

# Lawyer Licensing and Competence in Alberta

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Analysis and Recommendations

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## Table of Contents

<b>Executive Summary</b> .....	<b>4</b>
<b>1. Introduction</b> .....	<b>8</b>
<b>2. Principles and Observations</b> .....	<b>9</b>
Understanding “Competence” .....	9
The Role of the Law Society .....	11
The Role of Law Schools .....	13
Reconsidering Core Competencies .....	15
Equity, Inclusion, and ITLs .....	17
Lawyer Learning in Law Firms and Law Departments .....	20
<b>3. Licensing New Lawyers</b> .....	<b>21</b>
The Articling Dilemma .....	21
The Student-Centred Articling Experience .....	28
Effective Training vs. Gainful Employment .....	29
<b>Lawyer Licensing Recommendations</b> .....	<b>32</b>
Pre-authorized Approval .....	33
Principal Training .....	33
<b>4. Developing New Lawyers</b> .....	<b>37</b>
The Realities of Lawyer Licensure .....	37
Universal vs. Graduated Licensing .....	38
Competence Problems vs. Competence Opportunities .....	40
Holistic Lawyer Development .....	44
Mentorship Has Its Benefits .....	45
<b>New Lawyer Development Recommendations</b> .....	<b>47</b>
<b>5. Continuing Learning for Lawyers</b> .....	<b>50</b>
Minimum Hours vs. Self-Assessment .....	51
The Advantages of Self-Assessment .....	52
Problems with the System .....	54
Universal Competence Activities .....	57
CPD Options for More Experienced Lawyers .....	59
Levelling the Playing Field for Solos .....	60
Succession Planning and Business Continuity .....	62
<b>Continuing Lawyer Learning Recommendations</b> .....	<b>64</b>
<b>6. Summary and Conclusion</b> .....	<b>68</b>

<b>Appendix A: The Possibilities of a Teaching Law Firm.....</b>	<b>70</b>
<b>Appendix B: Licensing and Competence in Other Professions.....</b>	<b>73</b>
<b>Acknowledgments .....</b>	<b>79</b>

## Executive Summary

This report presents the Law Society of Alberta with an analysis of its lawyer licensing and competence assurance systems and makes several recommendations for their improvement.

This report concludes that although Alberta's current approach to lawyer licensing and competence is generally sound, several steps should be taken to maintain the quality and enhance the effectiveness of the system. In addition, fundamental changes to the legal services market will create more serious challenges to lawyer licensing and competence in the future, and so the law society should immediately begin to seek longer-term solutions to these challenges.

The report opens with an introduction that explains why the report was commissioned and describes the parameters and limitations of its scope, as well as the iterative process of review and consultation through which this final version was reached.

The report then makes six preliminary observations about lawyer licensing and competence assurance that do not rise to the level of formal recommendations, but that lay the groundwork for the more detailed discussions that follow.

- The law society should strive to ensure lawyer “competence” both in the minimum sense of baseline adequacy of knowledge and skills, and in the more aspirational sense of continuous advancement towards true proficiency in many different areas.
- The law society should act both as a “coach” to encourage lawyers’ fulfillment and enhancement of professional norms and as a “cop” to enforce standards and address violations of those standards, but the “coach” should be the default approach.
- The legal education system is outside the scope of this report, but its longstanding and well-documented failure to adequately prepare aspiring lawyers for legal careers should not be allowed to continue and requires urgent law society attention.
- The law society’s six core lawyer competencies, originally formulated eight years ago, would benefit from reconsideration and revision, in particular with the addition of cultural competence and a shift towards more client-centric standards of competence.
- The law society should seriously consider the effects and implications of anti-racism movements and the barriers and biases faced by lawyers who are Black, Indigenous, people of colour, and internationally trained on its licensing and competence systems.
- The law society should recognize the growth of sophisticated competence assurance programs within law firms, public-sector law departments, and corporate law departments, and should strive to dovetail its competence efforts with them.

The report then turns to the three broad categories of lawyer licensing, lawyer development in the first three years of practice, and continuing lawyer learning. These subjects are dealt with in three separate sections that begin with lengthy discussions of the topic and end with a series of recommendations for law society action.

## Lawyer Licensing

The first of these three sections is devoted to lawyer licensing. The three components of lawyer licensing in Alberta are the law degree (outside the scope of this report), the bar admission course (ably administered by the Canadian Centre for Professional Legal Education (CPLLED)) and articling, which occupies most of this section.

Articling is a vestigial holdover from the earliest days of the Canadian legal profession that has been co-opted to serve a competence assurance function for new lawyers. Its longstanding imperfections were amplified by surveys conducted last year by the Prairie law societies that revealed significant levels of discrimination, harassment, and ineffective professional development experienced by articling students.

Articling is the only system currently available to provide aspiring lawyers with supervised practice experience, which the law society judges to be a necessary condition for bar admission, and therefore articling cannot be abolished outright. But nor can it be perfected, as its flaws are fundamentally interwoven with its benefits.

Articling instead should be improved. This report recommends that the law society set baseline criteria, including the successful completion of an application process and a training program, that all lawyers who wish to act as articling principals must successfully meet. It further recommends that principals and students jointly develop and regularly review a learning outcomes document to guide the student's experiential development throughout the articling term. Acting as an articling principal should be allowed to constitute fulfillment of a lawyer's annual continuing learning requirements.

But articling should also be supplemented with other ways in which aspiring lawyers can obtain supervised practice experience. The law society should expect the number of available articling positions to diminish in the very near future, as fundamental changes to the legal services market reduce the amount of entry-level work that clients send to law firms, and as the pandemic triggers both short-term economic crises and longer-term upheaval in the legal sector.

Therefore, Alberta should immediately begin considering alternatives to articling, such as a training-intensive Law Practice Program, an integrated practice curriculum in law schools, and the development of a teaching law firm (described in more detail in an appendix) to provide universal and consistent supervised practice experience to all aspiring lawyers.

It is conceivable that these recommended changes will be met with such resistance from lawyers and law firms that they cannot be implemented. This would confront the law society with a choice between continuing to require aspiring lawyers to use a flawed and damaging articling system or dropping the "supervised practice experience" requirement for bar admission altogether. Given this stark choice, this report recommends the law society adopt the latter course.

The second of the three main sections of this report focuses on the development of lawyers in their first three years in the profession. There is a gap between what a law licence authorizes a new lawyer to do and what the lawyer actually is competent (and feels competent) to perform. The report examines whether and to what extent this gap is an addressable problem.

The report concludes that although a law licence authorizes a new lawyer to take on any and all types of cases, no matter how complex and serious, this does not present a problem in practical

terms, as neither new lawyers nor clients seek these types of retainers. A “graduated licensing” system, by which a new lawyer would be authorized to perform only limited types of legal services, is considered but rejected on the grounds that no clear path exists for a limited-license lawyer to prove “full-license” competence, and that such a system would amount to a multi-year articling requirement that would create even more barriers to entry to the practice of law.

The report accepts that new lawyers frequently feel unprepared to practise law, but contends that this not a problem with new lawyer competence so much as an opportunity to continue and enhance new lawyer development. Law society statistics indicate that lawyers in their first three years of practice generate fewer competence problems than other cohorts. To the extent that junior lawyers do experience problems, these are more attributable to a lack of professional support and training than to an inherent failing of the lawyer’s conscientiousness or quality.

The report therefore recommends that the law society create an online competence development program for new lawyers that continues and complements the knowledge and skills these lawyers acquired through law school, the bar admission course, and articling. The law society should make completion of this program compulsory for lawyers in their first three years in practice, in order to provide these new lawyers with the support and resources they need and deserve.

The report also cites a recent study into the shortcomings of traditional methods of new lawyer supervision, in particular the over-emphasis of “normative” correction and quality control, and the under-emphasis on “formative” mentoring and learning facilitation and “restorative” support for new lawyers in processing the cognitive and emotional impact of the transition to practice. The report therefore recommends that new lawyers’ active participation in the law society’s successful mentoring programs be strongly encouraged.

The third of the three main sections in the report is devoted to continuing lawyer learning. Earlier this year, the law society suspended the requirements of its Continuing Professional Development (CPD) program over concerns that the program was failing to provide the desired level of accountability and compliance among lawyers with regard to ongoing learning.

Unique among Canadian jurisdictions, Alberta does not require lawyers to complete a minimum number of hours of professional development activity; rather, lawyers are annually required to assess their learning needs, identify learning outcomes for the year ahead, and develop and carry out a learning plan to achieve these outcomes.

Although the “minimum hours” system is far more common in other jurisdictions and among other professions (described in more detail in an appendix), the report nevertheless contends that Alberta should not abandon its self-assessment and learning outcomes system. “Minimum hours” is an input measure that does not show how the lawyer has actually improved, which is the only outcome the law society is interested in achieving. Self-assessment is the preferred approach of experts in professional development and adult education, as well as the leading global study into lawyer competence, the Legal Education and Training Review.

Notwithstanding the foregoing, the report also finds that flaws in the implementation of the law society’s CPD program reduced its effectiveness and made lawyers’ compliance with the program unnecessarily difficult. The report therefore recommends the law society undertake three significant changes to its continuing lawyer learning system:

- Oversee the development of an online training program to help lawyers understand what “learning self-assessment” is and how it works, why the law society is requiring self-assessment, and how a lawyer can assess their own learning needs and choose learning outcomes related to those needs.
- Conduct random “learning checkups” on a percentage of Alberta lawyers each year to help ensure lawyers’ compliance with and pursuit of their stated learning activities and outcomes, with an initial emphasis on coaching to encourage desired behaviours and the eventual invocation of more punitive measures if compliance remains absent.
- Periodically supplement lawyers’ continuing learning efforts with activities and initiatives meant to ensure or enhance competence in areas of universal relevance to Alberta lawyers, including but not limited to professional conduct, cultural competence, access to justice, and health and wellness.

The report goes on to note that lawyers with more than 20 years’ experience in the profession present fewer competence problems and have different learning and competence needs than less experienced lawyers. This represents an opportunity to develop a more flexible approach to CPD for this demographic cohort. The law society should develop an alternative program of continuing learning by which these lawyers can perform a range of activities in public service, public legal education, and professional development in order to satisfy their continuing learning requirements.

The report further notes that lawyers in smaller firms, and especially sole practitioners, have less access to resources, training, and assistance than lawyers in other types of employment, a fundamental inequity that may contribute to the disproportionate frequency with which these lawyers experience complaints. The law society should develop an online information and training program for sole practice, and should make completion of the program mandatory for all lawyers who wish to start practising solo (and consider mandating it for all current solos as well).

The report then discusses the difficulties many lawyers face with preparing for the end of their careers and transitioning into the next stage of their lives, and the consequences these difficulties can create for these lawyers’ clients. The law society therefore should create a free business continuity plan template and should require all sole practitioners (and encourage all law firms) in Alberta to create a business continuity plan and register it with the law society.

The report concludes with a summary of its recommendations and an exploration of the urgent need for a unified system of “lawyer formation” in Alberta, stretching from the day a person considers applying to law school to the day they become an independent and autonomous lawyer. The report suggests that the law society exercise its statutory powers and lead all stakeholders in the lawyer development process through the creation of a new structure and vision for the formation of lawyers in Alberta.

## I. Introduction

This report was commissioned by the Law Society of Alberta in April 2020. A draft version of the report was prepared and submitted for the review of two law society committees in late July 2020; feedback from these committees and other stakeholders resulted in this final version.

It perhaps goes without saying that these timelines do not permit an extensive investigation of worldwide research regarding lawyer licensing and competence, or the commissioning and collection of detailed survey data about licensing and competence in Alberta. The COVID-19 pandemic, obviously, has also been a factor during the preparation of this report.

Nevertheless, more than two dozen experts and authorities in lawyer development, legal education, and lawyer licensing in Canada, the United States, and Great Britain have been interviewed over the course of these past several months. In addition, numerous staff members and Benchers of the Law Society of Alberta have given freely and significantly of their time and attention in the creation and revision of this report. All these individuals are acknowledged with gratitude at the end of this document.

The purpose of this report is to help the Law Society of Alberta improve the quality and effectiveness of lawyer licensing and competence in this province. It is intended to provide a framework of reference with which the law society can both attend to immediate enhancements to its lawyer licensing and competence systems and lay the groundwork for more significant reforms in the near future.

The triggering event for the commission of this report was the decision of the law society in February 2020 to suspend, for this year and next, the mandatory Continuing Professional Development filing requirement for Alberta lawyers, so that the CPD system could be analyzed and re-evaluated.

In addition, the law society also had the results of two 2019 surveys conducted by the law societies of Alberta, Saskatchewan, and Manitoba that revealed alarming levels of discrimination and harassment in the articling system in these provinces. It made sense to dovetail these two related issues together into one investigation of lawyer licensing and competence in Alberta.

The bulk of this report is divided into three sections. The first deals with lawyer licensing, including a particular focus on the articling system and the supervised practice requirement for bar admission. The second deals with the first three years of a lawyer's career and investigates whether and to what extent the law society should provide compulsory continued learning for lawyers during this time. The third deals with CPD in Alberta, which this report refers to as "continuing lawyer learning," and recommends changes to this system for all Alberta lawyers and for solo and more experienced lawyers in particular.

Prefacing these three sections is a series of observations that explain the premises upon which this report is based and explore key issues related to the lawyer development lifecycle and ecosystem. Included in an appendix is an overview of the current licensing and continuing learning practices of other regulated professions in Alberta.

The author wishes to thank the Law Society of Alberta for the opportunity to prepare and submit this report.



## 2. Principles and Observations

### (A) Understanding “Competence”

The primary mandate of the Law Society of Alberta is to protect the interests of the people of Alberta in the delivery of legal services in this province. An important means by which the law society fulfills that mandate is to govern and regulate the conduct of lawyers in Alberta.<sup>1</sup>

Central to the governance and regulation of lawyers in Alberta is to ensure the competence of those lawyers when they are first admitted to the legal profession, and then continuously throughout their careers. What is meant by “the competence of lawyers”? The term “competence” is frequently understood to have two related but distinct meanings:

- (a) Competence can mean “adequacy.” It can represent the barest fulfilment of the minimal standards expected of a professional service provider. In this meaning, to say a lawyer is “competent” is to say they<sup>2</sup> have achieved the lowest threshold of effectiveness and reliability acceptable in a regulated environment, but to say no more than that.
- (b) Competence can also mean “proficiency.” It can represent the demonstrated expression of the kind of knowledge, skill, character, and temperament that one would seek in a professional service provider for one’s own most important needs. In this meaning, to say a lawyer is “competent” is to say they are very good at what they do.

The Law Society of Alberta has a statutory mandate to ensure that no lawyer in Alberta may obtain or possess a licence to deliver legal services without meeting the first definition. But the law society also interprets its mandate to include striving to develop every lawyer in Alberta to the standards of the second definition. In the words of Law Society of Alberta President Kent Teskey in February 2020, “We want to go beyond setting a minimum standard for competence.”<sup>3</sup>

This report endorses that approach. If a regulator understands “competence” to convey only a sense of “mere adequacy” — of *minimal* qualification, rather than *minimum* qualification — then it might not apply itself vigorously to the pursuit of ongoing improvement in professional standards and client service among the professionals it regulates.

That would not be consistent with ensuring that the best interests of the public are protected and advanced. Nor would it be consistent with the standards that Alberta lawyers expect of themselves. Very few lawyers will take it as a compliment if they are told, “You are merely adequate.”

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<sup>1</sup> “The Law Society of Alberta regulates the legal profession in the public interest by promoting and enforcing a high standard of professional and ethical conduct by Alberta lawyers.” Law Society of Alberta website, “About Us,” <https://www.lawsociety.ab.ca/about-us/about-us/>

<sup>2</sup> The singular “they” is employed as an impersonal pronoun (instead of “he or she”) throughout this report.

<sup>3</sup> “Leading a New Era of Lawyer Competency,” Law Society of Alberta press release, Feb. 27, 2020: <https://www.lawsociety.ab.ca/leading-a-new-era-of-lawyer-competency/>

This report therefore attempts to address both senses of “competence.” It recommends measures to ensure that minimum standards of performance are attained and maintained by every lawyer in Alberta. But it also recommends measures by which lawyers can continuously improve their knowledge, skill, and effectiveness. This seems to be the approach most consistent with both the letter and the spirit of the law society’s statutory mandate.

## **(B) The Role of the Law Society**

How should a law society go about regulating its members? This important question is mostly beyond the scope of this report, which does not encompass strategic and tactical issues properly within the purview of regulatory leaders. But there is one aspect of this issue that is relevant to this report, which is whether the law society should view its competence-assurance function as fundamentally about enforcement or encouragement.

Those who consider the law society to be an enforcer of norms and standards often emphasize the authoritative, disciplinary, or punitive aspects of the regulatory function. From this perspective, the role of the legal regulator is to seek out inadequacies among lawyers and chastise or penalize those lawyers. This is the regulator as police officer or prison guard — vigilant, suspicious, swift to crack down.

Those who consider the law society to be a strengthener of norms and standards, on the other hand, often emphasize the developmental, facilitative, or encouragement aspects of the regulatory function. From this perspective, the role of the legal regulator is to identify opportunities for ongoing improvement among lawyers and to provide resources and platforms to fulfill those opportunities. This is the regulator as coach or mentor — inquisitive, constructive, eager to assist.

It is obvious that an effective regulator must be ready to wear both these hats at the appropriate times — to be both “a cop” and “a coach,” so to speak, as the situation requires. But when it comes to ensuring competence, this report considers that the law society’s default setting should be more inclined towards the coach than the cop.<sup>4</sup>

### **The Athletic Comparison**

When looking for the right model for competence assurance, consider the example of professional athletes. Great athletic performers do not employ sadistic fault-finders to yell at them whenever they miss a shot or drop a pass. They employ astute professionals who are trained to help the athlete improve their strengths, attend to their weaknesses, and enhance their physical, mental, and emotional condition to a point of peak performance. This is what makes good coaches invaluable and why great performers hire them.

Most people do not improve their competence and expand their capability by continuously absorbing criticism and enduring discipline (although even world-class athletes sometimes need harsh feedback). Proficiency is generally achieved by receiving and responding to steady, constructive, and professional support and training.

A good coach is interested in two things: that their client achieves a high standard of performance, and that their client takes personal ownership of their performance and attends consistently to activities that will ensure its maintenance and improvement. A good coach therefore engages frequently with their client, encouraging their efforts while giving them the tools and techniques with which they can enhance their effectiveness.

At a certain point, of course, a coach knows when their client is not putting in the effort to achieve a high standard of performance, and if the coach cannot motivate the client to change

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<sup>4</sup> See: “From Colleague to Cop to Coach: Contemporary Regulation of Lawyer Competence,” Amy Salyzyn, 95 *Can. B. Rev.* 489 (2017): <https://cbr.cba.org/index.php/cbr/article/view/4417>

their behaviour, the coaching relationship ends. At that stage, the regulator’s role shifts as well, becoming more of a police officer. A police officer has no interest in high performance — the officer is concerned only with investigating and condemning potential violations of standards.

This report recommends that when interacting with lawyers to ensure their ongoing competence, the law society’s default approach should be as a coach, who treats the lawyer as a responsible grown-up and deals with them positively and constructively. If that approach repeatedly fails with a particular performer, then the coaching hat should come off and be replaced with the law enforcement hat.

But the law society should generally default to “coach.” It should assume that most lawyers are professionals who want to do as well as they can, rather than to get away with as little effort as possible, and to engage with them accordingly.

## (C) The Role of Law Schools

The commissioning scope of this report specifically did not include any consideration of law schools or legal education. This decision was correct and necessary.

Canada has 24 law schools, including two in Alberta, and the Federation of Law Societies of Canada (FLSC) recognizes equivalent degrees from many foreign law schools as well. Each of these law faculties is independent of the Law Society of Alberta and does not answer to its regulatory authority. It would be pointless for this report to recommend that the law society take any steps concerning law schools when it has no ability to follow through on those recommendations in an effective manner.

In addition, the subject of legal education in Canada, and the relationship between law schools and law societies, is already bound up in the “National Requirements for Canadian Common Law Degree Programs,”<sup>5</sup> a document prepared and overseen by the FLSC. It is therefore outside the scope and authority of this report to recommend any actions in a field that is already occupied by other actors.

## The Reality of Law School

Notwithstanding these facts, it is also true that to address the questions of lawyer licensing and lawyer competence without also addressing the issue of lawyer education is similar to thinking about one’s route and destination only after walking three kilometres down the road in a particular direction. If the initial trajectory of the trip was off-line to any significant degree, the remainder of the journey will be compromised until that trajectory can be corrected.

It is trite to observe that the state of legal education is deeply dissatisfying to the legal profession in most jurisdictions worldwide. The disconnect between law school curricula and lawyers’ practical knowledge needs,<sup>6</sup> the longstanding misalignment of professional development priorities between the academy and the bar,<sup>7</sup> the ten-fold increase in law school tuition over the past two decades,<sup>8</sup> the consequent heavy burden of post-graduate law student

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<sup>5</sup> <https://flsc.ca/wp-content/uploads/2018/01/National-Requirement-Jan-2018-FIN.pdf>

<sup>6</sup> “The Gap Between the Foundational Competencies Clients and Legal Employers Need and the Learning Outcomes Law Schools Are Adopting,” Prof. Neil Hamilton, University of St. Thomas Law School, May 14, 2020, Forthcoming in 89 *UMKC Law Review* (2020) U of St. Thomas (Minnesota) Legal Studies Research Paper No. 20-04: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2828437](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2828437)

<sup>7</sup> “The Leadership Imperative: A Collaborative Approach to Professional Development in the Global Age of More for Less,” Prof. Scott A. Westfahl & Prof. David B. Wilkins, 69 *Stan. L.Rev.* 1667 (2017): <https://review.law.stanford.edu/wp-content/uploads/sites/3/2017/06/69-Stan.-L.-Rev.-1667.pdf>

<sup>8</sup> “Canada’s growing student debt crisis,” Holly Lake, *CBA National*, Oct. 21, 2019: <https://nationalmagazine.ca/en-ca/articles/law/in-depth/2019/canada-s-growing-student-debt-crisis>

debt,<sup>9</sup> and the increasing number of law school graduates who cannot find work as lawyers,<sup>10</sup> are just some of the problems plaguing legal education in Canada and elsewhere. Ask most lawyers whether they feel law school prepared them adequately for their legal career, and the response will be in the negative, often resoundingly.

There cannot continue to exist in Canada such a stark divide between the first three years of a lawyer's career — the law degree — and everything that follows, which for most law school graduates seems like an entirely different world than the one they were expecting to enter.<sup>11</sup>

As the governors of the legal profession and regulators of lawyers' competence, Canada's law societies have a legitimate and compelling stake in the process by which the foundations of lawyers' competence are first established. Much of the commentary and many of the recommendations in this report concerning the initial licensing of lawyers and their continuing development in their first years at the bar are necessitated by the failure of legal education to lay those foundations properly. Law societies are forced, at considerable expense, to reset the trajectories of their newest members three years after they first began their journey into the law.

There simply must be better integration of the aims and activities of the legal academy and the legal profession in Canada. The lawyer formation process must be focused squarely on the aspiring lawyer, giving this individual the capability and tools to identify and acquire everything they need to define their professional identities<sup>12</sup> and take charge of their careers from the very start. Legal knowledge and legal practice are not separate in the practice of law; they should no longer be separate in legal education.

This report does not make any official recommendations to the Law Society of Alberta concerning law schools and legal education. But it urgently calls the law society's attention to these issues and encourages the consideration of a similar report by other authors to examine the law society's mandate and options in this regard.

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<sup>9</sup> "Final Report, Findings & Recommendations on The Impact of Law School Debt on the Delivery of Legal Services," Illinois State Bar Association, June 22, 2013: <https://www.isba.org/sites/default/files/committees/Law%20School%20Debt%20Report%20-%203-8-13.pdf>

<sup>10</sup> "As Supply of Law Grads Drops, More Struggle to Find Work," Matt Leichter, *The American Lawyer*, May 16, 2016: <https://www.law.com/almID/1202757769463/As-Supply-of-Law-Grads-Drops-More-Struggle-To-Find-Work/>

<sup>11</sup> This report acknowledges, among the praiseworthy exceptions to these general observations, the excellent clinical practice opportunities offered to students at the University of Alberta Faculty of Law and the University of Calgary Law School, and in particular, the numerous innovations and admirable dedication to the future of law practice evidenced at the University of Calgary Law School.

<sup>12</sup> "Professional identity" is an emerging aspect of lawyer development that is highly important yet frequently undervalued in a lawyer's ability to build a successful and sustainable career. Law societies should confer with other stakeholders in the early years of lawyer development, especially law schools and bar admission providers, about how to help inculcate a sense of professional identity among aspiring lawyers. See: "Divided Selves: Professional Role Distancing Among Law Students and New Lawyers in a Period of Market Crisis," John Bliss, *Law & Social Inquiry*, Volume 42, Issue 3, Summer 2017, pp. 855-897: <https://onlinelibrary.wiley.com/doi/full/10.1111/lsi.12204>

## (D) Reconsidering Core Competencies

In September 2012, the FLSC published the “National Entry to Practice Competency Profile for Lawyers and Quebec Notaries.”<sup>13</sup> The Law Society of Alberta used this document as a guide when it subsequently established six<sup>14</sup> competencies required not only upon entry to law practice, but throughout the career of a lawyer.<sup>15</sup> They were:

- Ethics and professionalism,
- Substantive legal knowledge,
- Client relationship management,
- Practice management,
- Oral and written communication, analytical and research skills, and
- Wellness.

The commissioning scope of this report did not include a re-evaluation of the law society’s six core competencies, and so this report makes no specific recommendations with regard to them. But this report does refer frequently to these competencies — in particular, they are at the heart of Recommendation A3 (the articling experience) and C1 (continuing learning for lawyers). This makes it advisable to re-examine these competencies here in 2020 to ensure they are still accurate and relevant.

Accordingly, offered only for the law society’s potential consideration, this report suggests the following revised list of core competencies for the Law Society of Alberta, presented alphabetically.

1. *Client Relationships*. This category changes from “client relationship management,” a lawyer-centric term that implies relationships are risky obligations to be “managed,” rather than opportunities for healthy and resilient exchanges between clients and lawyers as equal partners in pursuing the client’s goals and priorities.
2. *Cultural Competence*. This new category is suggested for reasons set forth in the “Universal Competence Activities” subsection in Section 5 of this report.
3. *Law Business Management*. This category encompasses the previous category of “practice management,” but is renamed to reflect the importance to private-practice lawyers of operating an effective and profitable business in which the management of people, projects, procedures, and technology enables effective service delivery, high levels of client satisfaction, and a healthy workplace.
4. *Professional Conduct*. This category encompasses the previous category of “ethics and professionalism,” but places the focus squarely on what matters to clients: the lawyer’s

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<sup>13</sup> <https://flsc.ca/wp-content/uploads/2014/10/admission4.pdf>

<sup>14</sup> There are actually seven competencies listed on the law society website, but the seventh is “Other,” which is not a helpful category for current purposes.

<sup>15</sup> <https://www.lawsociety.ab.ca/lawyers-and-students/continuing-professional-development/background/cpd-competencies/>

actual behaviour. “Ethics” sometimes leads lawyers to think in narrow terms of obeying rules and avoiding illicit activities, whereas “professional conduct” speaks to the larger issues of a lawyer’s actions and demeanour. (This topic is explored further below.)

5. *Substantive Law*. The slight modification here is to remove the word “knowledge,” which might inadvertently cause lawyers to over-emphasize the textual, black-letter-law elements of substantive law at the expense of the “experiential” aspects of substantive law competence — the skills, systems, and solutions in any given practice area that can help bring the client to their desired goal.
6. *Wellness*. This category is unchanged.

Generally, these suggested revisions are intended to make the law society’s core competencies not just more relevant to the modern legal profession, but also more amenable to achieving learning outcomes, as described in Section 5 of this report.

The law society’s interest in a lawyer’s ethical competence, for example, resides in what the lawyer actually *does*, and what the lawyer actually refrains from doing, to and for their clients. An “ethically competent lawyer,” for example, is defined by their *actions*, which in turn are guided by the habits, systems and processes the lawyer has established to guide those actions. Just as there is no such thing as “fiduciary duty in the air,”<sup>16</sup> there is no such thing as “competence in the air.” Competence is practical, not theoretical.

The same reasoning applies to all six of these competencies. This report therefore suggests that the law society consider at length these questions:

- What does a lawyer proficient in client relationships do, and not do?
- What does a culturally proficient lawyer do, and not do?
- What does a lawyer proficient in law business management do, and not do?
- What does an ethically proficient lawyer do, and not do?
- What does a substantively proficient lawyer do, and not do?
- What does a healthy and well lawyer do, and not do?

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<sup>16</sup> *Strother v. 3464920 Canada Inc.*, [2007] 2 SCR 177



## (E) Equity, Inclusion, and ITLs

One month after this report was commissioned, George Floyd was killed by police in Minneapolis, Minnesota. One month before this report was submitted, Jacob Blake was shot and paralyzed by police in Kenosha, Wisconsin. Before, between, and after these shootings, data has repeatedly shown the disproportionately severe impact of COVID-19 on the lives and health of non-white North Americans and on people in less privileged socio-economic circumstances.<sup>17</sup>

These three developments in particular have galvanized a long-overdue reaction among members of predominantly white populations in the United States and Canada, focusing their attention on issues of racial justice and social equity. It is appropriate that this report take note of these contemporaneous events and make some observations about aspects of racial justice and social equity in legal regulation.

The recommendations in this report are meant to apply broadly in all cases and to have universal impact throughout the legal profession. But it is critical to recognize that while the law society's licensing and competence systems should be improved for all lawyers, Black, Indigenous, and people of colour (BIPOC) lawyers, as well as many internationally trained lawyers (ITLs), have previously faced and continue to experience additional challenges within these systems.

### BIPOC Lawyers

BIPOC lawyers routinely encounter numerous obstacles and barriers in their work as a result of systemic racism in Canadian society generally and the legal profession in particular, and they have faced these challenges for generations.<sup>18</sup> A concise snapshot of the problem is expressed by Prof. Joan Brockman in her summary<sup>19</sup> of Prof. Charles C. Smith's watershed article, "Who Is Afraid of the Big Bad Social Constructionists? Or Shedding Light on the Unpardonable Whiteness of the Canadian Legal Profession":<sup>20</sup>

- *The legal profession has failed to recognize racism within itself.*
- *There is a lack of information about the racialized composition of the legal profession and judiciary.*

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<sup>17</sup> See generally, "Black Americans dying of COVID-19 at three times the rate of white people," Ed Pilkington, *The Guardian*, May 20, 2020: <https://www.theguardian.com/world/2020/may/20/black-americans-death-rate-covid-19-coronavirus>

<sup>18</sup> "(Dis)Proving Racism: A Rebuttal to Klippenstein's Critical Review of the Law Society of Ontario's Report on Challenges Facing Racialized Licensees," Joshua Sealy-Harrington, ABLawg.ca, Feb. 20, 2020: <https://ablawg.ca/2020/02/20/disproving-racism-a-rebuttal-to-klippensteins-critical-review-of-the-law-society-of-ontarios-report-on-challenges-facing-racialized-licensees/>

<sup>19</sup> "Racism and Legal Culture: Is there Room for Diversity in the Legal Profession?" (2008) 45:5 *Alta. L. Rev.*: *Proceedings of the Law Society of Alberta's 100th Anniversary Conference* 75

<sup>20</sup> (2008) 45:5 *Alta. L. Rev.*: *Proceedings of the Law Society of Alberta's 100th Anniversary Conference* 55

- *There has been an "undramatic increase [or perhaps decrease] in the numbers of Aboriginal lawyers and lawyers from subordinate racialized groups."*
- *Both law schools and the legal profession are the agents who keep the profession largely white.*
- *There are many examples of what law schools and the legal profession are doing and could be doing to make the legal profession more representative of Canadian society in terms of Aboriginal lawyers and lawyers from racialized groups.*

## **Internationally Trained Lawyers**

For the past several years, the Law Society of Alberta has also been working with ITLs in the licensing process to address their unique circumstances. ITLs include Canadians who obtained their legal education outside of Canada, as well as new Canadians who were qualified and practised law in their home countries before coming to Canada. The number of ITLs choosing to come to Alberta has grown significantly over the last decade, to the point where nearly one-third of articling students in Alberta every year obtained their law degrees outside Canada.

Many ITLs face specific challenges as a result of being trained outside Canada. These include, but are not limited to:

- challenges in obtaining articling positions due to the timing of recruitment cycles,
- lack of access to career services assistance at a Canadian university,
- lack of familiarity with Canadian legal culture,
- absence of an established network of contacts,
- perceived lack of transparency with accreditation and application processes,
- less-than-ideal articling situations, and
- lack of access to quality mentorship after bar admission.<sup>21</sup>

The commissioning scope of this report did not specifically include obstacles and challenges facing BIPOC lawyers and ITLs in Alberta. But it would be wrong to pretend that every lawyer in Alberta walks the same path, is subject to the same challenges, and has access to the same resources and networks as everyone else. The sorry history of racial injustice in this country says otherwise.

The recommendations in this report do not address all the difficulties faced by BIPOC lawyers and ITLs. But in some specific instances, this report recommends the law society take steps to level the playing field and provide better resources and more support for these groups,

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<sup>21</sup> See generally: "The Importance of Mentorship in Composite Articles with a Focus on Internationally Trained Lawyers," unpublished, Agnes Bielecki, Internationally Trained Lawyers Research Project, March 2017 (updated January 2019 and April 2020).

particularly for lawyers in sole practice, where a disproportionate number of BIPOC lawyers and ITLs practise law.<sup>22</sup>

More generally, it is hoped that by improving the quality of the articling experience, developing more alternatives to articling, and providing better support for new lawyers, the ITL and BIPOC lawyer experience in Alberta can be significantly improved.

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<sup>22</sup> The law society's Strategic Plan also places a great deal of importance on equity, diversity, and inclusion. See: "2020-2024 Strategic Plan and Regulatory Objectives," Law Society of Alberta website: <https://www.lawsociety.ab.ca/about-us/strategic-plan/>

## **(F) Lawyer Learning in Law Firms and Law Departments**

The Law Society of Alberta establishes baseline competencies for all lawyers in the province and requires lawyers to engage in continuing learning to ensure their proficiency in these areas. But unlike in many other jurisdictions, the law society does not itself create and deliver programming to satisfy these learning requirements. Professional development programming for lawyers in Alberta is delivered by other entities, most notably the Legal Education Society of Alberta (LESA).

This separation of the power to compel continuing learning for lawyers in designated competencies from the role of providing the programming by which lawyers can access that learning is, in the view of this report, a wise one. It recognizes that learning is a complex and multi-faceted process, and so multiple providers should be encouraged to offer programming to facilitate learning outcomes based on competencies mandated by the regulator.<sup>23</sup>

Some providers of continuing learning programs are private-sector entities such as the Legal Education Society of Alberta (LESA). Others are based within legal organizations such as law schools and bar associations. But in the modern legal profession, providers of continuing learning also include entities that directly employ lawyers themselves.

Many law firms of all sizes, public-sector law departments, and corporate in-house law departments have developed thorough, high-quality educational programming for their lawyers. The law society shares with these entities the desire that their lawyers should continually maintain and grow their competence.

The law society therefore should seek ways to work with these entities, to ensure that their programming addresses the law society's core competencies so that lawyers can satisfactorily and conveniently fulfill many of their learning needs at their place of employment.

This report suggests that the law society consider ways in which its competence-assurance efforts might dovetail with the professional development programming in law firms and law departments in Alberta. Unnecessary duplication should be avoided, and there are many opportunities for the law society to not only cooperate with, but also collaborate on — and conceivably, even accredit — these programs.

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<sup>23</sup> It also shields the law society from the conflict of interest that arises when a regulator generates revenue from CPD programming that it mandates.

### 3. Licensing New Lawyers

#### The Articling Dilemma

A person who wishes to obtain a licence to practise law from the Law Society of Alberta must fulfill three requirements.<sup>24</sup> The first is to complete a Bachelor of Laws or Juris Doctor degree from a faculty of common law at a Canadian university, or an equivalent qualification.<sup>25</sup> The second is to complete the bar admission course administered by the Canadian Centre for Professional Legal Education.

The third requirement, which is the focus of this section and most of the recommendations at its conclusion, is to complete a term of articling with an Alberta legal employer. Every province and territory in Canada — indeed, most jurisdictions worldwide — require an aspiring lawyer to complete a period of supervised practice experience.<sup>26</sup>

Articling is one of the few elements of 19th-century legal practice to survive mostly intact into the 21st century. Professor W. Wesley Pue, in his comprehensive 1995 treatise “Law School: The Story of Legal Education in British Columbia,”<sup>27</sup> succinctly lays out articling’s origins and function.

*For most of its history, the legal profession has simply assumed that new lawyers would adequately learn their trade by doing it. Ideally, an initial period spent working under the direction of experienced and knowledgeable practitioners would expose the trainee to the mysteries of the lawyer’s art.*

*Over time, more or less formal apprenticeships were developed. Lawyers’ guilds came to require service for specified periods of time, as what came to be called “articles” developed into the principal mode of qualifying to practise law.<sup>28</sup>*

The evolutionary explanation for articling, therefore, is that it is a vestigial remnant of the original apprenticeship path towards law practice from the era before law schools developed.<sup>29</sup> Today, however, with 24 law schools across the country (and more law schools worldwide whose

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<sup>24</sup> “How to Become a Member in Alberta,” Law Society of Alberta (<https://www.lawsociety.ab.ca/lawyers-and-students/membership-services/how-to-become-a-member-in-alberta/>)

<sup>25</sup> “National Requirements for Canadian Common Law Degree Programs,” Federation of Law Societies of Canada (<https://flsc.ca/wp-content/uploads/2018/01/National-Requirement-Jan-2018-FIN.pdf>)

<sup>26</sup> “Qualification in other jurisdictions: International benchmarking,” a report by the Solicitors Regulation Authority, September 2016: <https://www.sra.org.uk/sra/policy/solicitors-qualifying-examination/research-reports/qualification-other-jurisdictions-international-benchmarking/>

<sup>27</sup> “Law School: The Story of Legal Education in British Columbia,” Professor W. Wesley Pue, University of British Columbia Faculty of Law, 1995 (<http://faculty.allard.ubc.ca/pue/historybook/school.html>)

<sup>28</sup> Ibid. (<http://faculty.allard.ubc.ca/pue/historybook/school01a.html#c1p2>)

<sup>29</sup> See generally: “The Path of Legal Education from Edward I to Langdell: A History of Insular Reaction,” Ralph Michael Stein, 57 *Chi.-Kent L. Rev.* 429 (1981): <http://digitalcommons.pace.edu/lawfaculty/228>

degrees are recognized by the FLSC), the apprenticeship path into law practice has all but vanished.

Yet articling remains a compulsory component of bar admission in every Canadian jurisdiction. Our modern rationale for articling is that it provides aspiring lawyers with the opportunity to translate their academic legal knowledge into tangible legal outcomes, learning how to serve clients and operate a legal services business in an effective and ethical manner under the supervision of a more experienced lawyer.

There is no serious argument against this; hardly anyone in Canada advocates changing our model to follow our American colleagues and permit bar admission without practice experience. This report therefore proceeds on the basis that bar admission in Canada properly requires a term of supervised practice under the auspices of an experienced lawyer.

For as long as we have had articling in Canada, however, we have also had arguments about its quality and validity. Professor Pue cites an address to the 1913 General Meeting of the Law Society of Alberta by University of Saskatchewan political scientist and lawyer Ira MacKay, who favoured formal legal education over what he saw as the unsystematic nature of apprenticeship.

*The [articling] clerks in the offices spend most of their time doing clerical work which they will not do for themselves but which they will require their own clerks to do for them when they themselves begin to practise. The result is a profession of apprentices without principals. These clerks receive absolutely no instruction and scarcely any assistance in their work.*

Mr. MacKay perhaps overstated his case; but more than a century later, the Canadian legal profession appears to be no happier with the articling system. Google “articling problems in Canada” today, and the first page of results will deliver titles with phrases like “horror stories” and “intolerable human cost,” among others.

Many law societies have established task forces, working groups, and inquiries over the years to look into articling’s problems and how they might be fixed. Most have recommended minor adjustments, but hardly any have come up with comprehensive solutions.

Not since the Law Society of Upper Canada’s 1973 Report of the Special Committee on Legal Education<sup>30</sup> (generally referred to as the “MacKinnon Report”) has any serious attempt been made to abolish articling.<sup>31</sup> That attempt failed and none has been made since, not least because there is no easy replacement for the functions articling performs.

## **New Challenges for Articling**

More recent inquiries have revealed other, more disturbing realities about articling. In May and June 2019, the law societies of Alberta, Saskatchewan and Manitoba conducted two surveys. One asked articling students and lawyers who articulated in the previous five years about their training and mentoring, and in particular about any discrimination and harassment they might

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<sup>30</sup> See, “Should Articling Be Abolished?” Lorne Sossin, personal blog, Oct. 26, 2010: <https://deansblog.osgoode.yorku.ca/2010/10/should-articling-be-abolished/>

<sup>31</sup> “Licensing and Accreditation Task Force Consultation Report,” Law Society of Upper Canada, 2008: [https://www.law.utoronto.ca/documents/conferences/Legaethics08\\_LSUCTaskForce.pdf](https://www.law.utoronto.ca/documents/conferences/Legaethics08_LSUCTaskForce.pdf)

have experienced. It also asked them how prepared they feel to practise law. A second survey posed similar questions to articling principals, recruiters and mentors.<sup>32</sup>

The results of the surveys were dismaying. The law society heard from 549 student and new lawyer respondents in Alberta. Nearly one in three (32 per cent) reported experiencing discrimination or harassment during recruitment and/or articling. The surveys also found an inconsistent experience in the competencies learned during articling and in how prepared students feel for entry-level practice, as well as challenges around the quality of mentorship and feedback for both students and their principals and mentors.<sup>33</sup>

The law society requires aspiring lawyers to undergo articling in order to gain admission to practice. The regulator has a corresponding duty to ensure that these individuals can access a safe and effective environment in which to meet this requirement. If the purpose of articling is to provide instructive experience in law practice, the regulator must also take steps to ensure that the experience is provided properly.

The foregoing only scratches the surface of articling's challenges: To make a long story short, articling is a flawed system. We cannot fault the architects of articling for its flaws, however, because there were no architects. Articling made its way to the centre of our lawyer development system almost by accident. And like most structures assembled without an architectural plan, the foundations are starting to give way.

Articling was not invented to serve as the critical third step in lawyer formation; it was borrowed and adapted over time to serve that purpose. Now, it is questionable how well it even does that. Articling today is a system in which:

- not everyone who wants an articling position can obtain one;<sup>34</sup>
- not everyone who obtains a position will be paid a salary;<sup>35</sup>
- not everyone who obtains a position (paid or unpaid) will receive an acceptable level of training and supervision;<sup>36</sup> and

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<sup>32</sup> "Articling system rife with harassment and discrimination," Carolynne Burkeholder-James, Canadian Bar Association *National*, Jan. 28, 2020: <https://www.nationalmagazine.ca/en-ca/articles/the-practice/young-lawyers/2020/articling-system-rife-with-harassment-and-discrimi>

<sup>33</sup> "2019 Articling Survey Results Report," Law Society of Alberta: <https://www.lawsociety.ab.ca/2019-articling-survey-results/>

<sup>34</sup> "Will the conversation catalyzed by the Law Society of Ontario mean the end of articling?" Aidan Macnab, *Canadian Lawyer*, Aug. 19, 2019 (<https://www.canadianlawyermag.com/resources/legal-education/will-the-conversation-catalyzed-by-the-law-society-of-ontario-mean-the-end-of-articling/297439>)

<sup>35</sup> "Law students concerned as firm posts articling job covering a transit pass," *Law Times*, July 20, 2015 (<https://www.lawtimesnews.com/news/general/law-students-concerned-as-firm-posts-articling-job-covering-a-transit-pass/261805>)

<sup>36</sup> "The Ethics of Articling," Adam Dodek, *Slaw*, Dec. 9, 2013 (<http://www.slaw.ca/2013/12/09/the-ethics-of-articling/>)

- not everyone who completes their articling term will do so without enduring a difficult or even damaging personal experience.<sup>37</sup>

This report does not recommend the abolition of articling. The Law Society of Alberta recognizes that supervised practice experience is a necessary condition of licensing for aspiring lawyers, and articling is currently the only means available to the law society for providing this experience.

Neither does this report prescribe a series of remedies that can transform articling into an outstanding experience for every aspiring lawyer in Alberta. Such remedies simply are not available. The reason why so many attempts over the years to “fix” articling have failed is that articling cannot really be fixed.

Articling is imperfect by nature. It is a process by which the regulator hands over — outsources, essentially — the critical final stage of bar admission to the private sector. This inherently creates a wide spectrum of potential workplace environments for articling students and surrenders any practical degree of control or close supervision by the regulator over the experience. When we complain that articling experiences are wildly inconsistent, subject to the demands of busy law practices, and resistant to centralized oversight, we are not reciting articling’s bugs. We are listing its features.

This report does recommend a series of steps by which the articling experience can be improved. In particular, the report recommends changes to the role of the articling principal<sup>38</sup> and their relationship with the articling student, in order to re-focus the experience on the aspiring lawyer.

More importantly, this report recommends the development of additional methods by which aspiring lawyers can obtain supervised practice experience. The following subsections of this report will explain the reasoning behind these recommendations and address potential questions or concerns about them.

But it is also important to make clear that even if all the improvements recommended in this report are implemented, articling still must be accepted for what it is: a tradition held over from a bygone era in law’s history to act as a makeshift solution in this one. It is a 19th-century square peg with which we are attempting to fill a 21st-century round hole.

If the Law Society of Alberta were considering, for the first time, how to provide aspiring lawyers with a period of supervised practice experience before bar admission, it is unlikely that it would come up with the current articling system. But it is the system we have. Since articling can

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<sup>37</sup> In addition to the results of the Prairie Law Societies’ 2019 surveys, see the May 2018 “Options for Lawyer Licensing Consultation Paper” by the Law Society of Ontario, which found that “21 percent of respondents who had completed articling indicated that they had faced comments or conduct relating to personal characteristics that were unwelcome, and 17 percent felt that they had received different or unequal treatment relating to personal characteristics.” ([https://lsdialogue.ca/wp-content/uploads/2018/05/lawyer\\_licensing\\_consultation\\_paper\\_bookmarksweblinks-toc.pdf](https://lsdialogue.ca/wp-content/uploads/2018/05/lawyer_licensing_consultation_paper_bookmarksweblinks-toc.pdf))

<sup>38</sup> Throughout this report, “articling principal” refers to the lawyer who is charged with the responsibility to oversee the student during their articling term and to report to the law society at the conclusion of the term whether the student has satisfactorily met the required standards. The obligations and opportunities for articling principals recommended herein are not intended to apply to other lawyers within the workplace who happen to have any kind of supervisory contact with the student.



neither be abolished nor perfected, this report recommends that it be improved and, more importantly, supplemented.

## Market Forces and New Pathways

The first of the five recommendations in this section is that the Law Society of Alberta develop additional routes and methods by which aspiring lawyers can apply their legal knowledge and skills in a supervised legal work environment before being granted entry to the profession.

Put differently, the law society should create new experiential “pathways into practice.” That is the term used by the Law Society of Ontario to describe the three ways in which an aspiring lawyer may gain the experiential learning required for admission to practice in that province:

- Complete a term of articling,<sup>39</sup>
- Complete the Law Practice Program (LPP)’s four-month work placement,<sup>40</sup> or
- Complete a law degree that features an Integrated Law Practice Curriculum (IPC, currently in use at Lakehead University Law School in Thunder Bay and at the new Ryerson University Law School in Toronto)<sup>41</sup>

This report recommends that the Law Society of Alberta also pursue the development of additional experiential learning pathways in this province. This is not to say that Alberta should simply copy Ontario and develop both an LPP and IPC; Alberta should chart its own course forward. But Ontario offers a model by which articling can be supplemented with other ways for an aspiring lawyer to obtain supervised practice experience.

This report contains a number of recommendations by which the articling experience can be improved. But even if every one of these recommendations is accepted and implemented, and even if the quality of the articling experience improves significantly as a result, the recommendation to develop additional pathways into practice would still stand. This is because there is reason to believe that the supply of available articling positions in Canada is diminishing and soon will fall below the level required to sustain each incoming class of new lawyers.

Set aside for a moment the growing number of aspiring lawyers in Canada, which has arisen from larger class sizes at most Canadian law schools and an increase in the number of

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<sup>39</sup> “How Do I Become a Lawyer in Ontario? Information for law students and NCA applicants,” Law Society of Ontario: <https://lso.ca/becoming-licensed/lawyer-licensing-process/how-do-i-become-a-lawyer-in-ontario>

<sup>40</sup> “Law Practice Program,” Law Society of Ontario (<https://lso.ca/becoming-licensed/lawyer-licensing-process/law-practice-program>); “Program Overview,” Ryerson University Faculty of Law (<https://lpp.ryerson.ca/prospective-candidates/>); “Law Practice Program,” University of Ottawa Faculty of Law (<https://commonlaw.uottawa.ca/en/students/law-practice-program>)

<sup>41</sup> “Integrated Practice Curriculum,” Bora Laskin Faculty of Law (<https://www.lakeheadu.ca/programs/departments/law/curriculum/ipc>) and “Integrated Practice Curriculum,” Ryerson University Faculty of Law (<https://www.ryerson.ca/law/program/integrated-practice-curriculum-ipc/>)

internationally trained lawyers seeking a license to practise law in this country.<sup>42</sup> While each of these phenomena contributes to the growing *demand* for articling positions, they are unrelated to the more systemic reasons for the dwindling *supply* of those positions.

The premise of articling is that a law firm or other legal employer will hire an articling student to carry out formative, entry-level tasks within their limited capacity. But this premise relies upon the sufficient availability of entry-level tasks to give to the articling student. If clients do not send these tasks to law firms, then the firms cannot give the tasks to articling students, and students' work on these tasks cannot be billed.

Economic and technological forces are now bringing transformative changes to the legal market, and there is every indication that they will only grow in importance in the coming years.<sup>43</sup>

- Corporate clients, whose work has kept generations of articling students employed at many law firms, have substantially increased their in-house lawyer ranks<sup>44</sup> and are keeping, or “insourcing,” many basic legal assignments that once went to law firms as a matter of course.<sup>45</sup>
- When these clients do outsource entry-level tasks, they frequently choose to send the work to an “alternative legal services provider”<sup>46</sup> that can perform the work more efficiently, with greater use of process and technology, and therefore less expensively than law firms.

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<sup>42</sup> “Canadian law schools added 316 students and 35 tenured faculty over five years, says FLSC update,” Bernise Carolino, *Law Times*, Nov. 28, 2019: <https://www.lawtimesnews.com/resources/legal-education/canadian-law-schools-added-316-students-and-35-tenured-facultyover-five-years-says-flsc-update/323360>

<sup>43</sup> “Where Have All the Big Law Associates Gone?” Bob Graff and Michelle Fivel, *Bloomberg Law*, Mar. 21, 2017: <https://www.mlglobal.com/en/knowledge-library/articles/where-have-all-the-big-law-associates-gone?byconsultantorauthor=robert-g>

<sup>44</sup> Statistics for Canada are not available, but between 1997 and 2016, the number of American lawyers working in corporate law departments increased by 203 percent. In that same period, the number of lawyers employed by law firms grew by just 27 percent. (“How Much Are Corporations In-Sourcing Legal Services?” Prof. William Henderson, *Legal Evolution*, May 2, 2017: <https://www.legalevolution.org/2017/05/003-inhouse-lawyers/>) See also, “Bring it inhouse,” *Canadian Lawyer*, July 24, 2011: <https://www.canadianlawyermag.com/news/general/bring-it-in-house/268273>

<sup>45</sup> “Canadian legal landscape 2019: Issues and trends facing in-house counsel in Canada,” Deloitte (<https://www2.deloitte.com/ca/en/pages/finance/articles/canadian-legal-landscape.html>); “Why alternative legal service providers are on the rise,” Cornelius Grossmann, *EY Law* ([https://www.ey.com/en\\_gl/tax/why-alternative-legal-service-providers-are-on-the-rise](https://www.ey.com/en_gl/tax/why-alternative-legal-service-providers-are-on-the-rise))

<sup>46</sup> “Close to 50% of Canadian businesses will turn to alternative legal service providers within 5 years,” Anita Balakrishnan, *Law Times*, Oct. 2, 2019: <https://www.lawtimesnews.com/resources/practice-management/close-to-50-of-canadian-businesses-will-turn-to-alternative-legal-serviceproviders-within-5-years/306011>

- Many law firms, recognizing this shift in the market, are building alliances with alternative legal services providers,<sup>47</sup> or in some cases, creating and building their own “captive ALSPs” to perform this work;<sup>48</sup> in both cases, the services of entry-level lawyers and articling students play a very small part.<sup>49</sup>
- Remarkable advances in technology over the past decade have increased the reach and effectiveness of tools that perform document automation, e-discovery, legal research, and due diligence — tasks that once occupied thousands of early-stage lawyers but that no longer do.<sup>50</sup>

Simply put, every year there is going to be less work that law firms can give to early-stage or lightly skilled trainee lawyers, and therefore less incentive for firms to employ these lawyers as associates or articling students.<sup>51</sup> Many law firms are shrinking their lawyer workforces during this pandemic. But those decreases were already happening before COVID-19; the crisis is merely going to accelerate that process.<sup>52</sup>

Overall, law firms are likely to employ fewer novice lawyers in the years to come, which could pose an existential threat to the continued viability of articling as a supervised practice pathway. Even if we succeed in reforming articling, it is very possible that we are merely postponing its day of reckoning.

The goal therefore should be to ensure that, whether the articling system continues or comes to an end, *all* applicants to enter the Alberta legal profession can safely obtain the supervised practice experience required for bar admission. Accordingly, the law society should begin now to develop new systems for enabling aspiring lawyers to obtain supervised practice experience that is:

- universally accessible,

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<sup>47</sup> “Even Without Client Pressure, Firms Are Becoming BFFs With ALSPs,” Victoria Hudgins, *LegalTech News*, Feb. 19, 2020: <https://www.law.com/legaltechnews/2020/02/19/even-without-client-pressure-firms-are-becoming-bffs-with-alsps/>

<sup>48</sup> “A Safe Space for Innovation — Law Firms Creating ‘Captive ALSPs,’” Gregg Wirth, Legal Executive Institute, Thomson Reuters, July 8, 2019: <https://www.legalexecutiveinstitute.com/forum-magazine-captive-alsps/>

<sup>49</sup> “Despair ahead: Millennial lawyers and the legal job market,” Hassan Ahmad, *Canadian Lawyer*, July 10, 2017: <https://www.canadianlawyermag.com/news/general/despair-ahead-millennial-lawyers-and-the-legal-job-market/270546>

<sup>50</sup> “AI having uneven impact on lawyers,” Anita Balakrishnan, *Law Times*, Aug. 28, 2019 (<https://www.lawtimesnews.com/news/general/ai-having-uneven-impact-on-lawyers/302816>)

<sup>51</sup> The main reason why technology has not already eviscerated the ranks of law firm associates is that the great majority of law firms rely on billed hours for their revenue, and automating lawyer tasks would vastly reduce firms’ hourly inventory. Should fixed-fee or monthly-retainer pricing models ever truly catch on in law firms, the legal profession would face an unemployment crisis. See generally, “The obsolete associate,” Jordan Furlong, *Law21*, July 14, 2016: <https://www.law21.ca/2016/07/the-obsolete-associate/>

<sup>52</sup> “Canadian Law Firms Make Adjustments in the Age of the Coronavirus,” Marlis Silver Sweeney, *Law.com International*, May 6, 2020: <https://www.law.com/international-edition/2020/05/06/canadian-law-firms-make-adjustments-in-the-age-of-the-coronavirus/>

- systematically defensible,
- rigorously consistent, and
- compliant with professional standards for legal workplaces.

Appendix A to this report contains an extensive discussion of one potential approach to supervised practice that the law society ought to closely consider — the teaching law firm.

The more pathways into practice that are developed for Alberta lawyers, the less pressure will be placed on the articling system to carry the entire burden of ensuring a supervised practice experience for all bar applicants.

### **The Student-Centred Articling Experience**

Three other recommendations at the end of this section concern the two most important people in the articling process: the supervising principal and the supervised student. This report recommends that a lawyer who wishes to serve as an articling principal should be required to apply for the role and to meet certain criteria in order to be approved for it, and that the principal and student should jointly develop and regularly revisit a learning outcome plan for the articling term.

The goal of these recommendations is to help ensure a safer, more effective, and higher quality experience for articling students. If accepted and implemented, these recommendations would toughen the conditions under which a lawyer can become an articling principal and increase the principal's responsibilities. But more importantly, they would represent a shift towards a more "student-centred" model for the articling experience.

A lawyer who acts as principal to an articling student is taking on a great responsibility — they will serve as the first and perhaps most important supervisor for whom a lawyer will ever work.<sup>53</sup> As the results of the 2019 Prairie Law Society surveys demonstrate, too many articling principals are failing in their duty to provide a secure, healthy, and effective workplace and training experience for their students.

Some of these principals, to speak bluntly, were simply unfit for the role and should not have sought, been asked, or been allowed to take it on. But most of the remaining principals had good intentions — they did not set out to create or allow an ineffective or uncomfortable articling experience for their students.

The law society therefore must not only screen out unfit principals; it must also provide guidance and assistance to principals who are willing to properly fulfill the demands of the role and who would, with proper training, be able to do so.

As it stands, almost all lawyers who apply to act as articling principals in Alberta are approved. The law society believes that both current regulations and principles of procedural fairness require that lawyers who wish to be principals cannot be turned down without providing them with evidence to support the refusal.

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<sup>53</sup> One Law Society Benchers who has presided over many disciplinary cases reported anecdotally that most of the lawyers she has witnessed in such cases share in common a poor articling or early development experience at the start of their legal careers.

The difficulty with this approach is that such evidence frequently resides in the negative experiences of people who had previously worked with or served under the principal. In order to satisfy the demands of administrative justice, complaints or warnings about a lawyer's unfitness would have to be brought forward by previous supervisees willing to go on the record and face the person who had fostered or permitted a hazardous working environment.

In most cases, it is not realistic to expect such evidence to be forthcoming. Many former articling students, especially ITLs and women and BIPOC lawyers, who have experienced hostile working conditions under a supervising lawyer will not lodge formal complaints. These ex-students might now be employed as associates at the same firm where the lawyer is a partner. Or they might be working in the same small town or community or practice area. Or they might simply have seen what happens to whistleblowers whose accusations threaten people of power and privilege.

At the core of this problem is the concept that a lawyer has a "right" to act as an articling principal. This concept prioritizes the lawyer's interests over those of the articling student. That is an incorrect prioritization even in the many healthy and constructive relationships between principals and students.

When more than 99 per cent of principals are approved, but nearly one-third of all articling experiences involve discrimination or harassment, the balance between the interests of principals and the interests of students has been wrongly struck.

Keeping in mind its duty to provide articling students with the conditions for a safe and effective supervised practice experience, the law society should set a high standard for articling principals. The law society should require a lawyer to show why they should be permitted to fill the role. All aspiring principals should meet established standards and receive formal training in mentoring and supervision before being allowed to take on the role. Serving as a principal is a privilege to be earned, not a right to be asserted.

The articling student is the person for whom the articling process exists. It is that person to whom the law society owes its primary consideration and on whom the articling experience should be centred.

### **Effective Training vs. Gainful Employment**

Most aspiring lawyers regard articling as the final hoop to jump through on the way to bar admission, and perhaps more importantly, as their first real "legal" employment opportunity — one that could set the course of their legal career for years to come. For most students, articling's main purpose is to be a year-long audition for full-time employment.

Many employers that hire students, it should be acknowledged, view articling as a professional duty, a way to "pay forward" the benefits of a law licence to the next generation of lawyers.<sup>54</sup> But for many other employers, articling is primarily a talent development opportunity, a tool for recruiting relatively inexpensive workers and potential future partners while also turning a profit.

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<sup>54</sup> One Law Society Benchler, a partner in a firm that regularly hires many articling students, opined that from a purely economic perspective, articling no longer makes much sense for the firm, and that it is now primarily the professional responsibility to help new lawyers gain their licenses that sustains the articling process there.

These are all legitimate aims and aspects of articling for both students and employers. But there is a third stakeholder in the articling system — the law society, which regards articling first and foremost as a professional licensing requirement to ensure the competence of new lawyers.

All the central players — the regulator, the student, and the employer — have different reasons for participating in the articling process. Inevitably, tensions arise when these inconsistent priorities intersect. This report adopts the regulator's view of articling and places it above the others in importance.

When these recommendations were first discussed with various stakeholders in the lawyer licensing process, one concern was consistently expressed: that placing more requirements on articling principals would have a chilling effect on the willingness of lawyers to fill the role. Many lawyers, it was suggested, would conclude that the new costs of becoming a principal outweighed the benefits, and they would decline the opportunity. If enough lawyers responded in this fashion, articling's continued existence could be jeopardized.

This report regards its proposed requirements for principals as reasonable. For example, one recommendation is that the law society should create a process and standards by which lawyers who wish to serve as articling principals must successfully apply for the role of principal and receive training to perform the job properly.

Most people who wish to perform a role, even in a volunteer capacity, normally are asked to supply evidence that they have successfully performed the role previously. If the role has a supervisory element, and especially if it relates to another person's ability to enter their chosen career, then the person can be asked to demonstrate that they have sufficient skills and experience in this area, or to accept training that will bring them up to an acceptable level. Regulators have both the right and the obligation to require no less when overseeing the admission of new members to a profession.

Another recommendation is that the articling principal and student jointly prepare a customized learning plan for the articling year, and that the two parties revisit this plan three times throughout the articling term.

Many articling students find out near the end of their term whether or not the firm intends to hire them back as associates. This decision, not infrequently, is the only actionable feedback they ever receive. Myriad problems result when a student rarely receives real-time feedback during their articling term.

- It prevents the student from accessing formal, structured assessments of their progress and performance that could help improve both.
- It allows the principal to downplay or ignore the developmental aspects of their role in favour of the supervisory and revenue-generating elements.
- It creates an informational vacuum for the student regarding their performance, which in turn generates significant mental and emotional stress.

Should these recommended requirements for articling principals, which are not especially onerous, nonetheless be considered so burdensome as to jeopardize the very existence of articling, then the law society will have to decide whether it is prepared to continue imposing on aspiring lawyers a bar admission requirement that is deeply flawed and frequently harmful, yet

is also effectively immune to reform and improvement. If forced to choose between sustaining an unreformable articling system or doing away with this requirement for admission altogether, this report suggests that the law society take the latter road.

A student's desire to be hired back as an associate, and a law firm's desire to maximize the financial value of the student's efforts, are both understandable. But the point of the articling term is not to help a student get a job as a lawyer or to help a law firm profitably develop new talent.

The point of articling is to ensure that an aspiring lawyer has achieved minimum levels of practice competence through experiential learning in a safe and professional environment in to be granted bar admission. That is why articling exists. The following recommendations are meant to help ensure that goal is achieved.

## Lawyer Licensing Recommendations

### **A1. The law society should develop one or more new pathways, in addition to articling, by which bar applicants can fulfill the workplace experience requirement for bar admission.**

The reasons for this recommendation, set forth in detail previously, are not unique to Alberta. This recommendation therefore could be fulfilled by the law society acting alone, or it could be undertaken in concert with other law societies and/or with the FLSC.

There is no reason why a term of articling in a law firm would not remain an option for obtaining supervised practice experience. Indeed, it seems likely that even if the law society authorizes new “pathways into practice,” many law firms might continue to offer articling positions regardless. If those firms can meet the standards for articling principals set out in the following recommendations, they should be permitted to offer these positions.

The law society should pursue this recommendation with alacrity. Even in normal times, articling’s numerous shortcomings, combined with imminent changes to the legal services market and the law firm business model, would leave articling in a precarious position. The pandemic and its economic consequences will greatly exacerbate these problems and accelerate these trends.

The law society should therefore proceed on the assumption that articling alone shortly will be unable to fulfill the requirement that bar applicants complete a term of supervised practice. Additional methods to ensure the supervised practice requirement should be thoroughly investigated as soon as can be arranged.

### **A2. The law society should establish baseline criteria — including the successful completion of an application process and a training program — that all lawyers who wish to act as articling principals must satisfy in order to serve in that capacity.**

The law society already has a process by which lawyers can become articling principals; this process should be enhanced. The law society should establish baseline criteria that an aspiring principal must meet, develop an application and approval process based on those criteria, and provide training to principals to ensure their supervisory and mentoring skills meet the standards required.

The conditions that an articling principal must meet should include the following:

- Describe the lawyer’s previous experience in a supervisory or mentoring role.



- Provide contact information for a former supervisee or mentee who is willing to be interviewed about their experience.<sup>55</sup>
- Confirm that the lawyer has completed (or obtain an undertaking that they will shortly complete) a training course required by the law society.<sup>56</sup>

Whatever requirements the law society chooses to impose should be sufficiently robust to show the law society takes seriously its duty to ensure that articling students receive a safe, high-quality environment in which to begin learning the practice of law.

Approval from the law society to act as a principal should be considered valid for 24 months following the date of the approval. If a principal has been approved by the law society once, then in the absence of new information coming to the law society's attention, the principal need only apply for routine renewal of the previous authorization. The principal should be under a positive duty to inform the law society of any material change in circumstances.

### **Pre-authorized Approval**

Where possible, an articling student should not be offered an articling position until the lawyer designated to serve as principal has received law society approval to do so. Consider a student who accepts an articling offer, then learns that their would-be principal has been denied permission to act in the role. That student could lose their articling job and have no time to find a new one before other positions have been filled.

Authorization to act as a principal should therefore be obtained before a lawyer offers a bar applicant an articling position — in effect, would-be principals should seek and receive pre-authorization.

At some law firms, it is the practice to offer an articling position before the firm has determined which lawyer will serve as principal to the articling student. These firms should begin the pre-authorization process at their earliest opportunity, to ensure that a lawyer who might be designated to act as a principal has been cleared by the law society before the firm's articling process is fully engaged.

### **Principal Training**

The law society should develop a training program and supporting resources to provide articling principals with training in best practices for supervising and developing new talent in a legal workplace. The content, duration, delivery model, and provider of this training and support

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<sup>55</sup> It is possible that an aspiring principal has never acted as a principal before, in which case a person from a supervisory or mentoring relationship outside the law should be put forward as a contact. If an applicant has never held any sort of supervisory or mentoring role before, the law society would be entitled to take that into account when assessing the application — but that should not be a disqualifying factor by itself.

<sup>56</sup> This course is described in Recommendation A3.

should be determined by the law society, in conjunction with experts in lawyer development and adult education.<sup>57</sup>

Some potential considerations in this regard might include the following.

- (a) *Minimal demands.* The training course for principals should make the fewest demands necessary on would-be principals while still providing the baseline amount of training needed for the role. This training course should be designed to produce the “minimum viable principal,” not a world-class lawyer development expert.
- (b) *Online offering.* The training course should be offered online to the greatest possible extent. An online training course would reduce cost, increase convenience, be accessed asynchronously at the most convenient time for the user, and be broken down into smaller and shorter modules for quicker and easier digestion and review.
- (c) *Broad application.* A core competence for Alberta lawyers is “practice management,” and a critical element of that competence is the management of people. If a principal training course helps a lawyer become a better manager overall, that would be additional incentive for a lawyer to take on the principal role.

### **A3. The law society should require an articling student and their articling principal to jointly complete a “learning outcomes” plan at the commencement of the articling term, and to jointly review the student’s learning outcomes quarterly throughout the term.**

Currently, articling principals must sign a “Principal Articling Agreement” in which they undertake, among other things, to ensure their articling student “obtains practical experience, training and mentoring” in five areas of competence (ethics and professionalism, practice management, client relationship management, conducting matters, and adjudication/ADR).<sup>58</sup>

This document is completed, however, with no input from the articling student, depriving the student of the opportunity to participate in an assessment of their learning needs and an identification of their learning outcomes. The student will be expected to undertake this assessment and identification throughout their career, as part of their annual continuing learning activities detailed later in this report.

It is therefore recommended that the law society replace the “Principal Articling Agreement” with a collaborative process that requires the articling student and their principal to jointly carry out the following activities.

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<sup>57</sup> Recommendation 16 of the Legal Education and Training Review in England & Wales states: “Supervisors of periods of supervised practice should receive suitable support and education/training in the role. This should include initial training and periodic refresher or recertification requirements.” <http://www.lettr.org.uk/wp-content/uploads/LETR-Report.pdf>, p. 290.

<sup>58</sup> Note that these five areas differ from the six core competencies that the law society sets for practicing lawyers. The law society should address this discrepancy.

- (a) Review the law society's core competence requirements and accompanying list of suggested activities.
- (b) Discuss the student's own self-assessment of learning needs, ideally conducted through the self-assessment process outlined in Recommendation C1 below.
- (c) Discuss which activities the principal can offer to meet both the competence requirements and the articling student's desired learning outcomes.
- (d) Develop a schedule of activities for the articling term by which the student can gain these competencies and work towards these outcomes.

The results of this process should be entered into a document template provided by the law society, which should then form the basis of quarterly reviews throughout the articling term of the student's progress toward their learning outcomes. At the final review, the student and principal should discuss whether and to what extent the competence and learning outcomes have been achieved. The principal should provide the student with their assessment, and the student should be given the opportunity to comment on that assessment. Based on this final review, the principal should complete (if warranted) and submit to the law society a modified version of the "Certificate of Principal" document that confirms the satisfactory completion of the articling term.

#### **A4. The law society should permit articling principals to consider their activities as principals to constitute fulfilment of their annual continuing learning requirements.**

Acting as a principal, while a privilege and not a right, nonetheless does represent a significant commitment of time and effort that the lawyer could otherwise devote to clients or firm business. The role includes a series of activities that enhance a lawyer's competence and effectiveness. In order to properly supervise an articling student and ensure they achieve entry-level competence in the core areas mandated by the regulator, a principal:

- must have deep knowledge and confident command of ethical requirements, business necessities, client communications, management techniques, and other key skills;
- must ensure that the workplace into which they are inviting the articling student has a system and culture that exemplify and encourage core professional competencies; and
- must maintain the knowledge and skill necessary to assess whether and to what extent the articling student is meeting the expectations of their learning outcomes plan.

Permitting principals to consider their activities as principals to constitute fulfilment of their annual continuing learning requirements could also help incentivize lawyers to take on the role and would recognize the contribution they are making to the profession.

## **A5. The law society should, in collaboration with CPLED, suggest potential modifications and improvements to the Practice Readiness Education Program that could improve the PREP experience for aspiring lawyers.**

CPLED is the administrator of the bar admission process and the Practice Readiness Education Program (PREP), while the law society is an important stakeholder in both. It is expected that the law society and CPLED will collaborate in the ongoing development and improvement of PREP. This report suggests one potential issue that the law society and CPLED could discuss further.

During its pilot phase, PREP runs concurrently with the articling term. While articling students are learning law practice, carrying out assigned tasks and attending to their learning outcomes, they are simultaneously completing a rigorous bar admission program that requires more than 200 hours of learning activity. This creates a heavy workload that can be, and reportedly for some articling students already has been, overwhelming.

One potential solution considered during the preparation of this report would be to compress PREP into a full-time 12-week course and schedule it at the start of the articling term, so that the articling student acquires baseline practice skills and experiences through the Foundation Modules and Virtual Law Firm that can then be applied effectively and productively throughout the balance of the articling term.

This approach has drawbacks, however. Law firms might be understandably reluctant to pay articling students for three months at the start of the articling term during which the student can carry out little or no billable work. And pedagogically, although it is less efficient to “interleave” the different types of learning experiences provided by PREP and articling, many educational experts believe it also improves learning.<sup>59</sup>

It is therefore recommended that the law society and CPLED discuss these and other issues further, in order to identify solutions that safeguard articling students’ mental and physical wellness while also creating the most effective environment for experiential learning.

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<sup>59</sup> See, for example: “The Effects of Interleaved Practice,” Kelli Taylor and Doug Rohrer, September 2010, *Applied Cognitive Psychology* 24(6):837-848 ([https://www.researchgate.net/publication/227530785\\_The\\_Effects\\_of\\_Interleaved\\_Practice](https://www.researchgate.net/publication/227530785_The_Effects_of_Interleaved_Practice)); “The Interleaving Method: How to Efficiently Pick Up New Skills Quickly,” Thomas Oppong, Medium, May 25, 2020 (<https://medium.com/personal-growth/the-interleaving-method-a-surprisingly-effective-way-to-learnfaster-4c9505b05f13>)

## 4. Developing New Lawyers

In the commissioning scope of this report, the Law Society of Alberta requested an examination of the first several years of a lawyer's career and an exploration of whether lawyers in these first years constituted a potential source of licensing and/or competence concerns.

This report concludes that while lawyers are given an extremely wide ambit of authorized practice upon initial licensure, there is no evidence that this wide ambit creates competence-related problems, or that lawyers in their first years of practice represent a particular risk in terms of the quality of services they provide to clients.

However, this report also concludes that lawyers in their first years of practice currently receive inadequate support for their continuing development as legal professionals, and that the law society should provide them with better support through a variety of means, including mandating some professional development activities and encouraging new mentoring relationships.

This section of the report will first examine the nature of new lawyer licensing and explore whether changes to the current system are either necessary or practical. It will then examine whether the competence of new lawyers should be viewed as a problem to be solved or as an opportunity to be addressed. Finally, this report will make two recommendations related to lawyers in their first three years of practice.<sup>60</sup>

### The Realities of Lawyer Licensure

New lawyers on their first day in practice often find themselves confronted by two realizations. The first is that their licence is universal — they are entitled to provide any kind of legal service, in any area of law, in any part of the licensed jurisdiction, for any kind of client, on issues of any kind of complexity. The second is that they feel not remotely ready or qualified to provide these or many other legal services on their own.

The licence to practise law in Alberta (and elsewhere) indeed bestows on its holder from Day One the right to defend someone accused of first-degree murder, or to close a complex merger between two large companies, or to settle a highly emotional dispute between two ex-spouses. It can be safely stated that no brand-new lawyer, and few lawyers with even one or two years' experience, should take on these kinds of cases — but their licence fully entitles them to do so.

Moreover, even many of the activities that a new lawyer actually is qualified to perform — drafting a simple will, generating a straightforward statement of claim, incorporating a new business — will often induce a moderate amount of anxiety in the lawyer when doing them the first few times. Most new lawyers would welcome a more experienced pair of eyes to review their early work and catch any problems, or a sympathetic ear to listen to their worries. Their licence says they can practise any kind of law independently and autonomously. Their gut, correctly in most cases, tells them otherwise.

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<sup>60</sup> This report settled on the first three years of practice, rather than shorter or longer periods of time, following an iterative process of consultation with law society Benchers and committee members. Two years after admission was felt to be an inadequate period to require new lawyers to continue their initial professional development, while four or five years was felt to stretch the meaning of “new lawyer” beyond reasonable interpretation. This report was unable to find any exploration of this issue in academic literature to help guide its decision.

Then there is the reality that in addition to doing “legal work,” new lawyers in private practice also have a business to run: partners to please (or employees to supervise), clients to find, retainer letters to draft, invoices to send, and bills to pay. Most new lawyers are learning both a profession and a trade simultaneously, in real time, effectively doubling their workload and ratcheting their stress even higher.

The gap between what a law license says a new lawyer can do, and what a new lawyer actually can do or feels ready to do, is significant. This gap is not, however, a novel discovery, and it is not the purpose of this report to explore it in detail. The only questions for this report are whether this gap presents an actual licensing or competence problem, and if so, whether much can be done about it in practical terms.

Is this gap an actual problem? It is true that under the current universal licensing system, a brand-new lawyer can take on the case of a person accused of first-degree murder. It is equally true, however, that in 21st-century Alberta, this simply doesn't happen.

It would be bizarre and irrational for a novice lawyer to undertake such a complex, high-stakes matter clearly beyond their skills. It would be equally irrational for an accused person, facing the prospect of life in prison, to entrust their freedom to someone with so little experience. It is further unlikely that any judge would permit such a retainer to proceed.

There is an argument that law societies should amend the nature of a law licence so as to prohibit new lawyers from taking on matters far beyond their ability or competence to perform. But there is a more compelling argument that this would be a solution in search of a problem. There is no evidence that Alberta lawyers in their first years of practice are taking on legal issues far beyond their ability.<sup>61</sup> This report therefore sees no reason for the law society to take action in this regard.

The law society, however, might disagree. It might conclude that initial universal licensing is a problem that it ought to solve. This report will therefore address the second question above, which is whether much can be done about universal licensing in practical terms. In particular, it will examine whether Alberta should consider instituting a graduated licensing system to replace the universal licensing system now in use.

## **Universal vs. Graduated Licensing**

One suggested solution to the unreadiness of newly licensed lawyers to take on every kind of legal work is to institute a “graduated license” system, which would place restrictions on the activities new lawyers can engage in until they have proven a higher degree of competence.

Under a “graduated licence,” a newly called lawyer would be prohibited from performing certain tasks, either not without the supervision of a more experienced lawyer or not under any circumstances. Those restrictions would remain in place until the lawyer could satisfy the regulator that they possess the competence required to practise any sort of law independently, thereby justifying the grant of a “full license.”

An analogy frequently drawn to a “graduated law licence” is a driver's licence. Not long ago, a newly licensed driver could drive most vehicles anywhere, at any time of day, unaccompanied.

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<sup>61</sup> See “Competence Problems vs. Competence Opportunities,” below.

Today, in most jurisdictions, a novice driver may not drive without an adult in the passenger seat, or at night, or on highways, until they reach a certain age or fulfill other conditions.

The occasional example of this approach to licensing can be found in the law. It is the practice in certain American courts to restrict the right of audience to litigators who have appeared in a minimum number of cases in a lower court, or who have otherwise earned a presumption of sufficient competence.<sup>62</sup> In addition, Legal Aid Alberta will not allow lawyers to take on more complex or high-stakes criminal law matters until they have acquired enough experience to prove their competence to do so.<sup>63</sup>

It should be noted that, technically, Alberta already uses a form of graduated licensing: the articling system. Articling students are granted limited rights to carry out some legal and quasi-legal tasks independently, but are barred or heavily restricted from exercising the full authority of a lawyer. Could Alberta effectively “extend” the articling period for up to three years following what would amount to provisional initial admission to the bar?

The possibility is worth consideration, but there are concerns. First and most importantly: How would a “graduated license” lawyer establish a higher level of competence to the law society and upgrade their license? The law society would have to establish criteria for “a level of competence that justifies independent and autonomous law licensure,” but no such criteria are currently in use anywhere.

Developing the criteria would not be a simple matter, either. What would constitute “full competence” for someone who practises family law solo in Lethbridge? Or works for the provincial ministry of health in Edmonton? Or serves as an in-house counsel developing a legal ops specialty at Suncor in Calgary? Or one of hundreds of other legal careers? Hundreds of different sets of criteria would be required.

There is also the related question of how “full licensure” competence could be proven. Would the lawyer take and pass a series of written tests to achieve full licensure? Produce written testimonials from clients, which would either be taken at face value or fact-checked? Or is it simply a matter of “putting in the time,” much as a novice driver is assumed to be competent to drive alone after they attain a certain age? Would these proofs be considered valid and defensible?

Many of these issues could be overcome if the lawyer seeking full licensure could produce an affirmation from an experienced lawyer who has overseen their development, supervised their work, and helped mentor and develop them along the way.

But this would require ongoing supervision and oversight of the novice lawyer for an extended period of time. Each novice would have to find an experienced practitioner who is willing, able, and qualified to closely supervise the novice lawyer during a lengthy probationary licensing period.

A graduated licensing system would indeed amount to a multi-year articling term — and would bring with it all the challenges that entails. As discussed previously, one-year articling positions are already difficult to procure and likely will become more difficult still. Finding lawyers willing to

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<sup>62</sup> See generally, [https://en.wikipedia.org/wiki/Admission\\_to\\_the\\_bar\\_in\\_the\\_United\\_States](https://en.wikipedia.org/wiki/Admission_to_the_bar_in_the_United_States)

<sup>63</sup> <https://www.legalaid.ab.ca/join-us/>

take on a more intensive supervisory role for a longer period of time — for a novice lawyer whose license restrictions would prevent them from carrying out much billable work — would be a greater challenge again.

Moreover, a “graduated license” system might make it effectively impossible for many novice lawyers to ever achieve full licensure. If the law society requires a novice lawyer to be supervised by a more experienced lawyer in a workplace setting, that would effectively make continuing multi-year employment at the start of one’s career a precondition for full licensure. Many law graduates, especially given the pandemic and recession, simply will not be able to find and maintain such employment.

In that situation, the primary option left available to the lawyer would be to hang out their own shingle, so that they can pay their bills while getting the hang of lawyering. But a graduated licensing system would effectively bar novice lawyers from going solo at the start of their careers, since a solo career is the very definition of an “independent and autonomous” law practice.

Graduated licensing is an attractive concept in theory. But its practical implications, coupled with the absence of evidence that lawyers in their first three years of practice represent an outsized risk to clients, leads this report to conclude that the law society should not pursue this option at this time.

## Competence Problems vs. Competence Opportunities

This inquiry therefore turns to the second category of concern cited above — those matters that are realistically within a new lawyer’s competence, but that the lawyer often feels unqualified to perform.

This is a more common phenomenon, one that lawyers often describe with the term “imposter syndrome.”<sup>64</sup> It is natural for a novice in any area to feel trepidation about their first attempts to perform an activity; but is it the case that new lawyers are actually not competent to deliver many of the services they provide?

There is relatively little data available regarding the competence of new lawyers, not least because few efforts have been undertaken to measure “lawyer competence” in everyday practice. Legal regulators historically have focused their efforts on identifying and addressing incidents in which lawyers clearly fell below accepted standards of competence. They have been less able or willing to devise measures by which lawyer competence can be achieved and maintained in practice.<sup>65</sup>

Lawyer competence measurement, therefore, is usually expressed in forensic terms: Regulators identify the absence or failure of competence when investigating its negative impact on clients and lawyers. To rephrase United States Supreme Court Justice Potter Stewart’s famous

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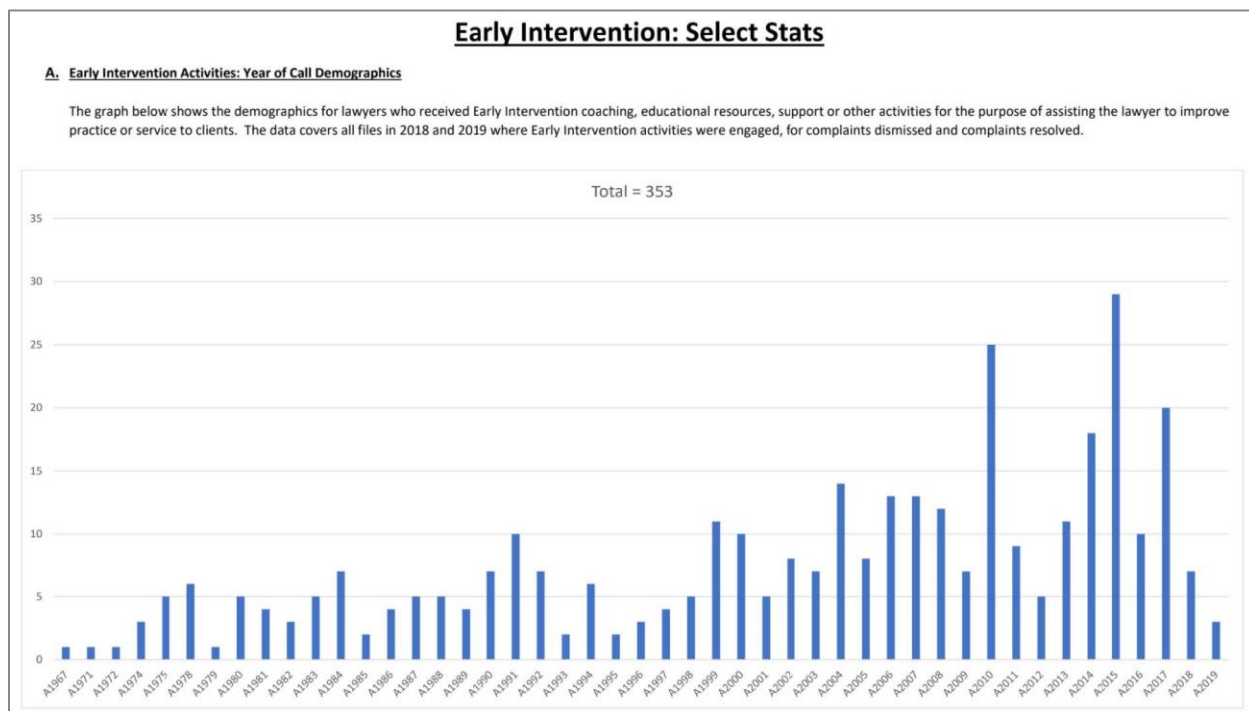
<sup>64</sup> Anecdotally, one member of the law society’s Lawyer Competence Committee, newly called to the Bar, agreed vigorously with this report’s assessment that new lawyers feel ill-equipped to provide most legal services independently and autonomously.

<sup>65</sup> “What Is Legal Competence?” Jeremy Cooper, *The Modern Law Review*, Vol. 54, No. 1 (Jan., 1991), pp. 112-121



aphorism about obscenity: We might not be able to fully define lawyer competence, but we know when we see the absence of it.

Can we measure new lawyer competence by its absence? In Alberta, the law society’s Early Interventions department tracks the demographics of lawyers who received coaching, educational resources, support, or other activities following a complaint or other expression of concern about a lawyer’s competence or conduct. The following two charts illustrate the results of these tracking efforts.



As the first chart demonstrates, the number of interventions is generally higher for lawyers with less than 20 years’ experience in the profession than for those with 20 or more years’ experience, as one would expect.<sup>66</sup>

But within the first 20 years, there is no obvious correlation between a lawyer’s experience and their susceptibility to complaints. The top yearly “cohorts,” when ranked by Early Intervention activities, are lawyers in their fifth, tenth, third, and sixth years of practice, respectively.<sup>67</sup> To the extent that these statistics tell us anything, it is that lawyers in their first three years of practice do not pose an outsized risk of activities that lead to client complaints and law society intervention.

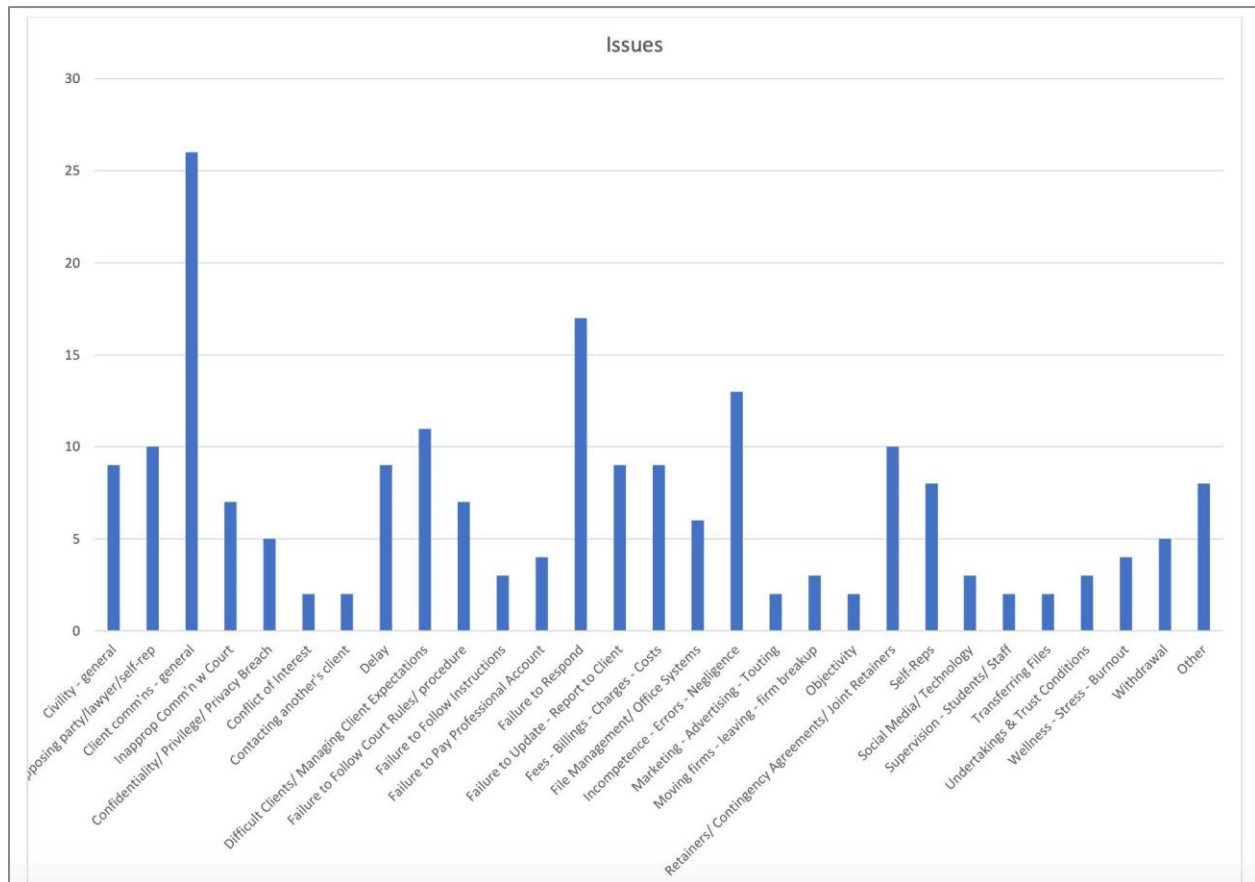
That does not end the inquiry, however. Many lawyers early in their careers anecdotally report anxiety and self-doubt about their competence to practise law, regardless of what law society

<sup>66</sup> This fact will be reflected in Recommendation C2.

<sup>67</sup> There is, in any event, an argument to be made that client complaints and regulatory interventions are questionable proxies for the absence or failure of competence. Many factors can contribute to the filing or lodging of a complaint against a lawyer, not all of which are related to the diligence or skill with which that lawyer carried out their duties.

statistics might say. These experiences might not signal a *problem* with lawyers' competence at the start of their careers; but they do signal an *opportunity* to upgrade that competence, to strengthen the foundations that the bar admission process has laid down and make new lawyers legitimately more confident about their own capabilities.

To illustrate this point, turn again to statistics supplied by the law society's Early Interventions department.



This chart shows the categories of complaints against or concerns about lawyers with ten or fewer years' experience in the profession. Note that the two leading categories are "client communications (general)" and "failure to respond," constituting the problem in 20.8% (43) of the 206 reported incidents.

One way to interpret these findings would be to conclude that less experienced lawyers are failing to meet the demands of competence when it comes to communication. This in turn would suggest that lawyers in the early part of their career should receive more training in communication best practices, or that the subject should be emphasized during the bar admission process.

A better course, however, would be to take a step back and ask: "Why are lawyers with less than ten years of experience struggling with communication?" Is it because these lawyers are particularly rude, or thoughtless, or more lackadaisical in their correspondence than lawyers from other generations? It is highly doubtful.

What seems more likely is that these communication breakdowns are a *symptom* of a larger problem. Perhaps these lawyers are not communicating in a timely fashion because they are overworked, anxious, and disorganized — swamped by calls, drowning in demands, and stressed beyond their ability to cope, leading them to postpone email responses or overlook deadlines.

In other words, communication breakdowns are not a standalone problem so much as they are a manifestation of larger issues. Perhaps what these lawyers need is not a communication CLE or a set of communication protocols, but help with managing workload, saying “no” to new requests, organizing their time, and generally managing their practice.

This is what it meant by seeking out competence-building opportunities, rather than looking for competence problems or failings, among new lawyers. It does no good to train a lawyer in good communication while leaving that lawyer to sink beneath the weight of crushing workloads, financial pressures, and imposter syndrome that caused the communication breakdown.

In order to help new lawyers avoid problems and practice more successfully, the law society must understand what actually causes the problems they experience and what gets in the way of their ability to succeed.

Further research should be conducted into these questions, ideally in conjunction with the law society’s Practice Management and Early Interventions departments. The answers that research yields should inform the first recommendation at the end of this section: the creation of a special continuing development program for lawyers in their first three years at the bar.

There is one other good reason why the law society should create such a program: to ensure a level playing field in competence for all new lawyers.

Some lawyers start their legal careers in highly structured legal workplaces (of all sizes) with strong professional development cultures, where experienced practitioners provide oversight and professional staff continue the lawyer’s development beyond what was learned in the bar admission process. But many other lawyers, whose careers start in other legal environments, receive inadequate or no support and assistance in continuing their professional development.

Lawyers in the first group often encounter fewer difficulties than lawyers in the second group, during their early years of practice, in growing their competence to a point where they can independently and confidently deliver a wide range of legal services. This in effect creates a two-tiered lawyer development system, where some lawyers coast along with the help of a strong support system, while other lawyers have to go it alone.

This two-tiered development system is especially problematic because BIPOC lawyers and internationally trained lawyers are disproportionately represented in the ranks of sole practices and very small firms that do not always have strong professional development systems. The barriers and biases that many of these lawyers already face are well-documented; that they should also suffer from a lack of continuing development support relative to other lawyers adds to the injury.

Whether or not a new lawyer receives the support, resources, and ongoing training to quickly reach a point of independent and autonomous competence should not depend upon where that lawyer happens to begin their legal career. The law society should rectify this inequity and ensure that all new lawyers can access pathways to greater professional proficiency.

## Holistic Lawyer Development

Although this report recommends the law society provide continuing learning assistance to lawyers in their first three years, it also acknowledges that there are limits to the extent that a regulator can directly attend to the professional development of its members.

Neither the mandate nor the budget of a law society permits it to organize and fund systems by which every lawyer it regulates reaches their full potential. Ultimate responsibility for ensuring lawyers' continuing competence rests on each individual lawyer, with complementary responsibility shared by the firm or organization that employs the lawyer and arranges for the lawyer's services to be provided to clients.

Nevertheless, this report wishes to identify some core problems with the legal profession's standard model of new lawyer development, in order to suggest better approaches that the profession could adopt and to recommend at least one way in which the law society can help to encourage this new approach.

Professor Michael McNamara, a Lecturer at the College of Business, Government and Law at Flinders University in Adelaide, Australia,<sup>68</sup> recently published *Supervision in the Legal Profession*,<sup>69</sup> considered to be the first book dedicated to the topic of professional supervision in the context of legal practice. Professor McNamara's work has been valuable to the development of this report and the recommendations in this section in particular.

*Supervision in the Legal Profession* is an insightful exploration of the shortcomings of the legal profession's traditional approach to the development of new lawyers, and in particular to the supervision new lawyers receive at the start of their careers. Professor McNamara's research strongly suggests that the legal profession has adopted an overly narrow definition of "supervision" in this context, with the consequence that many new lawyers begin their careers with insufficiently developed professional skillsets, poorly prepared to transition to independent and autonomous law practice.

The legal profession, Prof. McNamara writes, does well in the "normative" aspects of the supervision of new lawyers, directing their efforts and correcting their billable work product (albeit not always in a particularly supportive manner). But the profession does much less well in the "formative" function — making educational efforts aimed towards mentoring and facilitating the novice lawyer's competence and general effectiveness — and the "restorative" function — supporting the novice lawyer in experiencing and processing the emotional impact of transitioning to the life of a new lawyer.

In his concluding chapter, Prof. McNamara states:

*The legal profession has interpreted "supervision" literally, with scant regard for its purpose. When compared to the norm in other professional disciplines, this approach is unsatisfactory for the needs of the legal profession, especially in a time of rapid change and technological development. This is particularly so for novice lawyers, who need further workplace training to develop into autonomous practitioners. In fact, whether a novice lawyer receives the necessary*

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<sup>68</sup> <https://www.flinders.edu.au/people/michael.mcnamara>

<sup>69</sup> 2020: Palgrave Macmillan, Singapore, 221 pages, ISBN 978-981-15-4158-2

*training and development to become an autonomous practitioner depends significantly on their supervisor's ability to understand and then implement effective supervision.*

In short, the standard lawyer development system, including the articling term and the first few years of practice, over-emphasizes the “normative” refinement and delivery of work product and under-emphasizes the “formative” and “restorative” aspects of the lawyer’s personal and professional development.

Neither the culture nor the business model of law firms lends itself to a holistic supervisory approach that attends to the new lawyer’s overall professional and emotional development. But new lawyers need that personal support and engagement to help them integrate into their new professional environment, reduce their anxiety, enhance their wellness, and accelerate their development into independent and autonomous practitioners.<sup>70</sup>

Many of the foregoing observations have particular relevance to the articling experience, and Prof. McNamara’s conclusions are recommended to articling principals as well as to those contemplating the development of additional “pathways” of supervised practice. But this report has placed these observations in this section (lawyers’ development in their first three years of practice) precisely because this is the period in which most new lawyers lose whatever direct supervision they might have received up until this point in their careers.

The need for good professional supervision of lawyers does not end with the articling term and it does not end upon bar admission. It continues, to a greater or lesser degree, until such time as the lawyer has achieved the ability to practise law independently and autonomously.

The law society can take steps to supplement the supervision that new lawyers do receive, and in particular, to help supply some of the formative and restorative elements of supervision frequently absent from new lawyers’ first years.

## **Mentorship Has Its Benefits**

The second recommendation in this section, therefore, is that the law society should actively help and strongly encourage all newly admitted lawyers to develop one or more mentoring relationships throughout their first three years in the profession. The Law Society of Alberta, as it happens, already operates two highly successful mentoring programs, Mentor Connect and Mentor Express.

Mentor Connect<sup>71</sup> creates long-term, one-to-one mentoring relationships between less experienced and more experienced lawyers. The program’s administrators pair a lawyer seeking mentorship with a volunteer lawyer who would seem to be a good match for this individual. Mentor Connect places a one-year limit on the formal mentoring relationships that it

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<sup>70</sup> For a more detailed exploration of the challenges of transitioning into the professional life of a lawyer, see: “The Major Transitions in Professional Formation and Development from Being a Student to Being a Lawyer Present Opportunities to Benefit the Students and the Law School,” Neil W. Hamilton, *72 Baylor Law Review* (2019, Forthcoming) *U of St. Thomas (Minnesota) Legal Studies Research Paper* No. 19-11: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3449480#](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3449480#)

<sup>71</sup> <https://www.lawsociety.ab.ca/resource-centre/programs/mentor-connect/>

arranges, although the participants are free to continue the relationship outside the confines of the program if they wish.

Mentor Express<sup>72</sup> is a newer program designed to reduce the administrative hassle of matching and to give both mentors and mentees more choice and flexibility. Mentor Express employs a website with a sortable table of mentors, each with a profile that includes biography, practice areas, location, and interests. The profile also provides a list of six dates on which the mentor is available in the next year for a mentoring connection or contact. The goal is for each mentor and each mentee to have at least six mentoring contacts a year, ideally with six different people.

It is always possible, of course, that a new lawyer can find a mentor on their own. A lawyer in their first year of practice might be fortunate enough to find a supportive senior lawyer in their new workplace who will help them develop holistically as a person and as a legal professional.

But even in that happy circumstance, the new lawyer would be reluctant to complain to this mentor about difficult working conditions, high rates of stress and self-doubt, or any instances of workplace harassment or discrimination. And of course, a novice sole practitioner does not benefit from this kind of opportunity at all — the inexperienced solo often has no one to whom they can turn for advice and support.

The lawyer development system assumes that the license to practise law will enable lawyers to learn how to actually practise law — that lawyers will “figure it out as they go along.” They will make mistakes, they will learn from first-hand experience, and they will receive assistance and guidance by senior colleagues until they get the hang of it.

In defence of this assumption, it is inarguably true that every lawyer in practice today made it through their first few years in one piece. But survivorship bias should not mislead us: The truth is that many other lawyers did not make it through. The learning curve was too steep, they received inadequate support, and they left the profession earlier than they otherwise might have.

In addition, many of those who did make it through paid a price in mental and physical wellness, while an unknown number of the clients they served paid a price in the quality of legal services they received and the outcomes they obtained. This is not the right way to develop new generations of lawyers or to protect the interests of their clients.

The law society should recognize the drawbacks of the traditional, one-dimensional approach to new lawyer supervision identified by Prof. McNamara. It should take steps to facilitate and encourage a more holistic, new-lawyer-centred approach to continuing personal and professional development during the critical first years of a lawyer’s career.

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<sup>72</sup> <https://www.lawsociety.ab.ca/resource-centre/programs/mentor-express/>

## New Lawyer Development Recommendations

### **B1. The law society should require lawyers in each of their first three years in practice to complete a professional development program through which they strengthen certain core competencies and achieve specified learning outcomes essential to their growth as lawyers.**

This recommended program would run alongside and complement the everyday trial-and-error experience that all lawyers gain in the practice of law. It would, in essence, complete the initial stage of the lawyer development process, which began in law school, continued through CPLED, and carried on through articling, but did not end upon licensure.

Professional development experts familiar with the essential practice needs of new lawyers should help design this program. But this report suggests that the subjects covered and the skills inculcated should include:

- Business development and marketing
- Client intake and retainer protocols
- Communication best practices
- Conflict of interest rules and tools
- Cultural fluency and diversity training
- Leadership and character-building
- Office management and organization
- Workload management and mental health

Among the sources of guidance to be considered when determining this content should be the CPLED PREP Foundation Modules and data from the law society's Practice Management and Early Interventions departments. The law society should also commission surveys of lawyers in their third through seventh years of practice, asking them to identify the issues that this program ought to address, and why.

Even without regard to the physical distancing requirements of the pandemic, this program should be offered online rather than in-person. Attempting to gather novice lawyers from across the province for in-person sessions would be cost-prohibitive for the lawyers; attempting to conduct in-person sessions wherever novice lawyers are working throughout Alberta would be cost-prohibitive for the law society.

The types of online session could vary, however. Some could be interactive webinars, some could be recorded videos, some could be downloadable toolkits and flowcharts, and so on. While this report is reluctant to endorse any input measure when designing a continuing development system, nonetheless the law society should consider a total amount of programming in the range of at least 40 hours per year.

Completing this program would constitute, for lawyers in their first three years in the profession, fulfilment of their annual continuing learning requirements (described more fully in the next section of this report). This program would, in addition, help accustom lawyers to participating in

competence-building activities. By the time new lawyers reach their fourth year of practice and enter the standard “self-assessment and learning outcome” competence requirements for all lawyers, they would take for granted the proposition that they should spend at least 40 hours a year on competence-building activities.

There are, of course, resource implications to this recommendation, as there are to almost all the recommended actions and activities set forth in this report. Delivering a mandatory continuing development program for three annual cohorts of lawyers would not be an inexpensive proposition.

One solution to the resource challenge might be to develop this program in stages. Content could be prepared and rolled out for the “class of 2022” in the first year; in the second year, the “class of 2023” would take the first-year curriculum while the inaugural class would complete a new “second-year” program. By the time the third-year program is rolled out and completed, Alberta lawyers in their first three years of practice would be enrolled in a complete system that can then accept new cohorts and “graduate” old ones every year.

The lawyers who participate in this program should be expected to pay some of the costs of its administration. But new lawyers are steeped in debt and often struggle just to pay their monthly bills and student loans. So this mandatory program should be priced as affordably as the law society and its training partners can manage.

## **B2. The law society should, in conjunction with its Mentor Express and Mentor Connect programs, actively help and strongly encourage all newly admitted lawyers to develop one or more mentor relationships during their first year in the profession.**

This report does not wish to dictate to the law society the precise terms under which new lawyers should be engaged in mentorship opportunities. The details of the process by which this recommendation would be implemented are best left to the law society, and in particular to the administrators of its mentoring programs.

One point only is worth making here: This report does not believe that new lawyers should be *required* to enrol in a law society mentoring program.

It might be the case that a new lawyer simply does not need a mentor. They might be in a highly supportive work environment that provides formative and restorative supervision, or they might have already established a strong external mentoring relationship elsewhere.

In addition, while the majority of new lawyers would likely acquiesce to a mandatory mentorship program, a small percentage would be deeply opposed, and their objections would create a drain on the system. The point is not to require 100% active participation in the mentorship system, but to strongly encourage the use of a supportive resource for every new lawyer who would benefit from it.

Nonetheless, it would also be insufficient simply to make new lawyers aware of the mentoring service and provide them with a weblink or a phone number. There is a balance to be struck between forcing participation in a helpful activity and nudging people towards participating in it.



One potential route for the law society to consider would be to automatically enroll new lawyers in a mentoring program but give them the ability to “opt out” of the program if they wish. New lawyers who choose to opt out of the mentorship program should be asked to provide a reason for doing so. That reason would have no bearing on whether their opt-out will be accepted; providing this information and clicking a button would remove them from the mentoring process.

But the law society should collect the opt-out explanations provided and use them to decide whether the advantages of the mentoring system might be communicated differently. And more broadly, the law society should continue to survey lawyers at the end of their mentorship experiences to gain their feedback and use this information to make any desired changes to the mentoring system.

## 5. Continuing Learning for Lawyers

Unlike legal regulators in many other jurisdictions, the Law Society of Alberta does not employ a “mandatory minimum number of hours” system to ensure the continuing competence and professional development of its members. Instead, along with jurisdictions such as England & Wales<sup>73</sup> and (to a limited extent) New Zealand,<sup>74</sup> the law society uses a “self-assessment and learning plan” system.<sup>75</sup> This program requires lawyers to do three things once a year:

1. *Assess their learning needs:* Reflect upon their practice and determine whether and to what extent their legal knowledge and skills ought to be updated or upgraded, using the law society’s six core competencies<sup>76</sup> as a guide.
2. *Develop a learning plan:* Based on their self-reflection and self-assessment, create a plan by which various activities will be undertaken to help close the gap between their current level of competence and where they have identified they need to be.
3. *Execute the learning plan:* Follow the learning plan by carrying out the activities therein throughout the course of the year. At the end of the year, the cycle begins again, as lawyers assess where they now stand and what they should do in the coming year.

This system requires lawyers to annually assess their own learning needs and identify learning activities in which they can engage in the next year. This system, which was created based on the advice of experts in adult education and professional development, is intended to ensure the ongoing maintenance and improvement of lawyers’ skills and competence over the course of their careers.

In February 2020, however, the law society announced that it was suspending the mandatory CPD filing requirement for Alberta lawyers for the years 2020 and 2021, to allow the law society to “refocus its thinking and dedicate resources toward the next phase of lawyer competency.”<sup>77</sup>

Interviews conducted with law society Benchers and staff for this report indicated that a prime reason for this decision was a belief that the “self-assessment” CPD system lacked accountability. There was concern that the system did not ensure that lawyers actually were engaging in any professional development activities or actually were maintaining or improving their competence. Law society personnel wanted to ensure the province was employing an effective system for continuing lawyer learning.

This section of the report will address the question of whether Alberta should continue with its self-assessment system for continuing lawyer learning, and if so, whether it should make any changes to that system. This section will also address issues of continuing learning and

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<sup>73</sup> <https://www.sra.org.uk/solicitors/resources/cpd/tool-kit/continuing-competence-toolkit/>

<sup>74</sup> <https://www.lawsociety.org.nz/professional-practice/legal-practice/continuing-professional-development>

<sup>75</sup> <https://www.lawsociety.ab.ca/lawyers-and-students/continuing-professional-development/>

<sup>76</sup> Ethics and professionalism; substantive legal knowledge; client relationship management; practice management; oral and written communication, analytical and research skills; and wellness.

<sup>77</sup> “Leading a New Era of Lawyer Competency,” fn 3.

competence for sole practitioners and for lawyers with more than 20 years' experience in the profession.

### Minimum Hours vs. Self-Assessment

The question with which to begin this inquiry is whether the law society should maintain its current “self-assessment” system for continuing lawyer learning (either unchanged or with modifications), or whether it should adopt an entirely different system, such as the “minimum hours” approach used in other jurisdictions.<sup>78</sup> This report recommends that the self-assessment system be retained and improved, and that the law society should not switch to a “minimum hours” CPD system.<sup>79</sup>

To address the second point first: More than two dozen lawyers and experts in legal education, licensing, and competence were interviewed or consulted in the preparation of this report, and many were queried about the best system for continuing lawyer learning. There was no support from any interviewee for switching to a “minimum hours” system; some believed that making such a switch would constitute a significant backward step for lawyer competence in Alberta.

The main problem with the “minimum hours” approach to continuing learning is that it is an input measure: It measures only what the lawyer did, not whether the lawyer received or achieved any result or outcome of value.

A regulator is not interested in knowing whether a lawyer attended various courses or engaged in any particular activities; a regulator is interested only in knowing whether the lawyer maintained or upgraded their competence and effectiveness over a given period of time. A “minimum hours” system assumes a causal connection between hours of learning activity and the actual effectiveness of learning. This report was unable to find any studies to vindicate that assumption.

The June 2013 final report of the Legal Education and Training Review (LETR) in England & Wales<sup>80</sup> is generally considered to be the authoritative analysis of legal services education and training regulation in any jurisdiction. The LETR had this to say about minimum hours systems:

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<sup>78</sup> Under a “minimum hours” system, lawyers must engage in continuing learning activities for at least a specified number of hours each year. Many jurisdictions define the range of qualifying activities quite narrowly to include CLE programs and not much else, while others (such as British Columbia) specify a minimum number of hours but define the scope of activities broadly to include writing, teaching, mentoring, and bar association meetings: <https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/continuing-professional-development/eligible-activities/>. The latter approach is consistent with the CPD practices in other professions, as set out in detail in Appendix B, “Licensing and Competence in Other Professions.”

<sup>79</sup> There is, technically, a third option: Remove altogether any regulatory requirement that Alberta lawyers engage in ongoing efforts to maintain and improve their competence to practise law. Initial admission to the bar would tacitly constitute achievement of “permanent competence,” beyond which the regulator would take no steps to require lawyers to maintain ongoing competence, leaving it to competitive market forces and the spectre of negligence claims to motivate lawyers to stay competent. Research and interviews conducted for this report revealed little support for this approach, on the grounds that it could fatally compromise public confidence in the legal profession and potentially even the statutory grant of self-governance.

<sup>80</sup> <http://www.lettr.org.uk/wp-content/uploads/LETR-Report.pdf>

*The focus of compliance on satisfying the relevant number of “points” or hours rather than on the usefulness of what is learnt raises serious concerns. Much of the CPD system, as currently formulated, is built around “inputs” rather than “outputs.” The extent to which CPD “works” may in fact be in spite of rather than because of the current system, particularly where it fails to give proper credit for significant self-directed or informal learning or to encourage forms of learning and reflection that are central to the development of expertise.<sup>81</sup>*

There are several other problems with “minimum hours” systems:

- They do not require hours to be spent on activities relevant to the lawyer’s practice. Most professional development experts can tell a story about a lawyer who registered at the last minute for a CLE outside their area of practice solely to fulfill their CPD requirements.
- They set a ceiling, not a floor, on continuing learning efforts. The lawyer’s goal becomes not to improve their competence in a certain category, but to fulfill their hourly obligation and get back to practising law. The “minimum” number of hours effectively becomes a maximum.<sup>82</sup>
- They create an uncomfortable conflict of interest for regulatory bodies that both require lawyers to fulfill a minimum number of CPD hours and directly sell lawyers access to educational programs that will meet that requirement.<sup>83</sup>
- They do not deliver any higher degree of “accountability” than other systems for continuing lawyer learning. Specifying a certain number of hours might make it easier for a lawyer to “count up” their efforts, but it does not give the regulator any more certainty or assurance that competence has been improved.

## **The Advantages of Self-Assessment**

It is not just the shortcomings of the “minimum hours” system for continuing lawyer learning that recommend against switching, however. It is also the merits of the self-reflection, self-assessment, and learning outcomes system that Alberta already uses.

The regulator’s goal, when it comes to the competence of the lawyers it governs, is to ensure that each lawyer actually improves — or at the very least, maintains — their knowledge, skills, and effectiveness in the provision of legal services to clients, year over year.

Actual competence is inherently tailored to the individual lawyer — what makes one lawyer competent to provide their services will not be the same as what makes other lawyers competent. It is therefore incumbent upon each individual lawyer to determine precisely where their competence to practise law resides and how to ensure that that competence is maintained and improved. No one else can do this job for them.

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<sup>81</sup> Ibid., p. 197

<sup>82</sup> See generally, “CLE Requirements Are Usually A Big Waste Of Time,” Jordan Rothman, *Above The Law*, Apr. 10, 2019: <https://abovethelaw.com/2019/04/cle-requirements-are-usually-a-big-waste-of-time/>

<sup>83</sup> This is not an issue in Alberta, since many educational programs are delivered by an entity (LESA) separate from the law society.

The “self-assessment” system of continuing lawyer learning recognizes that the responsibility for professional development lies with each individual lawyer, who is in the best position to analyze their own learning needs and identify their required learning outcomes. A self-assessment CPD system provides lawyers with the opportunity to fulfill that responsibility.

The Legal Education and Training Review in England & Wales endorsed this approach. Recommendation 17 in the report reads:

*Models of CPD that require participants to plan, implement, evaluate and reflect annually on their training needs and their learning should be adopted where they are not already in place. This approach may, but need not, prescribe minimum hours. If a time requirement is not included, a robust approach to monitoring planning and performance must be developed to ensure appropriate activity is undertaken.<sup>84</sup>*

England & Wales adopted the self-assessment system based on the LETR’s findings and continues to employ it today.

Professor Neil Hamilton, co-director of the Holloran Center for Ethical Leadership in the Professions at the University of St. Thomas School of Law, is perhaps the leading American scholar on the subject of competence-based legal education and professional identity. In his article “Leadership of Self: Each Student Taking Ownership Over Continuous Professional Development/Self-Directed Learning,”<sup>85</sup> he writes:

*[L]earners in a competency-based system must be “active agents co-guiding both the curricular experiences and assessment activities.” What does it mean for a student to be an active agent in her own learning and assessment? “Learners must learn to be self-directed in seeking assessment and feedback.” Learners should ideally:*

- 1) be both introduced to the overall competency-based education curriculum at the beginning and engaged in dialogue about the overall program on an ongoing basis;*
- 2) actively seek out assessment and feedback on an ongoing basis;*
- 3) perform regular self-evaluations together with feedback from external sources;*
- 4) direct and perform some of their own assessments such as seeking out direct observation of the learner by an experienced professional and creating portfolios of evidence regarding specific competencies; and*
- 5) develop personal learning plans that students revisit and revise at least twice a year.<sup>86</sup>*

Finally, in the Canadian context, Yanneck Ostaficzuk and Suzanne Gagnon write in their 2017 *Canadian Bar Review* article “Professional Excellence Through Competency Development”:<sup>87</sup>

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<sup>84</sup> <http://www.lettr.org.uk/wp-content/uploads/LETR-Report.pdf>, p. 291

<sup>85</sup> *Santa Clara Law Review*, Vol. 58, No. 1, 2018

<sup>86</sup> *Ibid.*, p. 571, citing Dr. Eric Holmboe and Dr. Robert Englander, “What Can the Legal Profession Learn From the Medical Profession About the Next Steps?”, 14 *U. St. Thomas L.J.* 345 (2018).

<sup>87</sup> *The Canadian Bar Review / La revue du barreau canadien*, Volume 95, 2017, Number 1 / Numéro 1

*Taking inspiration from the changing standards governing the continuing development of professional competencies and promoted best practices, it is possible to suggest that the reflective approach has the advantage of making each professional's mandatory continuing professional development meaningful, insofar as it is based more on the foundations of modern adult learning theory.<sup>88</sup> ...*

*Canadian law societies can therefore help structure and promote their members' competency development process by encouraging them to set learning objectives based on the previously described assessment and develop an annual development plan. Conducting this planning process will "urge the member to really think about the CPD that they are doing and engage in a way which will encourage them to strive for results and indeed be fair when performing self-assessment of outcomes."<sup>89</sup>*

To be most effective, a continuing learning system must help a lawyer to reflect upon and diagnose their own competence needs, to develop their own unique learning plan, and to execute that plan in ways that make the most sense for that lawyer. The regulator's job is to give lawyers both the mandate and the means to carry out these tasks.

This report therefore recommends that the law society maintain its current system of self-reflection, self-assessment, and learning outcomes for continuing lawyer learning. Unique among law societies in Canada, Alberta's approach lines up best with the leading academic research into and professional assessment of lawyer competence systems.

## **Problems with the System**

That is not to say, however, that the execution of the self-assessment system for continuing lawyer learning in Alberta has been flawless. This report has identified three areas in which the self-assessment system for continuing lawyer learning in Alberta could be significantly improved.

### **1. The law society requires lawyers to reflect upon, assess, and plan to meet their learning needs, but provides little guidance and no training to help them accomplish these tasks.**

Assessing one's own competence and learning needs is a complex skill with which few people have natural affinity or proficiency. Conversations with experts in professional development indicate that lawyers in particular struggle with critical self-assessment. It is difficult for lawyers to identify gaps or shortcomings in their knowledge or skill base, in part because they are often unaware of what else they could learn and unconvinced that there would be sufficient benefit to learning it.<sup>90</sup>

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<sup>88</sup> Ibid., p. 134

<sup>89</sup> Ibid., pp. 137-8

<sup>90</sup> This is also known as "unconscious incompetence," or more colloquially, the condition in which "you don't know what you don't know." It is the first of the classic "four stages of competence" in adult learning, and often represents a significant barrier to learning for lawyers. See: "How to Design an Effective Law Firm Associate Training Program," Jay Harrington, Mar. 1, 2019: <https://www.hcommunications.biz/blog/how-to-design-an-effective-law-firm-associate-trainingprogram>

Where lawyers do not perceive a gap in their skills and knowledge, they are not inclined to value learning that could address it. This seems to apply especially to skills in areas such as practice management, communication, organization, and empathy — lawyers appear to discount their importance, or to believe these kinds of skills are simply “innate” and cannot be taught or improved. It is noteworthy that difficulties in these areas constitute the grounds for many clients’ complaints about lawyers.

Alberta’s CPD system requires lawyers to accurately and critically evaluate their own legal skills and knowledge for potential improvement, something that many lawyers do not know how to do and are not especially interested in doing. The law society must help them to acquire this ability, ideally through an online training program, if it expects a continuing learning and competence system based on self-assessment to succeed.<sup>91</sup>

**2. The law society asks lawyers to develop a list of “learning activities,” whereas it ought to require lawyers to develop “learning outcomes” first, and only then address activities.**

Alberta’s CPD system directs lawyers to navigate through the “Lawyer Portal” on the law society website and locate the “Learning Plan” section. The system then guides the lawyer through an overview of each of the law society’s six core competencies, along with examples of potential activities to help improve each competence. Lawyers are provided with blank comment sections in which they must list the activities they plan to undertake in the coming year in pursuit of each competence, along with a reflection on that competence.

This journey through the law society website is not always an easy one for lawyers to navigate, and the online system should be redesigned to make it more intuitive and user-friendly. But there is a more pressing problem with this process: It focuses its attention on lawyers’ learning *activities*, rather than on their learning *outcomes*.

As discussed earlier, a legal regulator is less interested in the learning efforts made by lawyers than in the specific outcomes or improvements the lawyer achieves through their efforts. Helping the lawyer to identify and commit to achieving those outcomes should be the primary focus of a self-assessment-based continuing lawyer learning system.

Accordingly, the law society should reconfigure this part of the system to help lawyers first identify the learning outcome they wish to achieve in each of the six competency areas, and then to develop a series of activities by which the lawyer hopes to achieve this outcome.<sup>92</sup> These activities, in each of the six competence areas, will constitute the lawyer’s learning plan. But it is critical to help the lawyer understand that it is the outcomes, not the activities, that are the foundation of the system.

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<sup>91</sup> The Law Society of New Zealand does a particularly good job of providing lawyers with information and resources to help them assess their learning needs: <https://www.lawsociety.org.nz/professional-practice/legal-practice/continuing-professional-development/>

<sup>92</sup> A sufficiently advanced redesign of the system could even offer the lawyers a selection of “suggested activities” activated by keywords used in the self-assessment, perhaps including links to CPD programming websites or community resources.

**3. The law society does not review the learning plans developed by lawyers or conduct any follow-up with lawyers to ensure they are implementing their plans.**

Recall the advice of the LETR report cited earlier: “If a time requirement is not included [in a CPD plan], a robust approach to monitoring planning and performance must be developed to ensure appropriate activity is undertaken.” This kind of enforcement measure is a key element missing from Alberta’s implementation of a self-assessment-based continuing learning system.

Prior to the law society’s suspension of its CPD system in February 2020, there was near-universal compliance with the *formal* requirements of the program — virtually every Alberta lawyer filed a learning plan with the law society, as directed. But the law society did not review any of the learning plans filed by lawyers, or follow up with lawyers to determine whether they actually were executing their plans and what (if any) learning was occurring as a result.

It seems likely that many Alberta lawyers did, in fact, execute their learning plans to one degree or another. But the law society has no data to support that proposition. And some percentage of lawyers certainly did not consult their learning plan after filing it and did not undertake any of the learning activities therein.

This is the area in which many stakeholders felt the CPD system lacked accountability: There was no way to tell whether lawyers were engaging in the activities featured in their learning plans or achieving any learning outcomes.

There are practical limitations, of course, to what a regulator can do in this regard. The law society cannot engage a team of investigators to cross-examine all 10,000 Alberta lawyers every year regarding their learning activities. Aside from the sheer unmanageable cost, this kind of strategy would contradict the approach favoured in the Introduction, that a regulator should strive to be “a coach” more than “a cop.”

But it is not necessary, for purposes of enforcement, that every Alberta lawyer be contacted by the law society and required to show that they have pursued their stated learning outcomes through their chosen learning activities. It is only necessary that lawyers know this realistically *could* happen to them.

The distinct possibility of a random regulatory assessment is an effective standalone incentive for a lawyer to pursue their learning outcomes, in much the same way that the distinct possibility of a random Canada Revenue Agency audit is a standalone incentive to accurately complete one’s tax return. Random audits also figure prominently in the CPD systems of doctors and accountants in Alberta.<sup>93</sup>

This report recommends that the law society develop a system by which lawyers are randomly contacted and interviewed about the content of their learning plans and the progress they are making towards achieving their learning outcomes. This is not intended to be a “gotcha” system to punish wayward lawyers, but a positive incentive to encourage compliance with a lawyer’s commitment to achieve their learning outcomes.

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<sup>93</sup> See Appendix B, “Licensing and Competence in Other Professions.”



## Universal Competence Activities

In addition to mandating that lawyers self-assess their competence needs, identify related learning outcomes, and design a plan of learning activities to achieve those outcomes, the law society should take one more step towards ensuring the competence of the lawyers it regulates. The law society should oversee the periodic development of certain “universal competence” activities, whose completion within a specified time frame should be mandatory for every Alberta lawyer.

The Alberta legal profession encompasses many different types of careers with myriad specialties and requirements. As noted previously, what keeps a lawyer competent in one type of private practice will be different from what keeps another private-practice lawyer competent, which will differ again for a lawyer in a government law department, a law school faculty, and so on.

But there is a small group of subjects that have relevance to *every* lawyer in 21st-century Alberta, no matter where they work and what they do, and with which every lawyer should possess a minimum level of familiarity and competence. These subjects include, but are not limited to:

- Professional conduct
- Cultural competence
- Access to justice
- Health and wellness

Some of these areas are not necessarily encountered in the everyday experience of many lawyers, or do not always lend themselves easily to inclusion in a “self-assessment and learning outcomes” professional development plan.

It might not, for example, even occur to a lawyer that they should know more about the root causes of justice inaccessibility, or that they are missing business opportunities because they lack familiarity with other cultures and traditions. And even if these occurred to the lawyer as the worthwhile subjects of learning outcomes, where would they go to find activities to help achieve those outcomes?

The law society should therefore supplement lawyers’ own continuing learning efforts by way of prescribed programs, courses and other activities, delivered periodically but regularly, in these areas of universal relevance to lawyer competence.

A good example of this sort of activity, — in fact, the model for this recommendation — is the forthcoming online education program “The Path,” which will trace the residential school system’s history and describe the system’s devastating impact on generations of Indigenous Canadians. It is becoming more widely accepted that “cultural competence” is a key attribute for lawyers in the increasingly diverse future of our country and our profession.<sup>94</sup> “The Path”

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<sup>94</sup> See: “Cultural Competency and the Practice of Law in the 21st Century,” Aastha Madaan, 30 Prob. & Prop. 29 (2016)

([https://www.americanbar.org/content/dam/aba/publications/probate\\_property\\_magazine/v30/02/2016\\_ab\\_a\\_rpte\\_pp\\_v30\\_2\\_article\\_madaan\\_cultural\\_competency\\_and\\_the\\_practice\\_of\\_law\\_in\\_the\\_21st\\_century.pdf](https://www.americanbar.org/content/dam/aba/publications/probate_property_magazine/v30/02/2016_ab_a_rpte_pp_v30_2_article_madaan_cultural_competency_and_the_practice_of_law_in_the_21st_century.pdf)); “Reconciliation and Ethical Lawyering: Some Thoughts on Cultural Competence.” Pooja Parmar, 97

responds to that trend, and in particular to the Truth and Reconciliation Commission's Call to Action Recommendation 27, which asks that all lawyers in Alberta receive appropriate cultural competency training.<sup>95</sup>

It is anticipated that this initiative will consist of five to six hours of interactive online programming, with summaries and short quizzes to help ensure the viewer's active engagement with the materials, and that all members of the Law Society of Alberta will be required to complete this program.

This report recommends that the law society draw upon this program as a model for mandated activities and initiatives meant to ensure or enhance competence in areas of universal relevance to Alberta lawyers. In a sense, these could be considered "Competence Special Projects." The law society should continually scan the legal sector, identify critical areas of universal competence that require particular attention, and develop programs or activities to enhance that competence among lawyers. Examples could include:

- *Professional conduct:* Lawyers might be required to complete an interactive online "Ethics Refresher" that updates lawyers on amendments to or critical aspects of the Code of Professional Conduct.
- *Access to justice:*<sup>96</sup> Lawyers might be required to complete 20 hours of pro bono activity over the course of two years specifically targeted to promoting access to legal services for low-income or marginalized communities.
- *Health and wellness:*<sup>97</sup> Lawyers might be required to complete an online program in mental and emotional health, perhaps based on the Ontario Bar Association's Mindful Lawyer series<sup>98</sup> or the Canadian Bar Association's Mental Health and Wellness in the Legal Profession program.<sup>99</sup>

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*Can. B. Rev.* 526 (2019) (<https://cbr.cba.org/index.php/cbr/article/view/4558>); and "The Cultural (Re)Turn: The Case for Teaching Culturally Responsive Lawyering," L. Danielle Tully, 16 *Stan. J. C.R. & C.L.* 201 (2020) (<https://law.stanford.edu/publications/the-cultural-return-the-case-for-teaching-culturally-responsible-lawyering/>).

<sup>95</sup> <https://www.lawsociety.ab.ca/about-us/key-initiatives/indigenous-initiatives/truth-and-reconciliation-commission-call-to-action-27/>

<sup>96</sup> The legal profession needs to acknowledge the metastasizing crisis in access to justice afflicting our country, especially given the economic impact of the global pandemic. See generally, "Access to Justice: Justice in the time of social distancing," The Rt. Hon. Beverley McLachlin, *The Lawyers Daily*, Mar. 31, 2020: <https://www.thelawyersdaily.ca/articles/18386/access-to-justice-justice-in-the-time-of-social-distancing-beverley-mclachlin>

<sup>97</sup> The legal profession also needs to acknowledge and act to combat rising rates of stress, depression, substance abuse, and suicide among members of the legal profession worldwide. See "Improving Mental Health for the Legal Profession" at the website of the Law Society of British Columbia's Mental Health Task Force: <https://www.lawsociety.bc.ca/our-initiatives/improving-mental-health/>

<sup>98</sup> <https://www.oba.org/openingremarks/MindfulLawyer>

<sup>99</sup> <https://www.cba.org/Professional-Development/Free-Professional-Development/Wellness>

These programs would not replace each individual lawyer's personal self-assessment and learning outcomes plan; they would supplement it.

This does not mean that the law society must devote substantial time and resources to commission a sophisticated interactive online program in a particular area — a mandated activity could be much less cost-intensive. Nor does it mean that the law society must develop such projects frequently — by “periodic,” this recommendation intends that such activities might be mandated as infrequently as every two years.

But the law society should recognize both the opportunity and responsibility to “fill in the gaps” that might otherwise develop among Alberta lawyers in these areas that have universal relevance to their competence, but that they might not necessarily be able to easily include in their own learning activities. When it identifies such an area, the law society should consider the best way to ensure that all its members can conveniently access or participate in an activity to promote competence in the area.

There is one other reason why this report recommends the adoption of periodic mandatory programs and activities for all lawyers in certain areas of universal competence.

Law society Benchers and stakeholders interviewed for this report consistently reported one concern: Should this report approve the re-institution (even with improvements) of the self-assessment and learning outcomes CPD system, lawyers might see no significant difference between the program that was suspended in February 2020 and the one that will be re-introduced in January 2022, and they might ask whether anything had meaningfully changed at all.

This report does not favour requiring the addition of a “minimum number of hours” element to Alberta's continuing lawyer learning system, even though the LETR Report allowed for the possibility of prescribing minimum hours. But in that same spirit, this report does suggest that the regulator can prescribe minimum *content*, as a way to strengthen both the real and perceived demands of the CPD system. The recommendation to periodically require learning activities in areas of universal competence is meant to help address that concern.

There are two other demographic segments of the Alberta lawyer population that merit attention and the development of specific types of continuing lawyer learning: lawyers who have been in practice for more than 20 years, and sole practitioners. The next two subsections of this report will examine each of these segments in turn.

## **CPD Options for More Experienced Lawyers**

As noted in Section 4 of this report, statistics from the law society's Early Interventions department indicate that the frequency of problems with and complaints about lawyers that require regulatory intervention decreases noticeably among lawyers with 20 years or more at the bar.

This is not an unexpected finding. It makes sense that most lawyers with more than two decades in practice have developed over that time certain habits, systems, and processes (not to mention confidence and expertise) that enable them to successfully practise law and manage their business. Those lawyers who did not learn these lessons or develop these systems have usually moved on from private practice, voluntarily or otherwise, at this stage of their careers.

A regulator's degree of oversight ought to be heavier in those situations and among those populations that present a greater risk of harm to the interests of clients and the public. By the same token, the regulatory touch should be lighter in those situations and among those populations that present a lesser risk of harm. If a particular demographic cohort of the legal profession demonstrates reliably high competence and poses less risk to the public, the law society can reasonably infer that this group does not require as much regulatory vigilance as other cohorts.<sup>100</sup>

In addition, professional development experts interviewed for this report related feedback from experienced lawyers who still want to engage in continuing learning, but in ways that take into account their own expertise and allow them to reflect their own knowledge and experience back to the profession. Traditional CLE programs are often of little interest to these lawyers and do little to help them maintain and improve their own competence.

Lawyers at this stage of their careers have acquired voluminous experience that they could share with newer practitioners. Many might welcome a system by which they could fulfill their competence requirements by sharing the insights gained during their own legal careers. Many less experienced lawyers might equally welcome the opportunity to gain such insights, in the best traditions of a legal profession that has long relied upon older lawyers to help develop newer ones.

Accordingly, this report recommends the development of an optional alternative system of continuing learning for lawyers with more than 20 years' experience in the profession. Lawyers in this demographic cohort may choose to fulfill the requirements of this alternative program rather than the standard self-assessment and learning outcomes system required for the rest of the profession.

## **Levelling the Playing Field for Solos**

Practising law by oneself is extremely hard work. Sole practitioners take pride in their ability to practise law without any support from colleagues or partners, and justifiably so — this is one of the most difficult, but also most rewarding, types of law practice in which a lawyer can engage.

Moreover, the vast majority of legal services bought by individuals, families, and very small businesses are provided by solos (and lawyers in small firms), making these types of practices integral to the law society's access-to-justice mission. Solos are integral to serving this sector today and will be instrumental in ensuring this sector is effectively and affordably served in the high-tech, multi-provider legal marketplace of the 21<sup>st</sup> century.

Precisely because this type of practice is so challenging and so important, the law society should provide additional support, resources, and foundations to the lawyers who wish to enter it.

Unlike lawyers in law firms, most lawyers in sole practice do not have ready access to resources, programs, training, and assistance for their professional success and personal

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<sup>100</sup> Nothing here is meant to suggest that lawyers with 20+ years at the bar present no risk to clients and the public, or that these lawyers do not have a continuing positive duty to maintain and grow their proficiency and expertise in serving their clients. It is meant to point out that risk is not spread uniformly throughout the legal profession, and therefore, the law society's limited risk management resources need not be applied uniformly either.

wellness. Facing all the same expectations and pressures as other lawyers, but with little if any of the support they enjoy, these lawyers operate at a permanent disadvantage.<sup>101</sup>

One way in which this disadvantage manifests itself is in the disproportionate number of client complaints and insurance claims brought against sole practitioners and lawyers in small firms. According to data from the law society's 2019 Annual Report and its Early Interventions department, lawyers in sole practice constitute 19% of all lawyers in Alberta, but account for 28% of complaints registered with the EI department. In addition, lawyers in firms of 2-10 lawyers constitute 31% of the Alberta bar, but account for fully 50% of all EI complaints.

As has already been noted, there are many reasons why lawyers in sole practice and small firms would experience disproportionate numbers of claims and complaints, some of them related to the types of work these firms engage in and some of them related to the systems that larger firms have in place to manage and settle similar types of issues.

There is no evidence that lawyers in sole practice or small firms are inherently less able or less competent than lawyers in larger firms or other types of legal employment. Far more likely is that these firms do not enjoy the kinds of support structures and systems that can reduce the likelihood and incidence of such problems.

In smaller firms and sole practices, there are fewer people available to handle administrative, organizational and financial duties, and those people who are available have limited bandwidth to devote to these duties. The great majority of claims and complaints against lawyers relate not to the quality of the lawyer's knowledge or advice, but to breakdowns or failures in management, correspondence, and organization.

The law society should step forward to ensure that sole practices, at least, receive the support they need to maintain operational competence, safeguard client interests, and reduce the likelihood of claims and complaints. In addition, since sole practices often serve the most vulnerable client populations, the law society has a public-protection mandate to ensure that baseline level of operational competence among these firms.

Accordingly, this report recommends that the law society develop or oversee the development of a mandatory information and training program that must be completed by all lawyers entering sole practice. This program should focus on the essentials of modern legal services provision and should provide instruction, tools, and resources that address the essential elements of a well-managed law firm.<sup>102</sup>

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<sup>101</sup> Recall as well the observation in the Introduction to this report that problems afflicting solos disproportionately affect ITLs and BIPOC lawyers as well.

<sup>102</sup> It might be asked why this program is recommended for lawyers entering sole practice but not for those joining firms of 2-10 lawyers, given the similarity in the risk profiles of these types of practices. The primary reason is practical: Implementing a comprehensive mandatory training program for every lawyer who becomes a member of a firm with 10 or fewer lawyers would be an enormous undertaking with immense administrative costs. There would also be questions about whether "10 lawyers" is an arbitrary threshold beyond which a firm would no longer require special attention — why not five? Why not seven? This report suggests that this program be developed and rolled out for lawyers entering sole practice, and that expansion beyond this modest beginning be considered in subsequent months and years.

## Succession Planning and Business Continuity

This final subsection deals with a subject that is relevant to both sole practitioners and those with more than 20 years' experience in the profession.

Succession and retirement planning are among the most difficult subjects to raise in conversation with lawyers, for a host of reasons.<sup>103</sup> Many law firms struggle to persuade their partners to plan for their retirement and develop younger partners to take over their client relationships. Equally, friends and members of the family of sole practitioners face the same challenges when they attempt to prevail upon these lawyers to make similar plans.<sup>104</sup>

The law society is not a consultancy, and its priorities do not include ensuring that a lawyer can enjoy a comfortable retirement. It is important that any steps the regulator takes to address end-of-career issues for lawyers remain strictly within the boundaries of its mandate to protect the public interest in the delivery of lawyers' services.<sup>105</sup>

Where the regulatory interest overlaps with lawyer succession and retirement is in the larger field of business continuity and client welfare. If a lawyer fails to anticipate and prepare for the impact of the end of their career — whether that end comes gradually or suddenly — the consequences are experienced not just by the lawyer and their family, but by clients and the community.<sup>106</sup>

Even in larger firms with extensive support infrastructure, the sudden retirement or incapacitation of a lawyer can compromise the interests of clients on whose matters that lawyer was working, and it could be several days or weeks before order is restored. In very small firms or sole practices, however, if a lawyer ends their practice with little or no warning — or if an emergency incapacitates the lawyer — invariably the clients' cases fall into limbo, their files are locked away on password-protected computers, and their calls for information go unanswered.

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<sup>103</sup> See: "Use Succession Planning as a Risk Management Tool," Camille Stell, *ABA Law Practice Today*, Jun. 15, 2020: <https://www.lawpracticetoday.org/article/use-succession-planning-risk-management-tool/>

<sup>104</sup> See: "Succession plans needed for future success," Marg Bruineman, *Law Times*, Feb. 15, 2018: <https://www.lawtimesnews.com/resources/practice-management/succession-plansneeded-for-future-success/262905>

<sup>105</sup> It is worth noting that retirement planning is not solely an issue for lawyers nearing the end of their careers — it is really an issue for every lawyer *starting* their career. It should be considered standard practice for a lawyer to outline a retirement plan during their fifth year in the profession and to revisit that plan every five years thereafter. Every lawyer in practice inevitably will come to the end of their career someday. It does no good for a lawyer to postpone acknowledgement of this reality to the last minute.

<sup>106</sup> See generally, *Business Continuity Planning and Management for Law Firms*, Caroline Poynton and Nick Brook: 2012, Ark Publishing, 95 pp.

It is in the interest of clients that their lawyers have a business continuity plan. Every law firm in Alberta, regardless of size, should have a plan for the continuation of its operations and the timely pursuit of its clients' interests in the event of a disruption of its services. This should be a core competence of a law practice.<sup>107</sup>

Accordingly, this report recommends that the law society develop a business continuity plan template and make it freely and easily available to all law firms in Alberta. All sole practitioners in Alberta should be required to develop a plan, either independently or based on this template, and register it with the law society. All other law firms should be strongly encouraged to do so.

Six years ago, the Law Society of Saskatchewan made it mandatory for all its members to have a succession plan for their law practice. The succession plan must be in writing, appoint another member, and address the events of temporary disability, long-term disability, and death. The Law Society of Alberta might consider replicating this approach in its entirety, but at the very least, should adopt this more modest recommendation.

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<sup>107</sup> An issue closely related to lawyer competence, but which was not part of this report's commissioning scope and is not addressed here, is what might be called "law practice competence" — whether a law practice's systems, procedures, and overall culture reinforce or undermine positive behaviours in client relationships and business management. These issues are more properly addressed under the auspices of "entity regulation" in the legal sector, an important issue worthy of further development. See: "Entity Regulation: Frequently Asked Questions," a document prepared by the Federation of Law Societies of Canada, [http://docs.flsc.ca/INTLegalReg-EntityRegulationCommitteeFAQsFINAL07142015\(1\).pdf](http://docs.flsc.ca/INTLegalReg-EntityRegulationCommitteeFAQsFINAL07142015(1).pdf).

## Continuing Lawyer Learning Recommendations

### **C1. The law society should upgrade its self-assessment and learning-plan CPD system to include a core of mandatory activities, better training and support in self-assessment and learning plan development, and random audits for lawyers' compliance with their learning plans.**

The law society should maintain a mandatory “continuing learning” program based on lawyers’ self-assessment of their learning needs, but with additional elements and improvements to enhance its effectiveness. Specifically, the law society should:

#### ***(a) Provide Better Training and Support***

The law society should oversee the development of an online training program to help lawyers understand what “learning self-assessment” is and how it works, why the law society is requiring self-assessment, and how a lawyer can assess their own learning needs and choose learning outcomes related to those needs.

This training program should provide lawyers with the knowledge, skills, and tools to:

- assess their own legal knowledge and skills against the required competencies,
- measure any gaps between their current knowledge and skills and the minimum requirements set by the law society,
- choose learning outcomes related to their knowledge and skills that they would like to achieve in the coming year,
- identify a series of activities by which they can achieve those learning outcomes, and
- create a plan and schedule for carrying out the activities they have identified.

This training program should be designed by experts in professional development and self-directed learning. It should be made available to and easily accessible by all lawyers in Alberta (including articling students, as described in Recommendation A3). The law society should also revamp its online CPD system navigation, based on human-centred design principles, so that lawyers are guided to identify their learning outcomes before creating a learning plan of activities to achieve those outcomes.

In addition, lawyers should be made aware at the start of this process that pursuit of their chosen learning outcomes and execution of their promised learning activities will be the subject of the random checkups described below, and that a lawyer’s failure to identify learning outcomes or carry out learning activities may be considered a violation of their professional duty to remain competent.

#### ***(b) Institute Random Learning Checkups***

The law society should conduct random “learning checkups” on a percentage of Alberta lawyers each year. The percentage should be large enough that lawyers take seriously the possibility that they could be randomly audited, but not so large that lawyers feel harassed or that the law society exhausts its limited resources. Other professions in Alberta that use audit mechanisms



to encourage continuing learning (see Appendix B) could be consulted for their experience and perspective.

In these checkups, a law society representative would discuss with the lawyer in a friendly manner the learning outcomes and activities identified in their registered learning plan and ask the lawyer how everything is going. The law society representative would ask the lawyer for an assessment of their activities, request an update on progress towards their learning outcomes, and offer recommendations for further development.

If the law society representative is satisfied that the lawyer is engaging with their learning plan and making progress towards their learning outcomes, no further action need be taken. If not, then the lawyer would be questioned further, would be given appropriate assistance, and would be advised to engage actively with their learning outcomes and activities. A follow-up call in several weeks' time would be scheduled.

If sufficient progress has been made at the time of the follow-up call and the law society representative is satisfied, they would close the inquiry. If the lawyer still has not attended to their learning activities or remains uncooperative, however, the matter would then be referred either to Early Interventions or to the Conduct Department.

### ***(c) Mandate Periodic CPD Programming in Areas of Universal Competence***

The law society should periodically supplement lawyers' continuing learning efforts with mandatory activities and initiatives meant to ensure or enhance competence in areas of universal relevance to Alberta lawyers, including but not limited to professional conduct, cultural competence, access to justice, and health and wellness.

This report leaves to the law society decisions regarding the content, nature and frequency of the required CPD activities in these areas. But the law society should not be deterred if a handful of lawyers argue that a subject is not relevant to them or bridle against the weight of the requirements. Other professions require far more from their members in terms of CPD than the legal profession does.

Perhaps in future, the law society might again consider broadening the scope of mandatory learning activities. Until then, compulsory completion of periodic activities in subjects of universal relevance is not too much to ask of a self-regulated profession.

## **C2. The law society should oversee the development of an alternative program of continuing learning by which lawyers with 20 or more years' experience can perform a range of activities in public service, public legal education, and professional development in order to satisfy their continuing learning requirements.**

Potential activities that could collectively satisfy the requirements of this program might include:

- signing up with "Mentor Connect" or "Mentor Express" to provide guidance and mentoring to less experienced lawyers in the province;

- contributing to an ongoing collection of “lessons learned” (in written, audio, or video form) in each of the law society’s five non-substantive core competence areas;<sup>108</sup> which the law society could distribute via weekly email to members and add to a permanent database on the law society website;
- serving as the featured speaker in a session organized by a law firm or local bar group on a non-substantive core competence subject;
- serving as a guest lecturer (in-person or video, for a minimum number of hours) in a for-credit course at the University of Alberta or University of Calgary law schools; and
- writing a regular column for a community publication explaining the workings of the legal system to the public and giving insights on the best ways to hire and interact with a lawyer.

It is important to note that lawyers who choose this alternative program of continuing learning would still be required to create a list of their intended activities and to register that list with the law society. They would also still be subject to periodic “check-in” calls from the law society, but with less frequency than lawyers subject to the standard continuing-learning requirements.

The purpose of this recommendation is not to “excuse” or “exempt” lawyers with 20 or more years’ experience from the requirement to maintain their competence. It is to provide additional flexibility and alternative routes by which that goal can be achieved.

### **C3. The law society should oversee the development of a comprehensive online<sup>109</sup> information and training program that must be completed by all lawyers who wish to enter into sole practice in Alberta.**

This program should focus on the essentials of modern legal services provision and should provide instruction, tools, and resources that address the essential elements of a well-managed solo law firm. These could include:

- business development and marketing;
- client trust account management;
- communication and client relations;

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<sup>108</sup> This suggestion excludes the “substantive law” core competence, because a lecture about substantive law does not differ significantly from traditional CLE offerings, which are widely available and frequently used by lawyers. Far less common are personal insights and observations about client relationships, time management, personal wellness, etc. Those are the types of information transfer between more experienced and less experienced lawyers that a program like this is intended to facilitate.

<sup>109</sup> Given the COVID-19 pandemic and the likelihood that significant restrictions on indoor assemblies will continue for some time, a program of this type could not be delivered in-person for the foreseeable future. Offering the program online would, in any event, greatly reduce costs to the law society and make the program far more affordable and easily accessible for lawyers. If and when circumstances allow, the law society might consider creating an optional in-person version of this program, which would have the advantage of allowing solo lawyers to enjoy personal interaction and shared experiences. But the online program should always be available and should be considered the “default” format.

- financial viability and profitability;
- health and wellness;
- law office technology;
- practice management and organization; and
- time management and resource allocation.

This program should draw upon existing law society programs such as Responsible Lawyer and Office Consult, and should engage the active involvement of the Practice Management and Early Interventions departments, as well as data from the Alberta Lawyers Insurance Association. Implementable tools and resources should be provided to all lawyers who register for and complete this program. Perhaps needless to add, sole practitioners themselves should be consulted throughout the development of the program.

Completing this program should be a mandatory condition to be fulfilled by any lawyer who wishes to start a sole practice in Alberta. The law society should decide whether it wishes to also require all current sole practitioners to complete this program, or whether current solos can be exempted from the mandatory requirement but still encouraged to complete the program voluntarily. Either way, the program should be made as affordable as can be managed.

#### **C4. The law society should create a free business continuity plan template, and should require all sole practitioners — and encourage all law firms — in Alberta to create a business continuity plan and register it with the law society.**

The business continuity plan should include the names of, and instructions for, responsible individuals who can step into the practice on an emergency basis. It should also include a pathway towards winding down the law practice if and when necessary (including valuing the practice, finding a seller, managing data, and communicating frequently with clients as the process wends its way forward).

All solo law practices in Alberta should be required to complete the business continuity plan template and register a copy with the law society. Each sole practitioner would also be under a continuing duty to notify the law society of any material change in the business continuity plan and to send a revised version of the plan to replace the old one.

Sole practitioners should also be required to include in all client retainer letters a standard notice that in the event of an unexpected interruption of the firm's business, the client can contact the law society (at a phone number provided) to obtain instructions on how to proceed. There is little point in making arrangements for the continued care of the client's matters if the client does not know where to turn to exercise their right to that continued care.

## 6. Summary and Conclusion

This report has sought to diagnose the state of lawyer licensing and regulation in Alberta and to recommend appropriate measures to improve its condition. The good news is that this checkup has discovered no life-threatening illnesses in the patient, and in many regards, has found a robust degree of health and fitness:

- Alberta's approach to CPD is aligned with leading practices in adult professional education worldwide and requires enhancement, not replacement.
- Alberta's interest in improving the lot of lawyers in their first few years is commendable, and progress in that direction can be made with some modest initiatives.
- CPLED PREP, a pioneer in new lawyer licensing, points the way forward for other jurisdictions to engage in an overdue reconsideration of their bar admission process.

The prescriptions presented in the foregoing pages are, for the most part, intended to enhance the state of lawyer licensing and competence in Alberta, rather than to order emergency surgery or life-saving interventions.

But this assessment has also detected some warning signals of potentially serious trouble. In particular, key elements of the lawyer licensing and competence system in this province require immediate attention. The articling system is failing in its duty to provide aspiring lawyers in Alberta with a safe and effective supervised practice experience, and it must be reformed.

Moreover, the rising demand for articling positions will encounter a sharply diminishing supply of such positions, perhaps as soon as the next pandemic-fuelled year, but certainly no more than in a few years' time. The law society must act now to begin developing other pathways by which aspiring lawyers can obtain supervised practice experience in a systematically defensible manner and within a secure environment.

And while Alberta is right to employ a self-assessment and learning-outcomes approach to continuing lawyer learning, the system contains serious flaws. Lawyers need training in self-assessment, guidance through a better-designed process for developing learning plans, core competencies strengthened through periodic mandatory programs, and stronger monitoring and enforcement to ensure that learning is actually taking place.

There is more than enough work to be done in these areas to keep the law society busy improving its lawyer licensing and competence systems. Decisions will have to be made about which measures should be prioritized, which stakeholders must be involved in the process, and how any or all of these recommended actions can be responsibly funded.

Before ending this report, however, some closing words about the future of lawyer development seem appropriate.

This report does not recommend a teardown and replacement of our current lawyer development system. But that does not equal an unqualified endorsement of the system or an expression of confidence in its ability to cope with what is coming our way. The COVID-19 pandemic has very likely opened the door to a decade of disruption and dislocation. The legal sector will not be spared from this disruption; more than likely, the law will be one of its primary targets.

The current system of lawyer licensing, not just in Alberta but across Canada and worldwide, amounts to a loosely tied collection of independent entities (law schools, bar examiners, legal regulators, law firms) with some interest in lawyer development. Each pursues its own objectives, playing its brief part in the system for a few months or a few years before passing the aspiring lawyer along to the next developmental stage or out into the open market. Cooperation among the entities is intermittent; collaboration is rare. The lawyer is the object, not the subject, of the process.

The tidal wave of disruption coming our way is going to strike this jury-rigged contraption and could tear it apart. The measures recommended in this report are meant to help mitigate the impact of this wave on the lawyer development system, in order to safeguard its effective operation for as long as possible. But now is the time to think seriously about what we can and will build to replace this system when the need arrives.

What is required is a unified system of *lawyer formation* — one that starts even before a person applies to law school and continues even after that person becomes an independent and autonomous lawyer. Lawyer formation is about producing and maintaining a healthy, proficient, ethical lawyer with a strong professional identity who helps clients and serves the public interest. Lawyer formation is the lens through which all the issues addressed in this report — licensing, first years, competence — should properly be viewed.

In the development of a unified approach to lawyer formation, the law society should exert its statutory authority to the fullest and take the lead. It is no longer an answer to complaints about the system for a regulator to complain, “Law schools won’t do this,” or “Law firms won’t do that.” The law society is statutorily charged with ensuring that the lawyers it regulates are effective, trustworthy, and reliable. This is job number one. And that job starts with the proper professional formation of the lawyers it regulates.

The law society, therefore, should regard this report not as the end of a process, but as the start of one. Consider this the first modest stone in what should become the foundation of a new structure and vision for the formation of lawyers in Alberta.

## Appendix A: The Possibilities of a Teaching Law Firm

In order for a regulator to confidently assert that it has properly evaluated candidates for bar admission, it should be able to accurately claim that all candidates have undergone more or less the same training and evaluation process.

The FLSC's National Requirement for Common-Law Degree Programs, to which the Law Society of Alberta is a signatory, provides this assurance of consistency for the legal education component of bar admission. CPLED PREP, in which every bar applicant completes the same Foundation Modules and the same "simulated law firm" program, provides this assurance of consistency for the practical skills training component.

Consistency disappears, however, when it comes to the experiential learning component. This is the primary consequence of the nature of articling, which outsources supervised practice to the private sector and thereby prevents the regulator from monitoring or overseeing the day-to-day experience of the articling student.

It would not be too great an exaggeration to say that every bar applicant in Alberta has received a different supervised practice experience through articling, ranging from exceptional at the top to abusive at the bottom, with a broad spectrum of experiences in between.

A certain degree of variability in supervised practice experience is not only inevitable, but also welcome. Everyday life in the legal profession can present myriad challenges to a lawyer, and an overly standardized supervised-practice experience could not hope to anticipate even a fraction of them. It would do bar applicants no good to bubble-wrap them inside an artificially sedate and predictable supervised practice experience, only to release them into the wilds of law practice upon admission.

So one advantage of the articling system is that bar applicants learn early to adapt to a potentially chaotic work environment. But it is a slim advantage: Many articling students navigate these rough seas, but many others flounder in the waves. And in any event, it is not clear that the rough-sea voyage is the optimal way to give bar applicants a glimpse of everyday life as a lawyer.

We ought instead to let bar applicants experience the unpredictability of lawyer life while tempering their consequent anxiety and stress within a secure support system that allows them to learn from their experiences in a guided fashion. Between the two extremes of never entering the water without a life vest, and being thrown dry and fully clothed into the deep end, there is a wide range of acceptable ways to learn how to swim.

If the law society decides that consistency in supervised practice is a priority, then articling becomes a questionable vehicle for achieving that experience. Law societies issue guidelines about the articling experience, instructing both the firms and the articling principals on what the experience must and must not include, and many firms and principals abide by these guidelines. But many others do not, and there is a limit to how much more the law society can do in this regard. The resource investment required to actively monitor hundreds of private-sector employment experiences every year is beyond what any law society can make.

One option the regulator might consider to ensure a universal and consistent supervised-practice experience is to create a “teaching law firm,” a non-profit law firm serving low-income clients in which every bar applicant must successfully work for several months.

A “teaching law firm” takes its name from teaching hospitals, where trainee medical personnel practise medicine on real patients under the eye of experienced doctors and nurses, receiving feedback on their performance and guidance on how to improve.

In a similar fashion, a teaching law firm would place applicants for bar admission who have completed their legal education and legal skill training in an actual law firm, where they serve real clients, under the supervision of experienced lawyers. Lawyers who have served in legal clinics in law school will find the concept familiar, except that the supervisors would not be law professors, but working practitioners.

A teaching law firm could be an ideal location for a bar applicant to learn the realities of practice — not just “solving client problems,” but leading a client intake process, creating a retainer letter, organizing and managing files, communicating with clients (including those from different cultures and backgrounds), and recording one’s activities and the resources (including time) spent to carry them out.

Just as importantly, however, the applicant’s supervising lawyers would not simply correct their errors and ensure the quality of their work, which describes the supervisory elements of most articling experiences. They would also debrief the bar applicant about their performance, provide support and answer questions, and carry out the mentoring and restorative functions discussed earlier in this report that are normally lacking in a law firm.<sup>110</sup>

In addition, by establishing the firm as a low-profit or non-profit operation geared towards serving low-income clients or those from marginalized communities, many advantages could flow, such as:

- The firm could help to alleviate the access-to-justice problem in its local community by making its services available at low cost or no cost.
- The firm could expose aspiring lawyers to the challenges faced by marginalized client communities that many of them might otherwise never encounter.
- The firm could avoid antagonizing lawyers who might consider it competition, since the firm would serve people who would rarely if ever consult a lawyer.
- The firm could give lawyers the opportunity to develop innovative, technology-based ways to help clients with few resources, thereby preparing themselves for 21st-century practice.

Last but by no means least, a teaching law firm would represent a way to increase equity in and enhance the diversity of the legal profession. It is well-established that women bar applicants and applicants who are BIPOC receive a disproportionately small percentage of articling opportunities.<sup>111</sup> Discrimination in the choice of articling students by law firms represents a

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<sup>110</sup> See: “Holistic Lawyer Development,” Section 4

<sup>111</sup> “The Real ‘Articling Crisis’?”, Amy Salyzyn, Slaw, Nov. 27, 2014: <http://www.slw.ca/2014/11/27/the-real-articling-crisis>

glaring example of a legal profession systemically inclined to be exclusionary on the basis of gender, race, and other factors.

A teaching law firm would be universal: Every bar applicant would be welcomed. The articling system might remain in place for those firms that consider it a key part of their recruitment and talent development strategy, and addressing discrimination in those instances is still a live issue. But the teaching law firm's doors would be open to all aspiring lawyers, and that would constitute a small but positive step in the right direction for this profession.

Balanced against all these advantages are significant challenges. First and foremost, there are vanishingly few "teaching law firms" anywhere in the world. Indeed, the University of Calgary's Faculty of Law piloted a similar entity in a "family law incubator" several years ago that encountered numerous difficulties and was forced to cease operations.

The most successful example of a teaching law firm today is the "Legal Advice Center" (LAC) located at the innovative Trent Nottingham University School of Law in Great Britain, which is now in its fifth year and which offers many useful lessons to others considering a similar project.<sup>112</sup> But the LAC took several years to develop and is a costly endeavour that requires significant levels of funding from the university and private donors.

Just as importantly, the LAC is operated and supported by a university and is located in a single community. There is no precedent for a teaching law firm that is operated by a legal regulator for the purpose of training future lawyers, and that if created in Alberta, would almost certainly have to operate in at least two jurisdictions (Calgary and Edmonton), with attendant extra costs in office space, equipment, maintenance, and salaries.

There is also the added consideration of finding the right people to operate the firm and oversee the activities of the bar applicants, who would number in the hundreds every year. The teaching law firm's "teaching lawyers" would have to possess an unusual collection of features:

- experience and expertise in serving low-income clients,
- an openness to innovation and technology,
- the talent and temperament to mentor and develop new legal talent, and
- the administrative skill to run a frugal law practice to professional standards.

If the law society wishes to pursue the establishment of a teaching law firm, it should do so with clear awareness that such a firm would very likely not be profitable or even break-even, and would require significant ongoing funding to keep afloat. It is not a project for the faint of heart.

But it is also a project that could, with sufficient support (including government funding, which would almost certainly be a prerequisite), completely reinvent the process of providing bar applicants with supervised practice in Canada, and perhaps even worldwide.

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<sup>112</sup> See: "Legal Advice Centre - Our teaching law firm," Website of Nottingham Trent University, <https://www.ntu.ac.uk/c/legal-advice-centre>; "First 'teaching law firm' celebrates benefits to students and clients," Neil Rose, *Legal Futures*, Mar. 14, 2019: <https://www.legalfutures.co.uk/latest-news/first-teaching-law-firm-celebrates-benefits-to-students-and-clients>



## Appendix B: Licensing and Competence in Other Professions

Here is a brief overview of how Alberta professions other than law approach some of the same issues of licensing and continuing competence with which this report grapples at length.

### 1. Accountants

In Alberta, Chartered Professional Accountants provide financial reporting and consulting services for organizations and individuals. As of July 1, 2015, Alberta's three previous regulated accounting designations (Chartered Accountants, Certified General Accountants, and Certified Management Accountants) were merged into a single designation, Chartered Professional Accountant (CPA).<sup>113</sup>

#### **Licensing**

Under Alberta's *Chartered Professional Accountants Act*<sup>114</sup> and Chartered Professional Accountants Regulation,<sup>115</sup> "Chartered Professional Accountant" (CPA) is a protected title, so practitioners who wish to use this title must register as a member of the Chartered Professional Accountants Alberta (CPA Alberta) in order to provide professional accounting services such as audits or review engagements. Registration requires:

1. A bachelor's degree in any discipline with specific subject area coverage.
2. Successful completion of the CPA Professional Education Program (CPA PEP), which includes online facilitated-learning modules and interactive group-learning sessions.
3. Successful completion of relevant practical work experience.
4. Successful completion of the Common Final Examination (CFE).

CPA licensing in Alberta therefore mirrors closely the current licensing system for Alberta lawyers, including a "Professional Education Program" with a very similar name to CPLED's Practice Readiness Education Program. The only difference is the inclusion of a "Common Final Examination," which Alberta does not administer.

#### **Competence**

CPA Alberta defines "Continuing Professional Development" as learning that develops and maintains professional competence to enable members to continue to perform their professional roles. Any learning and development that is relevant and appropriate to a member's work, professional responsibilities, and growth as a CPA will qualify for CPD.<sup>116</sup>

Each member of CPA Alberta is required to make a "CPD Declaration" annually. Each member must complete 120 hours of CPD over a three-year rolling cycle, of which 60 hours must be verifiable (with supporting documentation that provides third-party verification of the CPD

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<sup>113</sup> <https://alis.alberta.ca/occinfo/certifications-in-alberta/accountant/>

<sup>114</sup> <https://www.qp.alberta.ca/documents/Acts/c10p2.pdf>

<sup>115</sup> [https://www.qp.alberta.ca/documents/Regs/2015\\_084.pdf](https://www.qp.alberta.ca/documents/Regs/2015_084.pdf)

<sup>116</sup> <https://www.cpaalberta.ca/Members/CPD-Reporting>

learning activities); four of those verifiable hours must be in the area of professional ethics. Twenty hours of CPD, including 10 verifiable hours, must be completed each year.

Members have until March 1 each year to report their CPD. Failure to do so will result in a \$150 penalty. Failure to report CPD and pay the penalty within 30 days will result in suspension. Failure to report CPD and pay penalties within 60 days of suspension will result in membership being cancelled and ineligibility for continuing registration.

CPA Alberta conducts a random audit of members' CPD reporting each year. In addition to the random selection, members may be individually selected for an audit of their CPD learning activities. Of those members randomly selected for audit of their CPD compliance, 25% are required to produce source documentation evidence of CPD, while the remaining 75% are required to report on learning activity details. Members individually selected for audit of their CPD compliance typically are required to produce source documentation evidence of CPD.

## 2. Engineers

The Association of Professional Engineers and Geoscientists of Alberta (APEGA) regulates professional engineers in Alberta.

### *Licensing*

To become a professional engineer in Alberta, an applicant must:<sup>117</sup>

1. Graduate from a university program that is recognized by the Canadian Engineering Accreditation Board<sup>118</sup> or a related program that the APEGA Board of Examiners<sup>119</sup> considers to be equivalent.
2. Complete 48 months of engineering work experience. To establish this, an applicant must complete a Work Record Validator List (WRVL)<sup>120</sup> and a Competency-Based Assessment Tool (CBAT).<sup>121</sup>
3. Provide valid references. References confirm that the applicant was employed for a given period and position, while Validators review and score the competencies that the applicant has claimed for that position.<sup>122</sup>

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<sup>117</sup> <https://www.apega.ca/apply/membership/professional-member>

<sup>118</sup> <https://engineerscanada.ca/accreditation/accreditation-board>

<sup>119</sup> <https://www.apega.ca/about-apega/boards-and-committees/boe>

<sup>120</sup> <https://www.apega.ca/apply/membership/licensee/work-experience/engineers/competency-based-assessment-tool/work-record-validator-list>

<sup>121</sup> <https://www.apega.ca/apply/membership/licensee/work-experience/engineers/competency-based-assessment-tool>

<sup>122</sup> <https://www.apega.ca/apply/membership/professional-member/work-experience/engineers/competency-based-assessment-tool/work-record-validator-list>

4. Achieve a passing grade on the National Professional Practice Exam, offered five times a year. The NPPE consists of 110 multiple-choice questions based on six subject areas and must be completed in 2.5 hours.<sup>123</sup>
5. Show proof of Canadian citizenship or permanent resident status.
6. Demonstrate competency in written and spoken English.
7. Demonstrate good character and reputation.

### **Competence**

APEGA members must claim at least 240 professional development hours over three years, with an average of 80 hours per year, in at least three of the six categories listed in the Continuing Professional Development Program guideline.<sup>124</sup> Members submit their CPD hours by logging into the APEGA Member Self-Service Centre.

APEGA's Continuing Professional Development Program Manual<sup>125</sup> provides more details about ongoing competence requirements. Members are required to maintain a written record of CPD activities, report their CPD hours annually, and submit a detailed activity record on request. The six categories in which a member may earn credit for professional development are professional practice, formal activity, informal activity, participation, presentations, and contributions to knowledge.

Members are in breach of their compliance with APEGA's continuing development requirements if they fail to report their annual summary of CPD hours by the anniversary of their membership renewal date, if they report fewer than 240 professional development hours over a three-year membership cycle or in fewer than three separate CPD categories each reporting year, or if they fail to provide a written, detailed record of their CPD activities (including supporting documentation) when requested.

### **3. Doctors**

Family physicians in Alberta are licensed by the College of Physicians and Surgeons of Alberta (CPSA) to diagnose and treat patients' physical and mental diseases, disorders, injuries, and other health-related problems.<sup>126</sup> To practice medicine in Alberta, general practitioners and family physicians must be registered members of the CPSA and be issued a practice permit.<sup>127</sup>

Physicians and surgeons are licensed by the CPSA to assess the physical, mental and psychosocial condition of individuals to establish a diagnosis, assist individuals to make informed choices about medical and surgical treatments, treat physical, mental and

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<sup>123</sup> <https://www.apega.ca/apply/membership/exams/national-professional-practice-exam-nppe>

<sup>124</sup> <https://www.apega.ca/members/cpd/>

<sup>125</sup> [https://www.apega.ca/docs/default-source/pdfs/cpd.pdf?sfvrsn=f9057e60\\_2](https://www.apega.ca/docs/default-source/pdfs/cpd.pdf?sfvrsn=f9057e60_2)

<sup>126</sup> <https://alis.alberta.ca/occinfo/occupations-in-alberta/occupation-profiles/family-physician/>

<sup>127</sup> <https://open.alberta.ca/publications/general-practitioner-and-family-physician>

psychosocial conditions, and promote wellness, injury avoidance, and disease prevention, among many other activities.

### **Licensing**

Family physicians in Alberta must successfully complete pre-medicine studies at the university level, a three- or four-year medical doctor (MD) degree program at an accredited university, and a post-graduate training program in family medicine (minimum two years to complete).

Registration as a physician or surgeon requires successful completion of an approved medical doctor or doctor of osteopathic medicine degree, two years of acceptable postgraduate training in family medicine or four or more years of acceptable post-graduate training in a specialization, and completion of approved examinations.

### **Competence**

The CPSA requires doctors to continue acquiring knowledge and skills throughout their careers in order to maintain and improve the quality of their practice, Alberta physicians must be enrolled in one of two approved CPD programs: Mainpro+ at the College of Family Physicians of Canada (CFPC),<sup>128</sup> or Maintenance of Certification (MOC) at the Royal College of Physicians and Surgeons of Canada (RCPSC).<sup>129</sup>

Mainpro+ serves three key functions: to provide CPD participation, guidelines, and standards for Canadian family physicians, to enable family physicians to conveniently track and monitor their CPD participation, and to ensure high-quality, ethical CPD programming through a rigorous peer-review certification process.

Active CFPC members must submit a minimum of 250 credits in each five-year cycle, with a minimum of 25 credits per year. Half of the 250 credits must be “Mainpro+ certified” in any category, including:

- Group learning (conferences, rounds, journal clubs, ALS programs, AAFP prescribed credits)
- Self-learning (online programs, Linking Learning exercises, the CFPC Self-learning Program, CFP Mainpro articles)
- Assessment (practice audits, QA programs, Linking Learning to Assessment, Provincial Practice Review)

Online credit reporting is mandatory for all members. CFPC members are advised to keep their certificates of completion for certified events for a minimum of six years in case they are selected for a random audit.<sup>130</sup> There is a six-week grace period following the cycle end date during which members who have not yet fulfilled their cycle requirements have the opportunity to report their outstanding credits.

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<sup>128</sup> <https://www.cfpc.ca/en/education-professional-development/mainpro/mainpro-overview>

<sup>129</sup> <http://www.royalcollege.ca/rcsite/cpd/maintenance-of-certification-program-e>

<sup>130</sup> [https://portal.cfpc.ca/resourcesdocs/uploadedFiles/CPD/Mainpro\\_-\\_Maintenance\\_of\\_Proficiency/CPD\\_Providers\\_and\\_Planners/Mainpro-Certification-Standards.pdf](https://portal.cfpc.ca/resourcesdocs/uploadedFiles/CPD/Mainpro_-_Maintenance_of_Proficiency/CPD_Providers_and_Planners/Mainpro-Certification-Standards.pdf)

If credit requirements are still not met by the end of the six-week grace period, the Mainpro+ participant will be placed in a two-year temporary cycle. Individuals who fail to comply with the CFPC's requirements related to CPD and/or annual membership fees shall have their CFPC membership and the right to use any CFPC Special Designation suspended or revoked.<sup>131</sup>

The MOC program requirements<sup>132</sup> are broadly similar to those of Mainpro+. Interestingly, the RPSPC waived its MOC Program requirements for 2020 in light of the pandemic.<sup>133</sup>

#### 4. Architects

The Alberta Association of Architects (AAA) is a self-governing professional association legislated by the *Architects Act*. The AAA serves the public and its members by administering the standard of practice for the professions of architecture and interior design in Alberta.<sup>134</sup>

##### **Licensing**

To become a registered architect with the AAA, a person must first complete an architectural degree program accredited by the Canadian Architectural Certification Board (CACB) and apply to the AAA Internship in Architecture Program (IAP). Once approved, the person becomes an "Intern Architect, AAA."

The intern architect selects a mentor to advise and guide them through the IAP and a supervisor (a registered architect) to direct their work. The intern is required to complete and log 3,720 hours of work experience using the Canadian Experience Record Book (CERB) under the supervision of a RA. Upon completion of 2,800 hours of work experience, the intern is eligible to write the Examination for Architects in Canada, which is offered every November.

Upon completion of the national and provincial registration requirements, the intern applies to become a Registered Architect with the AAA. All new AAA members must complete the *Architects Act* course as part of licensure requirements. Finally, they must pass an oral interview to validate their experience, professional judgement, and competency to practice architecture in Alberta.<sup>135</sup>

##### **Competence**

The AAA's Professional Development Program ensures AAA members, who have exclusive statutory rights of practice, can respond to professional obligations to clients, the public, and the profession. This program ensures that members remain current with the technologies, business practices, and methods of their profession. The *Architects Act* and General Regulation requires members of the AAA to participate in and comply with the PD Program.

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<sup>131</sup> [https://cmelearning.usask.ca/accreditation1/Mainpro\\_User-Manual\\_ENG\\_Final.pdf](https://cmelearning.usask.ca/accreditation1/Mainpro_User-Manual_ENG_Final.pdf)

<sup>132</sup> <http://www.royalcollege.ca/rcsite/cpd/moc-program/moc-framework-e>

<sup>133</sup> <http://www.royalcollege.ca/rcsite/documents/about/faq-impact-covid-19-moc-dues-e>

<sup>134</sup> <https://www.aaa.ab.ca/The-Association/Who-We-Are/AAA-Role>

<sup>135</sup> <https://www.aaa.ab.ca/Registration-Licensing/Registered-Architect/Pathway-to-Registration> See also the AAA Road Map to Registration: <https://www.aaa.ab.ca/getattachment/d0b5c9de-1c59-4ca6-8486-0db0234dbf9d/RA-Registration-Pathway>

The pandemic has brought about some temporary changes to the AAA's mandatory PD requirements,<sup>136</sup> but generally, the current PD Program is based on a 24-month cycle, beginning July 1, 2018 and ending June 30, 2020. Members are required to complete and report 70 learning hours (LHs) by December 31, 2020. Learning activities must be recorded in the reporting period in which they were earned.

Learning activities are categorized as either structured or unstructured. Structured learning activities are defined as organized educational sessions that teach the fundamental knowledge and skills related to the professional practices of architecture and interior design. Members must complete and report a minimum of 35 structured LHs each reporting period.

These learning activities can occur in-person or online and include conferences, courses, lectures, seminars, webinars, and workshops. All structured learning activities must be a minimum of one hour in length and be supported by proof of participation. Members acting as a mentor as part of the AAA Intern Program can report up to 4.0 structured LHs per reporting period.

Unstructured learning includes in-person and distance learning activities that may take place outside the office or classroom and are typically more informal in nature. Proof of participation is not required when reporting unstructured learning activities. Unstructured learning activities cannot be part of normal work/practice requirements.

The different categories of unstructured learning, and their respective maximum number of hours allowed per reporting period, include committee meetings (maximum 25 LHs), discussion groups (25 LHs), presenting and teaching (25), scholarly research (45), professional writing (25), reading (15), and distance education and in-person learning (no maximum).

A separate mandatory professional development protocol applies to new architects.<sup>137</sup>

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<sup>136</sup> <https://www.aaa.ab.ca/Professional-Resources/Professional-Development/Professional-Development-Program>

<sup>137</sup> <https://www.aaa.ab.ca/CMSPages/getfile.aspx?guid=7f61cde8-9dad-4744-ad29-b158f2e63ba5>

## Acknowledgments

The contributions, insights, and assistance of the following individuals were invaluable to the completion of this report, and the author would like to acknowledge them with profound gratitude.

Ida Abbott, San Francisco, CA

Gina Alexandris, Law Practice Program, Toronto

Priya Bhatia, Law Society of Ontario, Toronto

Christine Sanderman, Legal Education Society of Alberta, Calgary

Jane Ching, Nottingham Trent University, Nottingham, UK

Logan Cornett, Institute for the Advancement of the American Legal System, Denver, CO

Zach DeMeola, Institute for the Advancement of the American Legal System, Denver, CO

Michele DeStefano, University of Miami Law School, Miami, FL

John Eamon, Alberta Lawyers Insurance Association, Calgary

Yves Faguy, Canadian Bar Association, Ottawa

Jennifer Flynn, Principia Assessments Ltd., Edmonton

Jennifer Freund, Law Society of Alberta, Calgary

Neil Hamilton, St. Thomas Law School, Minneapolis

Ian Holloway, University of Calgary Law School, Calgary

Paul Maharg, Fintry, Scotland, UK

Susan Manch, Winston & Strawn, Washington, DC

Kara Mitchelmore, CPLED, Calgary

Kendall Moholotny, Law Society of Alberta, Calgary

Ian Nelson, Hotshot, New York City

Crispin Passmore, Passmore Consulting, London, UK

Stacy Petriuk, JSS Barristers, Calgary

Laura Pinkney, Nottingham Trent University, Nottingham, UK

Len Polsky, Law Society of Alberta, Calgary

Aviva Rotenberg, Canadian Bar Association, Ottawa

Kyla Sandwith, deNovo Inc., Calgary

Katie Shea, Law Society of Alberta, Calgary



Julie Sobowale, Law Society of Saskatchewan, Regina

Ken Warren, Gowling WLG, Calgary

Victoria Watkins, Osgoode Hall Law School, Toronto

Paul Wood, Kelowna, BC

A special debt of gratitude is owed to Law Society of Alberta Deputy Executive Director Cori Ghitler, whose contributions were so significant that this report simply could not have been completed without her participation.