. These recommendations included:
  - Expanding the Members' Annual Report Practice Categories to include Aboriginal Law (to determine how many lawyers in Ontario self-identify as practicing Aboriginal law)
  - Mentoring and Networking Program
  - Continuing Legal Education Course in Aboriginal Law and Issues
  - Certified Specialist Program in Aboriginal Law<sup>5</sup>
6. In 2014, Convocation affirmed its commitment to place emphasis, through the EIAC, on Indigenous issues. In June 2016, the Indigenous Advisory Group<sup>6</sup> (IAG) was established as an independent body to advise the Law Society on the unique issues faced by Indigenous practitioners, paralegals and Indigenous peoples in Ontario and to promote the development of the relationships between Indigenous peoples and Canadian legal structures and institutions in a manner that respects Indigenous values, beliefs and legal systems.
7. In September 2016, the EIAC and the IAG committed to work collaboratively in the development of the Law Society's Indigenous Framework and on November 5, 2016, the EIAC and the IAG held a joint meeting to begin the development of this Indigenous Framework.

## INTRODUCTION

8. The Indigenous Framework has been developed in accord with the priorities identified in three key Law Society documents:
  - Convocation's 2015-2019 Strategic Plan, as relevant to the EIAC's mandate;
  - Treasurer's Memorandum to the Equity and Aboriginal Issues Committee (September 22, 2016); and
  - Approaches for the Law Society of Upper Canada's Responses to the Truth and Reconciliation Commission of Canada (TRC) Final Report (Sept. 2, 2016).<sup>7</sup>

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<sup>5</sup> 2009 *Final Report of the Indigenous Bar Consultation*, pp. 32-35.

<sup>6</sup> The Indigenous Advisory Group's Terms of Reference are attached as Appendix A. For greatest certainty, the term "Indigenous" is inclusive of First Nations, Status, non-Status, Inuit and Métis peoples.

<sup>7</sup> Each of these key documents has been reproduced in Appendix B.

9. The priorities identified in the above documents often intersect and coalesce, helping to shape this Framework into the following Four Pillars:
- Creating and Enhancing Cultural Competency
  - Achieving and Improving Access to Justice
  - Promoting and Supporting Knowledge of Indigenous Legal Systems
  - Taking Action on Reconciliation
10. The development of every initiative by the Law Society within any one of these Four Framework Pillars must be guided through an “Indigenous lens” in order to fully meet the objective of this Framework. The Treasurer, through his Memorandum to the Equity and Aboriginal Issues Committee, directed the EIAC to develop policies that will ensure an Indigenous lens to all the Law Society does.
11. The IAG define the Indigenous lens as inclusive of the Anishinabe Seven Sacred Laws ; the teachings of the Haudenosaunee of peace, respect, friendship and a good mind; Cree principles compliment the Seven Sacred Laws, are supported by the Métis and the 8 Inuit Qaujimajatuqangit guiding principles.<sup>8</sup> Such principles are: :
- **Love:** To know love is to know peace.
  - **Respect:** To honour all Creation is to have respect
  - **Courage:** To face life with courage is to know bravery
  - **Honesty:** To walk through life with integrity is to know honesty
  - **Humility:** To accept yourself as a sacred part of Creation is to know humility
  - **Wisdom:** To cherish knowledge is to know wisdom
  - **Truth:** To know of these things is to know truth

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<sup>8</sup> Inuuqatigiitsiarniq- Respecting others, relationships and caring for people.

Tunnganarniq- Fostering good spirit by being open, welcoming and inclusive.

Pijitsirniq- Serving and providing for family and/or community. Aajiqatigiinni- Decision making through discussion and consensus. Pilimmaksarniq- Development of skills through practice, effort and action.

Piliriqatigiinni/Ikajuqtigiingni- Working together for a common cause.

Qanuqtuurniq- Being innovative and resourceful

Avatittinnik Kamatsiarniq- Respect and care for the land, animals and the environment. (Source:Tungasuvvingat Inuit Restorative Justice Initiative)

## THE FOUR FRAMEWORK PILLARS

### CREATING AND ENHANCING CULTURAL COMPETENCY<sup>9</sup>

12. The Law Society will work in partnership with the IAG to create and enhance cultural competency recognizing the continued need for licensees to be equipped with the cultural, historical and legal knowledge that will enable the provision of legal services in a manner that supports Indigenous peoples in addressing their unique interests, issues and challenges.
13. The Law Society prioritizes life-long competence for lawyers and paralegals. The Treasurer's Memorandum to the Equity and Aboriginal Issues Committee further contextualizes this priority, and directs the EIAC to develop programs that will enhance cultural competence internally to the Law Society (staff, Benchers) and the profession (licensees) in dealings with Indigenous peoples.<sup>10</sup>
14. Specific proposed approaches towards supporting cultural competency are detailed in the Approaches for the Law Society of Upper Canada's Responses to the Truth and Reconciliation Commission of Canada Final Report and include knowledge enhancements, working with the Federation of Law Societies of Canada and developing skills-based training and other supports.

#### ***I. Creating and Enhancing Knowledge***

- a. Ensure Law Society ***staff and Benchers*** have the opportunity to access cultural competency training within the Law Society that includes unconscious bias, the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous laws, Aboriginal-Crown relations and basic cultural protocols.
- b. Ensure ***licensees*** have the opportunity to access cultural competency training that includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous laws, and Aboriginal-Crown relations and basic cultural protocols.
- c. Ensure ***licensees that are required by their employment*** to engage directly with the Indigenous people of Ontario, undertake cultural competency training

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<sup>9</sup> To be clear, the language of inter-cultural "competency" comes from the Truth and Reconciliation Calls to Action. In applying the term within this Framework, the IAG is not asking everyone to adopt the cultural practices that are unique to the Indigenous peoples of Ontario, rather, to gain knowledge of and respect for each Indigenous person's right to maintain justice in their own way. The IAG will further develop what is the intended meaning within this Framework and include examination of systemic barriers and anti-racism measures.

<sup>10</sup> Convocation's 2015-2019 Strategic Plan prioritizes life-long competence for lawyers and paralegals. Priorities include enhancing licensing standards, improving and increasing practice supports and considering education beyond traditional Continuing Professional Development formats (e.g. possible multiple-day courses including practical application of knowledge and skills), and working with the professions to develop initiatives that institutionalize mentoring, advisory services and other types of support.

which includes the history of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous laws, and Aboriginal-Crown relations and basic cultural protocols.

- d. Work with **Deans, law faculty and students** of Ontario Law Schools and colleges (paralegal education) to enhance their knowledge of a range of subjects, including but not limited to the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous laws and Aboriginal-Crown relations.
- e. Develop and offer **Continuing Professional Development (CPD)** programs and legal education sessions independently and in collaboration with partners to illustrate the relevance of the *United Nations Declaration on the Rights of Indigenous Peoples* in Ontario and its relevance to various practice areas.

## **II. Working with Partners**

- a. Participate with **other Law Societies in Canada and the Federation of Law Societies** in examining whether changes can be made to the *National Standards* and other licensing requirements to enhance knowledge of a range of subjects, including but not limited to the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous laws and Aboriginal-Crown relations.
- b. In partnership with the **Indigenous Bar Association**, examine the codes of professional conduct and the commentaries as well as the Federation Model Code to explore changes, where necessary, to promote reconciliation and culturally competent provision of legal services.
- c. Engage with **other legal associations, advocates and professional entities** in Ontario to further educate, consult and inform.

## **III. Developing Skills-Based Training and Other Supports**

- a. Support, develop and offer independently and/or in partnership with other providers, skills-based training and practice supports in inter-cultural competency, conflict resolution, human rights and anti-racism.
- b. Support Deans, law faculty and students of Law Schools and Colleges in Ontario regarding how skills-based training in inter-cultural competency, conflict resolution, human rights, and anti-racism can be introduced into experiential learning in Law Schools and Colleges.
- c. Support the Law Society's Equity Legal Education programs—developed, as appropriate, in partnership with Deans, faculty and students of Law Schools as well as Indigenous knowledge keepers, practitioners, organizations and others—to address the legacy of the Indian Residential School experience and Canada's colonialist law and policy, Treaty and Aboriginal Rights, the meaning of the *United Nations Declaration on the Rights of Indigenous Peoples* and current initiatives of First Nations, Métis and Inuit peoples.



## ACHIEVING AND IMPROVING ACCESS TO JUSTICE

15. The Law Society will work with the IAG recognizing that achieving and enhancing Access to Justice across Ontario is a key priority of the Law Society. It identifies strategic goals towards increasing collaboration with access to justice partners and other stakeholders as well as developing and implementing a more concrete access to justice action plan.
16. Additional priorities in the Strategic Plan, including engaging stakeholders and the public with responsive communications and increasing organizational effectiveness, will also support enhancing access to justice.
17. An important element of achieving and improving access to justice will be the review and improvement of the Mentoring and Networking Program to ensure it continues to deliver the objectives called for in 2009 by the Final Report of the Indigenous Bar Consultation.
18. The Treasurer's Memo provides further direction on specific priorities in relation to improving access to justice for Indigenous peoples, including improving access to the complaints process for Indigenous communities.
19. Improve the Law Society's hearing and regulatory process, including the Tribunal, in every interaction with Indigenous people.
20. Engage with the Law Society's Legal Aid Working Group to examine and improve the delivery of legal aid to Indigenous people community and address the financial barriers that prohibit meaningful access to justice.
21. Provide support for the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG), including:
  - a. Further support for Inquiry processes
  - b. Develop communication materials to promote awareness and access to justice, published in English, French and Indigenous languages.
  - c. Commit to address Inquiry recommendations.
22. Contribute to the elimination of the overrepresentation of Indigenous people in legal proceedings, care and incarceration through a number of channels:
  - a. Supporting the implementation of the recommendations of the Debwewin Implementation Committee's Final Report and Feathers of Hope.
  - b. Considering the results of TAG's cluster on "the Seventh Generation – the Crisis of Aboriginal Children and Youth in Care".

- c. Considering, as a justice system stakeholder, actions the Law Society can take and what collaborative opportunities exist with other stakeholders to promote alternatives to community sanctions, mandatory minimum sentences, bail procedurals and supporting culturally appropriate services to reduce domestic violence, dispute resolution mechanisms, Aboriginal healing lodges and halfway homes.
- d. Undertaking a study on barriers to access to justice in Northern Ontario, including the efficacy and standardization of the preparation of Gladue Reports (across all of Ontario).
- e. Expanding the Guidelines for Lawyers Representing Residential School Claimants to other areas within the Law Society's regulatory scope.

#### PROMOTING AND SUPPORTING KNOWLEDGE OF INDIGENOUS LEGAL SYSTEMS

23. The Law Society will work with the IAG recognizing that knowledge of Indigenous legal systems is an essential as part of the Law Society's commitment to prioritizing life-long competence and enhancing access to justice for Indigenous peoples. The promotion and support of knowledge of Indigenous legal systems can include:
- a. In response to Call to Action 50, support "the establishment of Indigenous Law institutes for the development, use and understanding of Indigenous laws and access to justice in accordance with the unique characteristics of Aboriginal peoples in Canada."
  - b. Develop and offer Continuing Professional Development (CPD) programs and legal education sessions independently and with partners to support understanding, respect for and application of Indigenous legal systems in Ontario.
  - c. Develop and enhance services available to licensees, including practice supports and learning resources that could provide guidance on Indigenous justice issues, including but not limited to the application of the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal Rights, and the MMIWG.
  - d. Enhance the Law Society's Lawyer Referral Program and Mentorship to provide support and guidance on Indigenous justice issues.
  - e. Enhance the Member Assistance Program to provide for the well-being of Indigenous licensees in ways that promote and support Indigenous, traditional healing methods.
  - f. Enhance supports for small and solo firm practices within the Indigenous community (i.e. mentoring).

## TAKING ACTION ON RECONCILIATION

24. The Law Society recognizes that it will work in partnership with the IAG and be guided by Indigenous knowledge keepers, leaders and citizens, Indigenous practitioners and others, in the development of the Law Society's responses to the Final Report of the Truth and Reconciliation's Calls to Action.
25. The Law Society's priority to engage with stakeholders and the public with responsive communications will support strengthened relationships with Indigenous and non-Indigenous licensees and members of the public, as well as build greater awareness of the Law Society's role in the reconciliation process.
26. Specific proposed actions related to reconciliation are outlined in the TRC Responses document and include:
  - a. A statement of support for the adoption and implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* as a framework for reconciliation.
  - b. A commitment to actively consider opportunities to collaborate with partners, including legal and professional entities in Ontario to extend the impact of the responses the Law Society undertakes and explore how the Law Society can support the work of partners in advancing reconciliation.
  - c. Examine, in partnership with the Indigenous Bar Association, the codes of professional conduct and the commentaries as well as the Federation Model Code to consider changes to promote reconciliation and culturally competent service delivery.

## **List of References**

**1982**

- [The Constitution Act, 1982](#)

**1996**

- [Report of the Royal Commission on Aboriginal Peoples](#)

**1999**

- [R v. Gladue, \[1999\] 1 S.C.R. 688](#)

**2005**

- [The Kelowna Accord](#)

**2007**

- [The Ipperwash Inquiry - Final Report](#)

**2008**

- [United Nations Declaration on the Rights of Indigenous Peoples](#)

**2012**

- [Forsaken: The Report of the missing Women Commission of Inquiry](#) (The BC Missing Women Commission of Inquiry)

**2013**

- [The Iacobucci Report – First Nations Representation on Ontario Juries](#)
- [Feathers of Hope: A First Nations Youth Action Plan](#)
- [Feathers of Hope: Justice and Juries](#)

**2015**

- [The Truth and Reconciliation of Canada Final Report](#)
- [Concluding observations on the sixth periodic report of Canada, United Nations Human Rights Committee](#)