REIMAGINING FAMILY JUSTICE IN SASKATCHEWAN 2.0

The Ninth Annual Dean's Forum on Access to Justice and Dispute Resolution

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EXECUTIVE SUMMARY

For the 9th meeting of the Dean's Forum on Dispute Resolution and Access to Justice (the "Dean's Forum"), our team of student researchers had the opportunity to explore the topic of independent legal advice ("ILA") in the context of family justice in Saskatchewan. Previously addressed in both the 2016 and 2020 Dean's Forum, past focal points included accessibility of superior courts and court procedures in the 2016 Forum, as well as access to justice issues surrounding family court forms in the 2020 Forum. This year's topic focused on the role of ILA during property distribution on the dissolution of an intimate relationship.

In order to understand the purpose of ILA, we completed a two-part study of family justice in Saskatchewan. Firstly, we undertook a **macro scan of the current situation of family justice in Saskatchewan** in order to establish a list of existing innovations (see Appendix 2), alongside envisioning an aligned set of intentional changes that could lead to a desired potential future state of family justice in Saskatchewan. Secondly, we completed a **micro level scan which examined the role of ILA during family reorganizations.** To complete this task, we examined mediation, collaborative family law, trauma-informed practices, and financial barriers.

The objective of our policy discussion paper is to analyze the role that ILA serves during family reorganizations, and to determine if the requirement to obtain ILA is needed in Saskatchewan today. In our evaluation, we first began with an overview of the current legislation, jurisprudence, and relevant articles surrounding ILA. In order to evaluate how ILA fits in this process, we then next consulted with stakeholders within the legal community and with those who work alongside families in other capacities.

This paper acts as a point of departure for consultees to explore the complex relationship that ILA has within the family justice system. We hope that this exploration of the ILA landscape can allow for the opportunity to advance innovations and initiatives that can better serve the needs of families in Saskatchewan.

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INTRODUCTION

When our research first began, we expected a straightforward conclusion if ILA is still needed. After researching case law, reviewing articles, and consulting with stakeholders in the community, it became evident just how complex the role of ILA truly is. **Although the landscape of family law looks significantly different than it did when the legislation was first introduced in the 1980s, ILA still has a role in helping families resolve family law issues following separation. However, our paper will largely focus on *how* ILA should work, instead of *if* ILA should be required.**

Presently, the ILA requirement does not fit cohesively into the broader context of a family breakdown. Within this space, lawyers have inherited roles and responsibilities which has created unintended consequences. An exploration of the present landscape will be provided in order to guide and help align future practices with early, out-of-court dispute resolution practices, in family law.

This paper will begin with a historical overview of the legal landscape in Saskatchewan prior to family property legislation. Next, the implementation of the relevant legislation will be discussed. Additionally, tensions surrounding ILA, for both spouses and the lawyers, will be examined. Following this, the current landscape of ILA will be considered. This part will include a reflection on the current family law initiatives which may serve as a basis to improve the function of ILA. Collaborative law, mediation, trauma-informed practice, and the financial barriers of legal advice will be discussed with the perspective of how these can resolve tensions around ILA. Finally, this paper will close with a list of appendices.

DISCUSSION

I. Contextual Overview: Why Independent Legal Advice?

Legal Landscape in Saskatchewan Prior to Family Property Legislation

When exploring the objective of ILA, it is important to consider the purpose it originally aimed to serve.[1] Prior to 1978, Saskatchewan operated under a very different property regime than today. At the time, title to family property was typically held by the husband, which gave him full ownership regardless of each party's contributions.[2] **Without any existing legislation to govern property distribution upon the dissolution of a marriage, women were forced to rely on the common law in to seek an equitable outcome.** This meant that after the marriage was dissolved, a wife could end up with nothing.

In 1973, the Supreme Court of Canada considered a wife's right to matrimonial property on the dissolution of marriage in *Murdoch v Murdoch*.[3] However, clear guidance was not given until five years later, when a similar case came before the same court, in *Rathwell v Rathwell*.[4] The couple decided to start a farm, each contributing about $700 to a joint bank account at the beginning of their marriage.[5] This money was used to purchase farmland, in which the title was registered solely in Mr. Rathwell's name. Over the next twenty-some years, the couple worked

[1] The authors of this paper undertook a scan of Westlaw and Hansard to research the original purpose of requiring ILA for interspousal contracts. This research was used to frame the questions we ask during consultations with stakeholders from the legal community. It is important to note that *The Children's Law Act*, SS 1997, c C-8.2, *The Family Maintenance Act,* SS 1990, c F-6.1, and *The Divorce Act,* RSC 1985 C. 3, do not require ILA, and this paper will focus on the ILA requirement set out in *The Family Property Act*.
[2] In order to overcome this, the applicant had to prove unjust enrichment through the common law. This was extremely onerous and required litigation to achieve.
[3] *Murdoch v Murdoch*, [1975] 1 S.C.R. 423 [*Murdoch*].
[4] *Rathwell v Rathwell*, [1978] 2 S.C.R. 436 [*Rathwell*].
[5] *Rathwell* at para 7.

together as a team on their grain-farm. Mr. Rathwell harvested the lands while Mrs. Rathwell did the chores.[6] By all accounts, Mr. and Mrs. Rathwell functioned as a team.

The couple had marital difficulties, which ultimately led to their separation in 1967. Mrs. Rathwell "commenced an action in the Saskatchewan courts for declaration that she had an interest in one-half of all real and personal property owned by her husband and for an accounting of all income and benefits returned by the property."[7] However, the trial judge dismissed the action, finding there was no "agreement between the parties that Mrs. Rathwell was to have a proprietary interest in the farm assets," and that she, "made no contribution of the real or personal farm assets by way of labour."[8] Mrs. Rathwell was therefore entitled to receive no property. Finding this to be unequitable, the Court of Appeal for Saskatchewan reversed the trial decision and awarded Mrs. Rathwell one-half interest in all the lands.[9] Mr. Rathwell appealed this decision.

On appeal, the Supreme Court of Canada upheld the appeal decision and dealt with the issue of a wife's right to matrimonial property on the dissolution of marriage at length.[10] Justice Dickson noted that in earlier days, the view on marriage was that a "man and woman are one and that one is the man."[11] The introduction generally of the *Married Women's Property Act* made it "possible for wives to hold separate property but did little otherwise to improve the lot of married women."[12] Justice Dickson identified that "the need for certainty in matrimonial property disputes is unquestionable, but it is a certainty of legal principle hedging in a judicial discretion capable of

[6] *Ibid* at para 12.
[7] *Ibid* at para 15.
[8] *Ibid*.
[9] *Ibid*.
[10] *Ibid*.
[11] *Ibid* at para 2.
[12] *Ibid* at para 19.

redressing injustice and relieving oppression."[13] He dismissed the appeal and delivered a strong message regarding matrimonial property:

> In one sense it was a family farm; in another, a business; in another it was a way of life. The property was all operated as one family unit by Mr. and Mrs. Rathwell working together.[14]

Ms. Rathwell was awarded half of all property the couple acquired during their marriage.

Legal Landscape on Implementation of Family Property Legislation

In the same year that the Supreme Court of Canada decided *Rathwell*, Saskatchewan developed corresponding legislation to ensure women's property rights would remain protected after a marriage breakdown. *The Matrimonial Property Act*[15] was adopted in 1979 and came into force one year later.[16] Echoing Justice Dickson's message, the *Act* recognized "that marriage is a partnership of equals in which contributions and benefits are shared."[17] Section 20 of the *Act* stated:

> The purpose of this Act...is to recognize that child care, household management and financial provision are joint and mutual responsibilities of spouses and that inherent in the marital relationship there is joint contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities that entitles each spouse to an equal distribution of matrimonial property, subject to the exceptions, exemptions, and equitable considerations mentioned in this *Act.*[18]

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[13] *Ibid* at para 19.
[14] *Ibid* at para 45.
[15] *The Matrimonial Property Act*, SS 1979, c M-6.1. Note that *The Matrimonial Property Act* was repealed in 1998 and was replaced by *The Family Property Act*, SS 1997, c F-6.3. Both statutes will be considered in this paper.
[16] Law Reform Commission of Saskatchewan, *The Matrimonial Property Act: Selected Topics: Report to the Minister*, (1996) at 2.
[17] Law Reform Commission of Saskatchewan, *The Matrimonial Property Act* at 2.
[18] *The Matrimonial Property Act*, s 20.

Saskatchewan's implementation of this *Act* was considered ground-breaking legislation and was the first province in Canada to enact such a law.[19] However, the new legislation did not come without problems. In the Law Reform Commission of Saskatchewan's 1996 Report to the Minister, the *Act* was said to embody straightforward concepts, but was flawed in certain respects regarding implementation.[20] The report identified that "[w]hen the legislation was adopted, there were no tested models to assist in making these decisions."[21] Since its implementation, some revisions have been made, such as providing more inclusive legislation for common law partners. Eventually repealed in 1998 as *The Family Property Act,*[22] the current legislation is largely the same today as when it came into force over forty years ago.

Although not identified in any formal Saskatchewan report, issues have arisen surrounding Part VII of *The Family Property Act.*[23] Part VII includes the necessary requirements for parties to follow when executing interspousal contracts.[24] **There are two contentious pieces in this process: firstly, the mandate requiring each party to seek the signature of two independent lawyers, and secondly, the ambiguous concept of what independent legal advice truly is.**

Barriers that the ILA Requirement Currently Create for Spouses

The first barrier to access to justice in the current interspousal contract regime is the **requirement that each spouse seek their own independent legal advice.** As the Law Reform

[19] Law Reform Commission, *supra* note 15 at 2.
[20] *Ibid*.
[21] *Ibid*.
[22] *The Family Property Act*, SS 1997, c F-6.3 [*Family Property Act*].
[23] *Family Property Act*, Part VII.
[24] Under section 2(1) of *The Family Property Act,* interspousal contracts are defined as a binding contract made in accordance with s. 38 of the *Act*. An interspousal contract is a written agreement between two spouses that generally deals with the possession, ownership, or distribution of family property. The contract can also be entered prior to the commencing a relationship, during, or after the relationship has ended.

Commission of Saskatchewan has noted, the policy of the *Act* "has achieved the general goals it was designed to serve. It reflects contemporary community values, and usually produces results most people regard as fair and equitable."[25] The intention behind requiring each party to seek ILA was to prevent a vulnerable party (typically the wife) from having to sign an interspousal contract that was drafted by the lawyer of the advantageous party (typically the husband). This, of course, would protect the vulnerable party from entering into a binding agreement that might forfeit property rights they were otherwise entitled to. Having two separate lawyers each consider their client's property rights on the dissolution of marriage was intended to serve as individual counsel would in a typical commercial contract.

However, this requirement has increasingly become a barrier in access to justice for some couples. There is, of course, the issue of increased cost in services. **By requiring two separate lawyers to ensure the agreement is binding this essentially doubles the couple's costs.** But there are other considerations as well. Not only does each spouse have to access a separate lawyer, but the lawyers also cannot belong to the same firm. In the 1980 Saskatchewan Court of Queen's Bench case of *Crohn v Crohn,*[26] the Court established that if one lawyer at the firm is acting for one of the spouses, all the lawyers at that firm are said to be acting of that spouse for the purposes of s. 38(2). Spouses in rural and remote Saskatchewan may be disproportionately affected by this requirement as many communities only have one accessible law firm.

The second issue with the current structure of interspousal contract requirements is the **unclear concept of ILA itself.** In fact, s. 38 of *The Family Property Act*[27] does not specifically mandate ILA per se. Rather, there is a requirement that each spouse:

has acknowledged, in writing, apart from the other spouse, that he or she:

[25] Law Reform Commission, *supra* note 15 at 2.
[26] *Crohn v Crohn*, 1980 CarswellSask 160 [*Crohn*].
[27] *Family Property Act, supra* note 21 at s. 38.

(i) is aware of the nature and the effect of the contract;
(ii) is aware of the possible future claims to property he or she may have pursuant to this Act; and
(iii) intends to give up those claims to the extent necessary to give effect to the contract.[28]

"The problem with s. 38 of *The Family Property Act* is that it merely requires [individuals] are aware of their obligations, then be signed by the client, then signed off. The lawyer doesn't have to give legal advice--there is no standard."

Family Justice Consultee

This lack of clarity has created issues within family law in Saskatchewan. The current legislation imposes the requirement that the client must acknowledge that they understand their rights **before a lawyer other than the lawyer** who acted in the matter of the other spouse, or before whom the acknowledgement is made by the other spouse.[29] Therefore, legal advice may not officially be required to legitimize an interspousal contract.

This requirement has led to some confusion in its practicality. In the 1989 Court of Appeal of Alberta case, *Brosseau v Brosseau*, the Court explained that "[t]he term 'independent advice' is not one of precision. It may cover the situation in which a lawyer explains, independently, the nature and consequences of an agreement... It may extend, as it does in cases of undue influence, to the need to give informed advice."[30] The Court went on to state, "We doubt that any hard and fast rule can be laid down and the peculiar circumstances of this case are not appropriate for the

[28] *Ibid*, at s. 38(1).
[29] *Ibid*, at s. 38(2).
[30] *Brosseau v Brosseau*, 1989 ABCA 241 [*Brosseau*].

formulation of such a rule, in any event."[31] **This commentary has highlighted a crucial issue within family law: there is no formal standard for what constitutes ILA.** In order to execute a binding agreement, parties are currently required to seek the signature of two separate lawyers but are not given any overview on what to expect as advice or information. This well-intended requirement has led to unclear guidelines on what the lawyer's role is under s. 38, and what purpose the mandate serves in an era where legal information about family property rights is easy to find.

II. What are the Unintended Risks Created by s. 38?

Risks for Spouses in Not Adhering to s. 38 of The Family Property Act

Various issues with s. 38 of *The Family Property Act* have been identified. However, there is also risk for spouses who do not adhere to the requirements as set out in s. 38. **One potential risk is that if spouses do not execute their agreement in compliance with the *Act*, either spouse may apply to the court to have their property divided based on the regime set out in the *Act*, rather than how the family property was divided in the agreement.**[32] Although under s. 40 of the *Act*, the court may "take into consideration any agreement, verbal or otherwise, between spouses that is not an interspousal contract and may give that agreement whatever weight it considers reasonable,"[33] there is no guarantee that any agreement made outside the parameters of s. 38 will be considered enforceable. Therefore, if spouses draft and sign an agreement in which both parties intend to be binding, but do not formalize the contract before two separate lawyers, it is unenforceable before the court.

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[31] *Brosseau*, at para 21.
[32] Legally married couples must make the application before they are formally divorced. Common law spouses are required to make the application within 24 months of being separated.
[33] *Family Property Act*, *supra* note 21 at s 40.

When the requirement of ILA was first introduced, the landscape of family law was much different than it is today.

> **"There weren't places people could go to get information to get rights or remedies. There were really only lawyers. You couldn't go pick up pamphlets, you couldn't go see a mediator, or ones who were familiar with family law. A huge void of accurate information or service providers. In this context, the role of ILA in ensuring (if there is only one lawyer, and say it was the husband's), we want to make sure the other person was aware of their rights. They wouldn't have known otherwise. Now, good and reliable legal information is pretty easy to find on the FamLi website, through Justice Canada, and on the Ministry's website."**
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> *Family Justice Consultee*

With more accessible resources, individuals are better able to understand their property rights. They may draft an agreement based on an online template[34], attend mediation, or a combination of both. However, the written agreement will still not be enforceable before the court without adhering to the requirements under s. 38 of *The Family Property Act*. This may be confusing for individuals, especially if they have attended mediation with a mediator who has training in family law. **Although the landscape of legal information has changed considerably, the legislation has not reflected this growth.**

Risks for Lawyers in Providing ILA

Spouses are not the only population that should be considered during a risk analysis of s. 38 of *The Family Property Act.* Lawyers attract risk when providing independent legal advice to

[34] The Ministry of Justice developed Self-Help Kits which can assist spouses in drafting separation agreements.

clients. This risk largely stems from the ethical responsibility as set out in the *Code of Professional Conduct.*[35] Under the *Code*, lawyers in Saskatchewan are obligated to "perform all legal services undertaken on a client's behalf to the standard of a competent lawyer."[36] In addition, Rule 3.4-27 of the *Code* includes a general overview of what ILA should entail, however, this isn't specific to ILA in interspousal agreements.[37] **What is problematic about the vague standard that the *Code* provides is that there is not a true standard for what ILA means in the context of interspousal contracts.** This is troublesome because without any sort of standard or guidelines, ILA may range from "rubber-stamping" an agreement that was drafted by the client, or to the lawyer writing the agreement themself. Where it becomes an issue for lawyers is if clients are improperly disclosing their property. This is common, mistakenly or purposefully, because there are many considerations, such as, *inter alia*, real property valuations, tax exemptions, and financial investments. If a lawyer reviews an interspousal agreement without making reasonable inquiries toward full disclosure, that lawyer may be open to a claim of professional negligence. As reiterated in the recent Saskatchewan Court of Queen's Bench case *Luther v Luther*, "If the elements of s. 38 are met on the face of the agreement, the onus to prove an invalid agreement lies upon the party asserting that."[38] This means an interspousal contract that technically met the requirements under the *Family Property Act* still leaves room for the ILA lawyer to be sued.

This potential liability under the current structure of ILA under the *Family Property Act* has exasperated the issue of access to justice in family disputes. Many lawyers will only engage with an interspousal agreement if they have drafted it themself. Some firms do not offer the ILA

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[35] The Law Society of Saskatchewan, *Code of Professional Conduct* (1 July 2012; amendments current to 6 February 2021), online: <https://www.lawsociety.sk.ca/wpcontent/uploads/2020/03/codeofconduct13dec2019.pdf> [*SK Code*].
[36] *SK Code*, Rule 3.1-2.
[37] *Ibid*, Rule 3.4-27.
[38] *Luther v Luther,* [2019] SKQB 313, at para 16 [*Luther*].

service at all, since it is too risky. Clients looking to finalize their interspousal contracts under s. 38 of the *Family Property Act* will have to choose among fewer firms.

If a lawyer is solely providing ILA and is not involved with the larger framework of the agreement, the provision of the service is generally regarded as not being worth the liability. Even in situations of providing ILA, lawyers have a professional obligation to have sufficient knowledge of the client's situation and the extent of the family property in order to advise the client what they would be entitled to under the *Act* and advise the client what they are giving up in the agreement. The lawyer also needs to be confident that the client understands the information or advice given by the lawyer. A lawyer is expected to follow a process of documentation that determines the rights and responsibilities provided within the agreement. To do the job well, a lawyer would have to invest significant time.[39] Competency, context, and client understanding remain as significant determinants of the successful delivery of ILA. British Columbia has stated that "When giving independent legal advice, it is important to go much further than explaining the legal aspects of the matter and assessing whether the client appears to understand your advice and the possible consequences."[40]

Communication can itself serve as a barrier to the client's understanding of a lawyer's advice and the related documentation, especially where language or disabilities are considerations within. Lawyer liabilities brought about by the ILA process, along with the pressures faced by families as they 'reconfigure,' together acts as a tipping point towards the need to change the services provided to clients in the ILA landscape.

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[39] Lawyers' Insurance Association of Nova Scotia, "Independent Legal Advice" (24 February 2021), online: https://www.lians.ca/resources/risk-and-practice-management/risk-management/independent-legal-advice; *Webb v Tomlinson*, [2006] ON S.C. 18192 [*Webb*].

[40] Law Society of British Columbia, "Practice Resource: Independent Legal Advice Checklist"(23 February 2021), online: < https://www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/checklist-ila.pdf>

III. Summary of Independent Legal Advice under s. 38

The Matrimonial Property Act was an integral piece of legislation that ensured equitable treatment before the courts on the dissolution of a marriage. When repealed as *The Family Property Act*, common law partners became entitled to the same property rights. While the obligation of receiving ILA during a separation agreement was intended to protect vulnerable parties, the requirement has unintentionally created an access to justice barrier for many spouses.

IV. The Current Landscape of Independent Legal Advice in Saskatchewan

The ILA requirement is a complexity that may be problematic in how it interacts with settlements and the reorganization of families. ILA often stands as a rights-based assessment of settlements and responsibilities. **Even when the negotiations between past partners are co-operative, the restructuring of family relationships can still be complex, leaving participants vulnerable to fear and worry.** Consultations with clients should align with the expectations and needs of a family's circumstances so that a successful process can occur. Doing so may shift away from the rights-based assessment prescribed by the function of ILA, and towards a process that does not derail the decision-making process of the family involved.

> **"The independent legal advice requirement often gets people off track because it is based upon a rights-based assessment of entitlements and responsibilities. The law may not fully reflect what a family is going through. For independent legal advice objectives to be met, there needs to be more balanced ways to consider the objectives of the family."**
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> *Family Justice Consultee*

As it was intended with the introduction of the ILA requirement, there remains a need to account for individuals of vulnerable demographics and circumstances, where a high degree of integrity and professionalism is required for the duty of care for these individuals. **The vulnerable demographics emphasized in the initial intentions of the ILA process, however, are argued to be placed at a disadvantage in reality.** There is a perceived fallacy that ILA protects the vulnerable party.[41] If parties sign a separation agreement without ILA having occurred, and the negotiation is not in the best interest of one party, then the court will view this agreement as a contract and may set aside the contesting party's claim in the absence of recommended ILA. If ILA does occur for the agreement and individuals complete an agreement that is not in the best interests of one party as a result of the more powerful party having secured the ILA principal, then there is no recourse to action because the ILA has occurred. If there is an issue with the ILA agreement, the disadvantaged party is expected to take up their concern(s) with the principal lawyer. There is a discontinuity in the intentions of ILA's initial application and the contemporary consequences that result from its application or absence in separations.

> **"There is no ILA police out there, and a lot of people strike their own deals."**
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> *Family Justice Consultee*

For individuals of vulnerable demographics and circumstances, a high degree of integrity and professionalism is required for the duty of care for these individuals. If lawyers seek minimal background information and context, this may leave both parties to be without the knowledge or trust that is often required in matters of family law disputes. ILA is argued to provide the "best

[41] Interview of Family Justice Consultee (19 February 2021).

evidence" to determine that the free will of participants is not compromised,[42] but the onus then shifts to the party who received ILA to explain why the agreement should still be overturned. If ILA is adapted according to its stated intentions, it still must be shown how it can serve the needs of vulnerable populations.

The ILA requirement is an opportunity to pause and make informed decisions, where the objectives of the agreement must stand to balance the objectives of the family. **ILA presently stands as a tension point between this balancing of objectives as a result of professional responsibilities and practical realities of such an agreement.** One such practical reality was described by a family lawyer stakeholder whose client is a mother who lives within the primary residence with her children, but the ILA agreement does not state this information. If she wants to keep the primary custody of her children, she finds herself willing to give up her financial property entitlement in order to maintain her parenting arrangement. Her husband is therefore capable of receiving an equal share of the custody arrangement, along with the taxation and financial benefits provided therein. The practical reality is that this agreement is not aligned with the legal equitability prescribed by the law, but its circumstances presently suit the unique and dynamic needs of the family. Should an ILA process be initiated without the context of those needs in mind, it is possible that the agreement will reflect a discord within the expectations and values of those involved with the marital relationship in question.

[42] Whaley, Kimberly A., "Independent Legal Advice: Risks Associated with "ILA" Where Undue Influence and Capacity are Complicating Factors" (2017) at 461, Advocates Quarterly 47.

Family Mediators in ILA

The involvement of family mediators could serve as an opportunity to advance the interests of clients, but these interests may, again, be 'outside the parameters' of legal entitlements. While no specific dispute resolution method appears to be able to alone address the objectives of ILA, some differ in their ability to "mitigate the impact of inequalities and offer other benefits to clients."[43] Upon being provided a poll of potential immediate changes that should made to the ILA landscape, a majority of key stakeholders suggested that more family-trained mediators should be a priority.[44] **A tension exists, however, in the practical realities of the role of mediation both in its benefits alone within the context of ILA, as well as in its coherence with subsequent agreements made by lawyers who were not involved with the mediation process.** Whether the mediation process brings about a beneficial result for ILA appears to require the effective hand-off between the mediator and the lawyer so that procedural and psychological interests can be accounted for.

Mediation remains a space of opportunity and integration into the family law context, but the realities of its involvement are of concern in its current state, such that the relationship between mediation and ILA is troubled. Mediation has a persuasive hold upon divorce and separation processes, but the disparity between successful mediation and the stage in which ILA is involved becomes a point of contention. Lawyers are legally obligated to advise their clients of mediation,[45] and judges have the ability to order mediation.[46] For ILA to be an effective

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[43] Keet, M., Wiegers, W., "Collaborative Family Law and Gender Inequalities: Balancing Risks and Opportunities" (2008) 46 *Osgoode Hall Law Journal* at 740.
[44] Stakeholders at A2J Network Meeting in Saskatchewan via Webex, 22 January 2021.
[45] As in Keet, M., Wiegers, W. See e.g. *Divorce Act*, RS.C. 1985 (2d Supp.), c. 3, s. 9(2); *The Children's Law Act*, 1997, S.S. 1997, c. C-8.2, s. 11 (1) (b).
[46] As in Keet, M., Wiegers, W. See e.g. *The Children's Law Act*, 1997, s. 10; *The Family Maintenance Act*, 1997, S.S. 1997, c. F-6.2, s. 15(1).

step in mediation, the parties need to openly communicate, and the concept of legal advice needs to come up early in the process of mediation. One of the key concerns around consensus-based processes is how to ensure that inequalities in bargaining power do not operate to the disadvantage of solely one party.[47] Where lawyers are not 'at the table' (such as is often the case with mediation), then the ILA retains important protective power. [48]

> **"There may be a tendency to send people off to mediators, the 'messy piece', but the 'messy piece' is the essential piece."**
> *Family Justice Consultee*

Collaborative Family Law in the Independent Legal Advice Process

The practice of collaborative law ("CL") in ILA could serve as a potential resolution to these disparities in process. CL allows for a "more extensive involvement of lawyers [and] has the potential to deal more effectively with vulnerable clients than current forms of either litigation or family mediation."[49]

Presently, the single ILA device does not fit cohesively into the broader context of families, and lawyers have inherited roles and responsibilities within this context that are difficult to deliver.

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[47] See Martha Shaffer, "Divorce Mediation: A Feminist Perspective" (1988) 46 U.T. Fac. L Rev. 162; Sandra A. Goundry, Yvonne Peters & Rosalind Currie, *Family Mediation in Canada: Implications for Women 's Equality: A Review of the Literature and Analysis of Data from Four Publicly Funded Canadian Mediation Programs* (Ottawa: Status of Women Canada, 1998) at 39-41.

[48] See Wanda Wiegers, "Economic Analysis of Law and 'Private Ordering': A Feminist Critique" (1990) 42 U.T.LJ. 170; Allison Diduck, *Law's Families* (London: LexisNexis UK, 2003) at 103-130; Keet, M., Wiegers, W., "Collaborative Family Law and Gender Inequalities: Balancing Risks and Opportunities" (2008) 46 *Osgoode Hall Law Journal* at 735.

[49] As in Keet, M., Wiegers, W., See e.g. Nancy J. Cameron, Collaborative Practice: Deepening the Dialogue (Vancouver: The Continuing Legal Education Society of British Columbia, 2004) at 156; Tesler, *supra* note 7 at 9. Shields, Ryan, and Smith tie the deficiencies of mediation to the absence of lawyers from the process. Shields, Ryan & Smith, *supra* note 6 at 30; Keet, M., Wiegers, W., "Collaborative Family Law and Gender Inequalities: Balancing Risks and Opportunities" (2008) 46 *Osgoode Hall Law Journal* at 740.

The network between mediators and lawyers could stand to be expanded upon both in the increase of service provisions for family mediation and in the engagement of service provider networks to develop a more coherent process for families to follow. While there exists an inclination to develop service delivery in family mediation broadly stated, the residual expectations involved in family dispute resolution processes becomes an impedance to resolution if there remains an incongruence between agreements made within a mediation context and the execution of an ILA. An impetus therefore exists to discuss the potential for involving solicitors in the mediation process in a manner that positively and actively engages clients with legal understandings throughout the process of mediation. The representation of clients involves a trust relationship that can be better informed through trauma-informed practice,[50] and the involvement of lawyer-assisted mediation could guide better outcomes with this awareness. The direct participation of lawyers in family mediation is particularly infrequent but could bring benefit to the process especially in circumstances involving legally complex matters.[51] **The use of strategies to build communication and collaboration between mediators and lawyers is an essential step to bringing about this type of process, but to do so would benefit a significant change in the family justice system.**[52] The ILA remains a single piece of the greater picture of the reorganization of the relationship for a family and the contents of its role are unable to consider the broader contexts of the relationship.

As is stated in the Cromwell Report, processes require change and adaptation to face the current realities of families in order to provide accessibility, efficiency, fairness and justice.[53] A

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[50] *See generally,* Golden Eagle Rising Society, "Trauma-Informed Legal Practice Toolkit" (2020), online (pdf): *The Law Foundation of British Columbia* < https://www.goldeneaglerising.org/photos/trauma-informed-legal-practice-toolkit>.
[51] Edwards, J., Sandys, A., Gaw, J., "Working with Solicitors in Mediation – A Mediator's Perspective" (2018).
[52] Edwards, J., Sandys, A., Gaw, J.
[53] Action Committee on Access to Justice in Civil and Family Matters, "Access to Civil & Family Justice: A Roadmap for Change" (2013).

present need exists to restructure legal processes that involve ILA to allow for the provision of distinctive and simplified procedures that correspond to the access barriers and dynamic needs of families involved in the process. Generally, laws and their legal requirements should reflect a "more consensual and supportive" approach to dispute resolution.[54]

There remains an incoherence in the system of family justice within the mechanisms of communication and corresponding services due to the variability of service networks provided for families.[55] A cohesive and ineffective network of services remain ultimately unresolved, due to the justice system working ineffectively between its formal and informal aspects, **which gives rise to a defined need for coordinated integrated service provisions and inter-organizational dynamics so that their roles can better serve as supports rather than impediments to those who seek legal services**.[56]

A more holistic approach that involves meaningful client and lawyer participation can serve as a turning point in the alignment of client expectations and the roles and responsibilities of legal professionals. An example of a holistic approach would be through a collaborative 'team' that could "work together with both parties in a joint effort to reach a satisfactory settlement that may include a parenting plan [and] an agreement on financial matters and support."[57] Such a process would turn away from the disparities created by ILA agreements that are directed towards rights-based assessments instead of being responsive to the complexities and expectations of clients.

[54] Action Committee on Access to Justice in Civil and Family Matters at 19.
[55] Canadian Bar Association, "Reaching Equal Justice" (2013) at 48.
[56] Canadian Bar Association, at 47.
[57] BC Family Innovations Lab, "BC Collaborative Roster Society Pro Bono Collaborative Divorce Project"

> **"A good lawyer is balancing two factors in particular:**
>
> **1. What is possible from a legal perspective**
>
> **2. What the client wants from the process."**
>
> *Family Justice Consultee*

"Unlike in traditional negotiation or litigation, CL [collaborative law] lawyers commit to a set of transparent values that emphasizes the importance of the emotional and participatory needs of their clients, the possibility of creative outcomes, and the interdependence of the parties."[58]

ILA and the Incorporation of Trauma-Informed Practice in Family Law

Another missing piece of the puzzle is the component of trauma-informed practice, in which services are provided to guide individuals interacting with the justice system in a manner that ensures they feel safe and respected.[59] **An essential aspect of improving the ILA landscape would be for legal professionals to receive trauma-informed training and to implement strategies that would assist in avoiding the exacerbation of trauma for clients.** For example, when an experience is distressing, such as a divorce, the stress response can cause individuals to have poor memory recall, which is a central factor in client interactions. This response is a result of the sympathetic nervous system being triggered, which causes shrinkage of the hippocampus, a centre for memory in the brain.[60] As a result, information may not be as obtainable during client discussions at certain times in the separation process, so it is essential to recognize the psychological limits of the client and that certain essential information may not be adequately

[58] Keet, M., Wiegers, W., "Collaborative Family Law and Gender Inequalities: Balancing Risks and Opportunities" (2008) 46 *Osgoode Hall Law Journal* at 739.
[59] "Trauma-Informed Legal Practice Toolkit", *supra* note 50.
[60] *Ibid*, at 20; Kim, EJ., Pellman, B., Kim, JJ. "Stress Effects on the Hippocampus: A Critical Review"

provided as a result of stress responses, such as the failure to disclose property or financial interests. Trauma-informed training allows for the identification of traumatic symptoms, and the adaptation of interviews and information gathering for ILA so that trauma can be accommodated.[61] Accommodating this process does not require that legal professionals assume the role of a therapist, but rather it emphasizes the delivery of legal services that are aligned with the interests of individuals interacting with the justice system and the reorganization of their relationships.

> **"Every file deals with trauma."**
> *Family Justice Consultee*

Whether the ILA protects vulnerable individuals as it was intended remains a matter of developing a more holistic, human-centred landscape in family justice to account for the meaningful participation of individuals in matters that affect their lives. The participation of clients could allow for a CL process with a collaborative emphasis guided by family professionals, such as a psychologist or counsellor, but at times it is not possible to have everyone be involved with a collaborative process if trauma has occurred between the parties. Similarly, if a client has a psychiatric disorder, such as a personality disorder, then the individual's rigid and unhealthy pattern of thinking may inhibit an effective information gathering process with their lawyer or the successful execution of CL. An awareness of these dynamics in a separation process is essential to the protection of a client's procedural and psychological interests to ensure that effective measures are taken to involve trained professionals and skillsets in legal practice. Accounting for

[61] "Trauma-Informed Legal Practice Toolkit", *supra* note 50 at 11.

these measures will assist with the fostering of client accountability and identifying a clearer understanding of the areas of development that may need to occur for an outcome to be reached.

What are the Financial Barriers and Solutions for ILA in Family Justice?

Financial barriers in accessing ILA remain a prominent issue in obtaining legal services, with lawyer fees creating challenges in access to justice for individuals seeking ILA. The CL process for separations provides financial accessibility through the involvement of lawyers with collaboratively trained family professionals and financial specialists. Rather than having a lawyer alone determine the process, a team of experts are provided for the process at a significantly lower cost. A notable example of benefit for CL is when a financial neutral is established in the process through the use of an accountant or financial advisor, rather than requiring that a lawyer be brought up to speed. Should a CL process be provided for ILA, it would likely need to be billed at an hourly rate as if it were outside of the CL process. When parameters are placed around an agreement, factors such as a time frame may complicate the process. Having a flat rate for a streamlined process may act as a financial barrier for individuals who have intimate knowledge about their settlement, such that their meeting would need only take fifteen minutes to complete. Conversely, complexities to the settlement may cause the process to take place over the course of months or years, whereby a time parameter is not effective.

Facilitating pro bono legal services in the provision of advantageous and comprehensive family law agreements remains an objective in the need for adequate funding, regulatory changes, and indemnification components for lawyers providing pro bono services.[62] **Providing financially accessible services for separations should remain a priority for ensuring equitable outcomes**

[62] Law Society of BC, "Promoting Pro Bono" at 16-17.

for individuals seeking a separation. The underfunding of legal services, such as legal aid, results in harmful consequences such as impeding an individual's access to "leave or stay out of abusive relationships."[63] The initial intention of ILA urges the need for an alignment of trauma-informed practice with legal mechanisms and practices that effectively serve the interests of vulnerable individuals. "Access to justice costs and barriers are higher and more complex for domestic violence survivors,"[64] and the power dynamics between partners should be accounted for in the assessment of ILA as it currently functions.

There is a governmental incentive to establish financially accessible mechanisms for separations, such as the creation of an ILA secretariat to fulfill administrative duties relating to ILA agreements, or the allocation of pro bono resources to individuals seeking a favourable separation. Inevitable financial repercussions exist for inequitable and unfavourable agreements when individuals have undesirable outcomes in their separation agreements. Child benefits and income from government sources represents a significant component of the income of single parent families. As compared to single male parents whose government income sources represent 11% of the parent's income, child benefits and government transfers represent 36% of the income of single female parents.[65] Debt payment costs for single parent families represents 40% or more of their incomes, compared to a 4% debt payment rate for couples with children.[66] Government income sources and debt loads faced by families are economic consequences that could be mitigated by properly executed separation agreements in which the balancing of

[63] "Trauma-Informed Legal Practice Toolkit", *supra* note 50 at 12.
[64] *Ibid* at 3.
[65] Statistics Canada, *Income Composition in Canada*, *2011 National Household Survey* Catalogue No 99-014-x2011001 (Ottawa: Statistics Canada, 2011) < https://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-014-x/99-014-x2011001-eng.pdf>.
[66] Canada, Department of Justice, *Economic Consequences of Divorce and Separation* (Ottawa: Justice, 2016) < https://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/jf-pf/ecds-cfds.html>.

expectations, rights, and entitlements are accessibly provided through defined separation services or regulatory reconfiguration in the context of ILA requirements.

V. Independent Legal Advice in Other Jurisdictions

As previously stated, Saskatchewan was the first province to enact legislation regarding ILA during the dissolution of an intimate relationship. Shortly thereafter, many provinces followed this initiative by including this as a requirement in their jurisdiction, as indicated in the chart, below. Currently, Alberta has the same requirement as Saskatchewan. In contrast, some provinces do not require ILA to legitimize an interspousal agreement; neither British Columbia, Manitoba, nor Ontario mandate this step. However, all three provinces do recommend that spouses seek ILA to ensure the contract is more valid. Outside of Canada, and similar to Saskatchewan, New Zealand requires ILA to legalize an interspousal agreement.

Lastly, along with fulfilling public interest, law societies in Canada set the standards for admission to the profession. The competency of members is detailed in each province or territory's Code of Professional Conduct including provisions specific to ILA.

Jurisdiction	ILA Requirement	Law Societies Code of Conduct
British Columbia	Not required but recommended.[67]	Specifically outlines the issuance of a Certificate of ILA relating to a transaction in which funds are to be advanced by the client to another lawyer.[68]

[67] See *Family Law Act*, [SBC 2011] Ch. 25. There is no requirement to obtain ILA for an interspousal contract. However, the BC Ministry website recommends ILA during these agreements.
[68] British Columbia, Law Society of British Columbia, Code of Professional Conduct for British Columbia (2013) 3.4-27 and 3.4-32.

Alberta	Required under *Family Property Act,* s. 38(2).[69]	Provision same as SK with no info. pertaining to documenting nor issuing a certificate re: ILA.[70]
Manitoba	Not required but recommended.[71]	Provision same as SK with the added provision Advising Clients & Commentary.[72]
Ontario	Not required but recommended.[73]	Provisions same as SK with added provision of Documenting a Client's Decision to Decline ILA or Independent Legal Representation.[74]
New Zealand	Required under *Property (Relationships) Act 1976*, chapter 21F.[75]	Unknown.

VI: Pathways for Reforming ILA

As stated in the introduction, our group expected to conclude with a recommendation of either keeping the ILA requirement or removing it from *The Family Property Act*.[76] After engaging in consultations with stakeholders, and researching relevant case law and articles, we conclude that ILA is still necessary in Saskatchewan. However, we appreciate many steps can be taken to improve its function. **Suggested pathways, which may alleviate access to justice barriers that ILA unintentionally creates, include:**

[69] *Family Property Act*, C-F4.7, at s. 38(2).
[70] Alberta, Law Society of Alberta, Code of Conduct (2020) 3.4-13.
[71] See *The Family Property Act*, CCSM C-F25. There is no requirement to obtain ILA for an interspousal contract. However, the Manitoba Ministry website recommends ILA during these agreements.
[72] Manitoba, Law Society of Manitoba, Code of Professional Conduct (2011) 3.2-2C and 3.4-27.
[73] *Family Law Act*, RSO 1990, c-F3.
[74] Ontario, Law Society of Ontario, Rules of Professional Conduct (2019) Chapter 1 Citation and Interpretation & 3.4-29.
[75] *Property (Relationships) Act 1976*, chapter 21F.
[76] *Family Property Act*, *supra* note 21.

Barrier	*Proposed Solution*
1. There is currently **no standard** for what constitutes ILA. This creates an unregulated spectrum from "rubber stamping" to a full legal assessment on property.	Create a standard for what ILA entails. British Columbia's checklist in Appendix C may be used as precedent.
2. Spouses are accessing mediation services from **mediators who are not required to have training in family law.**	Increase the number of family-trained mediators in Saskatchewan.
3. The **mediation profession is not currently regulated in Saskatchewan.** When an agreement is brought before a lawyer, there is no assurance that the agreement has been considered within a legal framework. Additionally, mediators are not insured so liability is held solely by the lawyer who signs the agreement.	Regulate the mediation profession in Saskatchewan. If this is unattainable, increase collaboration between mediators and family law lawyers in Saskatchewan with the goal of building trust between the two professions and better serving families.
4. Collaborative law offers an opportunity for families to reorganize in a collective manner. Since this process involves more professional support, it is **expensive and becomes inaccessible for low-income families.**	Create a governing body similar to the Office of Residential Tenancies (ORT) where families could access mediation and assigned lawyers; if a solution is not achieved, the agency could make rulings.
5. Parties enter mediation, or draft agreements themselves, without knowing their property rights. **Sitting at the end of the process, ILA may not help individuals understand their rights** (as opposed to ILA being sought at the beginning of the process).	Consider where ILA sits in the current process. Though important to have when the agreement is being finalized, there may a better opportunity to educate parties earlier (to ensure a more equitable agreement).
6. Parties can experience **trauma throughout the reorganization of a family.** Additionally, having Adverse Childhood Experiences increases the likelihood that individuals will need sufficiently	Increase trauma-informed training for lawyers and mediators in Saskatchewan. Consider this as a competency under the Law Society of

trained professionals during this process.		Saskatchewan's *Code of Professional Conduct*.
7. **Lawyers are hesitant to sign an ILA if it hasn't been drafted by themselves or, if they haven't had the opportunity to do a full legal assessment all property considerations**; this is likely due to the liability that ILA attracts.		Review liability that ILA attracts for lawyers. Consider how sound legal advice can be balanced with potential liability (while also appreciating financial barriers).
8. **Legislation is mandating more aspects in the reorganization of family which increases financial barriers.** Parties may be required to seek mandatory mediation and then, still be required access ILA at the end of the process. The financial burden is heavy for many parties.		If Saskatchewan is increasing mandatory measures, consider if there a corresponding obligation to provide an accessible means to it. This may be resolved by creating a governing body, like the ORT mentioned above, which could reduce costs but increase accessibility for families.
9. Often, the **general public does not understand their legal rights** regarding property and may not understand what ILA entails.		Increase public education regarding ILA and how to access it.

In order to begin the process of implementing proposed solutions, Saskatchewan may consider drafting a framework summary to assist in the undertaking. Appendix 4 includes British Columbia's *Access to Justice Measurement Framework* which may assist in considering all family services available and provides an opportunity to improve the function of ILA.

"We can't talk seriously about access to justice without getting serious about how inaccessible the result, not the system, is for most people. **Process is the map, lawyers are the drivers, law is the highway and justice is the destination. We're supposed to be experienced about the best, safest and fastest way to get there. If, much of the time, the public can't get there because the maps are too complicated, then, as Gertrude Stein said, "There's no there there." And if there's no "there there," what's the point of having a whole system to get to where almost no one can afford to go?** So, let's be bold and acknowledge that the public has judged our relationship with incremental change to have been largely Sisyphean. The tinkering at the edges, with reforms like mediation and arbitration, may have been a necessary rehearsal, but it hasn't exactly been the hit with the public we thought it would be. **It's time to think about designing a whole new way to deliver justice to ordinary people with ordinary disputes and ordinary bank accounts. That's what real access to justice needs and that's what the public is entitled to get. Justice must be seen to be believed. And getting people to believe in justice is what the legal system exists for. It's time they got what they're entitled to."**[77]

Justice Rosalie Silberman Abella

[77] Justice Rosalie Abella, "Our civil justice system needs to be brought into the 21st century", *The Globe and Mail* (24 April 2020), online: < https://www.theglobeandmail.com/opinion/article-our-civil-justice-system-needs-to-be-brought-into-the-21st-century/>.

APPENDICES

Appendix 1: List of Consultees

Beau Atkins, Evolve Family Law

Carly Romanow, Pro Bono Law Saskatchewan

Chantelle Johnson, Director of CLASSIC

Charmaine Panko, Panko Collaborative Law

Craig Goebel, Legal Aid Saskatchewan

Greg Walen, Scharfstein Gibbings Walen Fisher LLP

Jordan Furlong, Law 21

Kim Newsham, Ministry of Justice

Kyla Shea, Legal Aid Saskatchewan

Leah Howie

Marilyn Poitras, University of Saskatchewan

Michaela Keet, University of Saskatchewan

Sarah Buhler, University of Saskatchewan

Tanis Pura, Saskatoon Crisis Intervention Services Inc.

Appendix 2: A Macro Scan of Existing Programs and Innovations within Saskatchewan

Legal Aid Saskatchewan: Provides free legal representation for low-income individuals facing legal matters including those seeking: divorce or separation, resolution of child custody matters, child support, spousal support, or having someone legally declared the father of your child.

Pro Bono Saskatchewan: A non-profit organization, operating from Regina, that provides free legal advice, from volunteer lawyers, to low-income residents in Saskatchewan.

Community Legal Assistance Services for Saskatoon Inner City Inc. [CLASSIC]: A free, student-run, law clinic operating in Saskatoon who provides professional and confidential legal services for low-income individuals. CLASSIC also refers to other community organizations.

Family Matters: Assisting Families going through Separation and Divorce: Using an intake assessment, this Saskatchewan program provides information and referrals to other services. Available information includes a Parenting Plan Workbook and Parenting Checklist. If required, a free 3-hour session is available to assist in resolving urgent and outstanding issues.

The Collaborative Process: Collaborative Professionals of Saskatchewan Inc.: In place of a traditional adversarial court process, this resource offers services through a collaborative team including: family lawyers, separation/divorce coaches, mental health professionals, child specialists, and financial specialists. Not free; cost is noted to be less than traditional litigation.

Public Legal Education Association of Saskatchewan [PLEA] - a central website for legal information in Saskatchewan.

Family Law Saskatchewan [FamLi]: For self-representing litigants, FamLi offers information to specific to separation, divorce, child and spousal support, home and property, & safety from domestic abuse. FamLi also freely provides an Agreement Maker (an artificial intelligence program that supports individuals to create their own agreements).

Family Law Information Centre provides information only by telephone (1-888-218-2822). This resource provides automated answers to questions about the family law process; it is most helpful when answering questions about the FamLi website and does not provide strategic advice – just advice on the process.

Self-Help Kit #1 Starting a Family Law Proceeding: This kit is for self-representing litigants who wish to commence a claim through the Court of Queen's Bench for issues such as: custody, access, child support, spousal support, property division, and divorce. Along with copies of the required forms, the kit includes an overview of the process, a checklist, and links to other helping agencies (not referrals to lawyers). The kit suggests legal advice be sought before use of the kit.

Self-Help Kit #9 Preparing a Separation Agreement: This kit is for person(s) who wish to create a separation agreement to outline some rights and obligations that may arise after separation. The template for a separation agreement attached does not cover all possible scenarios, nor is it guaranteed to be enforceable or upheld in Court. The kit suggests legal advice be sought before use of the kit.

Conflict Resolution Saskatchewan: A non-government organization/community of dispute resolution practitioners that advocate for mediation and other dispute resolutions. The website provides a directory of its members practicing throughout Saskatchewan.

ADR Institute of Saskatchewan: A membership-based, non-profit, organization affiliated with the ADR Institute of Canada. ADR Institute provides the public with information about alternative dispute resolution processes and a director of ADR professionals.

Appendix 3: A Macro Scan of Routes Taken by other Jurisdictions (not specific to ILA)

The following appendix offers a scan of family law innovations specific to improving access to justice. The pressure to make justice more accessible, and to meet the needs of changing families, is a universal challenge. In one way or another, the following jurisdictions have shown a commitment to bettering the justice landscape including: British Columbia, Manitoba, and Ontario. Rather than a compilation of existing innovations, this is a brief analysis of the routes taken by each of the jurisdictions. Though not specific to Independent Legal Advice, the innovations discussed reflect the most recent procedural steps taken by each law societies and/or government. Whether creating a new category of alternative legal service providers or amending court procedures, these innovations may provide a roadmap for Saskatchewan to consider in its own pursuit of innovation in family law.

British Columbia

In 2014, the Law Society of British Columbia (LSBC) sought amendments to the *Legal Profession Act* to permit the creation of new categories of members, other than lawyers, to provide limited legal services. To support this work, various committees and task forces were utilized including: the Futures Committee, Access to Justice Committee, Delivery of Legal Services Task Force, Legal Service Providers Task Force, and Legal Services Regulatory Framework Task Force.[78]

In 2018, the LSBC struck an Alternate Legal Service Providers Working Group to develop recommendations pertaining to family law legal service providers. In conjunction with other access-to-justice policy work, preliminary consultations with small groups of stakeholders occurred including a feasibility study of "categories of members who are not lawyers and [whether] to permit them to provide some legal services directly to clients as regulated alternate legal service providers."[79] At this stage, it is not clear which stakeholders were consulted.

Later that year, the LSBC sought input from the public, lawyers, the judiciary, and justice system stakeholders along with the release of a consultation paper. In their review of family law legal services, the LSBC noted their foundational "accept[ance] that it is in the public interest for people to be able to access legal advice and services when facing a legal problem..."[80] Any concepts advanced during this phase were not considered conclusive rather, feedback was to be analysed to further refine a series of recommendations to the Benchers.[81]

Along with posting the consultation paper on their website, the LSBC also posted letters received in response to their call for submissions. Feedback pertained to both the consultation paper and Bill 57 (*the Attorney General Statutes Amendments Act, 2018)* includes:

[78] British Columbia, The Law Society of British Columbia - Alternate Legal Service Provider Working Group, Family Law Legal Service Providers: Consultation Paper, (September 2018) at 3.
[79] The Law Society of British Columbia at 2.
[80] *Ibid* at 3.
[81] *Ibid*.

- The absence of a gender-based analysis and utilization of incomplete data (i.e., no assessment was available of the percentage of women who do not access a family lawyer);
- Lack of consideration for those with mental health issues;
- Concern for the creation of a two-tier justice system and general concern that both the independence and strength of the Bar were undermined; and
- In the alternative, some submissions noted their support for the proposed framework but encouraged a carefully designed scope of practice and an experimental approach.[82]

Following the creation of a new task force mandated to continue with the work, the LSBC released a proposal for developing and regulating alternate legal service providers in September 2020.[83] Specifically, "the Task Force recommends a "grass roots" approach to advance the licensed paralegal initiative within a regulatory sandbox."[84] Preferring to obtain the endorsement of Benchers first, the task force identified next steps to include developing administrative and operational criteria of the sandbox.[85] In their final comment, the task force noted that "the amendments to the *Legal Profession Act* have been in a holding pattern for almost two years, and it is time to move forward with a program of expanded service provision with a path towards licensing."[86] On the LSBC website, it was noted that recommendations were approved at the October 30, 2020 Benchers meeting.[87]

In conjunction with the work noted above, an order-in-council was published on June 1, 2020 which will repeal and replace the provincial court family rules. This initiative is meant "to improve how British Columbia families can resolve their legal issues in family court."[88] No further reports were found in relation to the effect of these changes.

Manitoba

Beginning in 2017, the Government of Manitoba pursed modernizing family law. Following the creation of an advisory committee and the release of the committee's report in June 2018, the Government of Manitoba passed legislation called *The Family Law Modernization Act* in June 2019.[89] Having set the framework for innovation, an updated action plan was released in July 2020 and noted the following initiatives:

1. arbitration for family law matters;

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[82] The Law Society of British Columbia, " Law Society seeks feedback on alternate legal service providers" online: https://www.lawsociety.bc.ca/about-us/news-and-publications/news/2018/law-society-seeks-feedback-on-alternate-legal-serv/.
[83] British Columbia, The Law Society of British Columbia - Benchers, Licensed Paralegal Task Force Report, (September 25, 2020) at 1.
[84] The Law Society of British Columbia, "Licensed Paralegal Task Force Report" online: < https://www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/2020LicensedParalegalTaskForceReport.pdf>
[85] *Ibid*.
[86] *Ibid*.
[87] The Law Society of British Columbia, "Licensed Paralegals" online: <https://www.lawsociety.bc.ca/our-initiatives/access-to-justice/licensed-paralegals/>
[88] The Ministry of Attorney General, "Family Court Rules Modernized To Help Families, Children" (June 02, 2020), online (blog): The Canadian Bar Association British Columbia Branch <https://www.cbabc.org/News-Media/News/2020/Family-court-rules-modernized-to-help-families,-ch>
[89] Manitoba, Government of Manitoba, Family Law Modernization Action Plan, (July 2020) at 2.

2. enhancements to the Maintenance Enforcement Program;
3. launch of the new Child Support Service on July 1, 2020; and
4. launch of Phase 1 of a single-window Family Resolution Service (including extensive collaboration and consultations).[90]

Back to 2017, the Law Society of Manitoba (LSM) also developed a strategic plan which included a focus on addressing access to justice issues. Following the strategic plan, a President's Special Committee on Alternate Legal Services Providers was struck.[91] Subsequently, "in 2018 the [LSM] sought legislative amendments to *The Legal Profession Act* that would permit the benchers to authorize the provision of prescribed legal services in the area of family law..."[92] Currently, in its 3rd session of the 42nd legislature, the Government of Manitoba has introduced Bill 24 (*The Legal Profession Amendment Act*) which, if passed, will allow for the licensing of non-lawyers to provide some legal services. Additionally, the LSM has released a consultation paper on their website which includes a questionnaire for stakeholders; feedback is being collected until January 31, 2021 in the hopes of initiating consultation efforts.[93]

Other innovations occurring in Manitoba include updating the rules of The Court of Queen's Bench of Manitoba for family law matters. As of February 1, 2019, a new model for scheduling and case flow management has been introduced. Changes are meant to address access to justice concerns and lead to a system that is "significantly less complex, less slow and less expensive."[94] In developing the new rules, "the Court undertook a course of both internal and external consultation with judges, court staff, collateral services and the family Bar in order to address procedural shortcomings and to enhance and revitalize the case conferencing process."[95] No further reports were found in relation to the effect of these changes.

Ontario

On May 1, 2007, the mandate of the Law Society of Ontario (LSO) expanded to include the regulation of paralegals. Subsequently, a license has been required of paralegal who practice independently from the supervision of a lawyer.[96]

In 2016, the Ministry of the Attorney General and the LSO supported a review of the family justice system which culminated in the Family Legal Services Review Report (the Bonkalo Report).[97] In her report, Justice Bonkalo made a number of recommendations relating to the creation of "a specialized licence for paralegals to provide specified legal services in family law."[98]

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[90] *Ibid*.
[91] Manitoba, The Law Society of Manitoba, Consultation Document: Alternative Legal Services Providers, (January 2021) at 1 [LSM].
[92] *Ibid*.
[93] *Ibid* at 2.
[94] Manitoba, Court of Queen's Bench of Manitoba, *Practice Direction re: Comprehensive Amendments to Court of Queen's Bench Rules (Family)*, (February 1, 2019) at 1.
[95] *Ibid*.
[96] The Law Society of Ontario, "History of the Law Society" online: https://lso.ca/about-lso/osgoode-hall-and-ontario-legal-heritage/collections-and-research/research-themes/history-of-the-law-society.
[97] Ontario, Family Law Working Group of the Law Society of Ontario, *Family Legal Services Provider License Consultation Paper*, (June 2020) at 1 [FLWG].
[98] FLWG at 2.

In response, the LSO's Family Law Working Group carried out a significant amount of work to develop a Family Legal Services Provider (FLSP) licence which considered: 1. scope of permissible activities; 2. competencies (required knowledge, skills & abilities); and 3. education and training based on the identified competencies.[99]

In December 2017, the LSO approved licensing paralegals, and others with appropriate training, to offer some family law legal services.[100] To further develop a model licensing framework, consultations (as recent as June 2020) have included "meeting with approximately 100 family law practitioners, family law clerks, paralegals, mediators, court staff workers, intermediaries, and others to gain insight into the opportunities and limitations of an FLSP licence."[101] Leaders of these consultations included subject matter experts and psychometricians.[102] Preliminary work also included scanning environmental issues (i.e. feasibility, the effectiveness of paralegals, etc.) and regulatory issues (i.e. availability and cost of professional liability insurance).[103]

In addition to the above work, other noteworthy initiatives in Ontario include:

- anticipated expansion of a Unified Family Court;
- continued efforts to modernize court processes including online filing of claims;
- continuation of Steps to Justice (a website which provides guidance to legal problems that lawyers would traditionally provide); and
- continuation of the Family Law Limited Scope Services project (a project which aims to increase limited scope retainers, legal coaching, and summary legal counsel).[104]

[99] *Ibid* at 3.
[100] *Ibid* at 1.
[101] *Ibid*.
[102] *Ibid* at 4.
[103] *Ibid* at 1.
[104] *Ibid* at 5.

Appendix 4: British Columbia's Access to Justice Measurement Framework Summary

Access to Justice Measurement Framework Summary			Org/Pro X
Elements	Dimensions	Components	Outcomes
Improving Population Access to Justice	Prevalence of legal needs/problems	• Prevalence of legal problems in the population	
		• Prevalence of unaddressed legal needs in the population	
		• Public legal awareness	
	Response to legal needs	• People's choice of path to justice	
		• Legal information and education need	
		• Legal advice needs	
		• Need for legal representation and other legal assistance	
		• Need for consensual dispute resolution process	
	Fair and equitable access to justice	• Accessibility of justice system for British Columbians • Including geographical access, accessibility for Indigenous people, accessibility for people with mental illness, and accessibility for immigrants and refugees	
		• Financial access to justice system	
		• Timeliness of access to justice system	
	Social and economic impact of access to justice	• Social policy objectives	
		• Protection of people's rights	
		• Public confidence in the justice system	
		• Public confidence in social institutions	
		• Gender equality	
		• Justice for Indigenous people	
		• Social & economic costs and benefits of access to justice	
Improving User Experience of Access to Justice	User experience of obstacles to access to justice	• Obstacles to access (distances, technology, affordability)	
		• Eligibility to services	
		• Affordability of services	
		• Delays in accessing justice services and their impact	
	Quality of user experience of the justice system	• Quality of legal information and education	
		• Trust and confidence in legal information	
		• User empowerment	
		• Quality of referral services	
		• Quality of legal advice	
		• Quality of legal assistance and representation	
		• Experience of self-represented litigants	
		• Quality of consensual dispute resolution processes	
	Effectiveness of justice system in addressing user legal problems	• Effective resolution of legal problems	
		• Mitigated impact of legal problems	
		• Prevention of legal problems	
		• Prevention of conflicts	
		• Unmet legal needs and their consequences	
		• Limits to the assistance received	
	Appropriateness of the justice process	• Fairness, equity and impartiality of the process	
		• Cultural appropriateness	
		• Voice and participation	
	Justice outcomes for the users	• Outcomes of the justice process	
		• User satisfaction with outcomes of justice process	
		• Compliance with court orders, judgments, and mediated agreements	
		• Post-resolution support	
		• User enhanced legal awareness	
		• Enhanced legal capability	
Improving Costs	Per-capita costs of services	• Per capita costs of services	
		• Impact on new initiatives on per-capita costs	
	Per-user costs of services	• Per user costs by type of services	
		• Impact of new initiatives on per-user costs	
	Other costs	• Social and economic costs of unresolved legal problems	
		• Impact of unresolved problems on costs in other sectors	

Appendix 5: Literature Review

Alexy Buck & Marisol Smith, "Back for the future: a client centred analysis of social welfare and family law provision" (2013) 35:1 Journal of Social Welfare & Family Law 95–113.

> In discussing the legal landscape of Wales and England, Buck and Smith look to lessons drawn from community legal advice centers. 42 advice sessions were observed and provided qualitative findings in relation to the dynamics of advice provision. Both clients and advisors' perspectives were analysed as were barriers to integrated advice provision and inter-organisation dynamics. Ultimately, Buck and Smith found benefit in an integrated advice service model.

Gabrielle Davis et al, "An Appeal for Autonomy, Access, and Accountability in Family Court Reform Efforts" (2014) 52:4 Family Court Review 655-661.

> Davis and others argue for the provision of community-based and private-sector services (i.e., opt into dispute resolution processes) as long as court funding and access is not diminished. Davis highlights "Key Points for the Family Court Community:
>
> - Choices about participation in dispute resolution processes should be party driven.
> - Parties should receive complete and accurate information about available dispute resolution processes and have access to confidential legal advice.
> - Dispute resolution processes should be fair, affordable, competently provided, and accountable.
> - Parties should have open access to traditional court processes."
>
> Ultimately, Davis and others note that, regardless of whether a process is public or privately funded, the process must be clear, accessible, fairly implemented, competently performed, and subject to enforceable standards of practice.

Golden Eagle Rising Society, *Trauma-Informed Legal Practice Toolkit*, (2020)

> *The Trauma-Informed Legal Practice Toolkit* provides legal practitioners with human-centred design practices for legal practice, including trauma-informed lawyer-client relationship strategies and resources for lawyer resiliency in vicarious trauma. For the purposes of independent legal advice, there is a discussion of harm potential in re-traumatization of participants through practices, procedures, and policies involving client experiences with obtaining independent legal advice. Furthermore, this discussion of trauma-informed practice is directly linked to managing harm potentials through the informing of well-communicated exchanges between ILA and its connected processes such as mediation, pretrial conferences, and alternative dispute resolution models. Being that legal work is "inherently relational," the *Trauma-Informed Legal Practice Toolkit* provides the argument that "one would be hard-pressed to find a lawyer who doesn't interact with people," which requires sensitivities to client "emotions, personalities, motivations, beliefs and values, which are all areas influenced by trauma" (at 25). This *Toolkit* equips lawyers

with the skills to predict and manage circumstances involving trauma, which are prevalent within the practice of Family law.

Jo Edwards et al, "Working with Solicitors in Mediation – A Mediator's Perspective" (2018)

Edwards et al discusses the potential for involving solicitors in the mediation process in a manner that positively and actively engages clients with legal understandings throughout the process of mediation. The representation of clients involves a trust relationship that can be better informed through trauma-informed practice (*see Trauma-Informed Legal Toolkit*), and the involvement of lawyer-assisted mediation could guide better outcomes with this awareness. Edwards et al states that the direct participation of lawyers in family mediation is particularly infrequent but could bring benefit to the process especially in circumstances involving legally complex matters. Strategies to build communication and collaboration between mediators and lawyers is an essential step to bringing about this type of process, but to do so would benefit a significant change in the family justice system.

Kimberly A Whaley, "Independent Legal Advice: Risks Associated with "ILA" Where Undue Influence and Capacity are Complicating Factors" (2017) Advocates Quarterly 47 Advoc. Q. 459-499

For individuals of vulnerable demographics and circumstances, a high degree of integrity and professionalism is required for the duty of care for these individuals. Lawyers sometimes seek minimal background information and context, but this may leave both parties to be without the knowledge or trust that is often required in matters of family law disputes. ILA is argued to provide the "best evidence" to determine that the free will of participants is not compromised (at 461). Additionally, the court established that independent legal advice provides the opportunity for undue influence to be rebutted against. (See *Thorsteinson Estate v. Olson* (2016) SKCA 134, 404 D.L.R. (4th) 453, 20 E.T.R. (4th) 178 and *Csada v. Csada* (1984) 2 W.W.R. 265, 35 Sask. R. 301, 29 A.C.W.S. (2d) 70)

Ministry of the Attorney General, "Family Legal Services Review" (2016)

Legal aid certificates can be provided to eligible low-income individuals living in Ontario for separation agreements and independent legal advice in order to support mediation services as an avenue for family law issues. While these legal aid certificates are provided for these circumstances, support for mediation and independent legal advice remains substantially unfulfilled. It is determined in this review that clients are reluctant to seek legal advice upon receiving a perceived resolution to their family law issues because of the factor of cost in a lawyer's involvement in the issue.

Robert Contois, "Ethical Considerations: Independent Professional Judgment, Candid Advice, and Reference to Nonlegal Considerations", (2002-2003) 77 Tul L Rev 1223

> Lawyers' involvement of nonlegal considerations in client representation is a considerable issue in their ethical conduct and treatment of client concerns. Model Rule 2.1 of the American Bar Association provides that lawyers have the authorization to counsel clients on nonlegal considerations, including moral, economic, social, and political factors that may affect a client's circumstances. Having a broad standard of this kind included into the Model Rules that authorizes conduct of the kind stated has been seen to serve as an important measure because the rules defined within it have been broadly adopted into jurisdictions without substantial revision.

Rosemary Sheehan, "Alternative Dispute Resolution in Child Protection Matters: The Victorian Experience" (2006) 59:2 Australian Social Work 157-171.

> In 2002, Sheehan studied 208 pretrial conferences held in the Melbourne, Victoria at the Children's Court. Despite finding a number of factors that impeded the settlement of cases, Sheehan found the quality of legal advice provided to parents significantly affected the outcome of pretrial conferences. Sheehan recommends the development of alternative dispute resolution models in relation to child protection matters; specifically, a system which uses mediation principles in a conciliation framework. As the participant's positive views of the pre-trial process was dependent on the approach taken by legal representatives, Sheehan recommends professional training in alternative dispute resolution. Offering a cautionary note, Sheehan highlights mediation principles typically assume equal power among participants.

Sinead Conneely & Roisin O'Shea, "Innovative Family Mediation Research Initiative Embedded in the Community in Ireland" (2019) 57:3 Family Court Review 342-348.

> Conneely and O'Shea present the efficacy of the Family Mediation Project – a project developed in Dublin which aimed to provide effective, quick mediation for families and their children including referrals to trusted resources - making it easier and quicker for parents and children to reach a range of professionals and supportive services. 50 cases were analysed including participant buy-in, agreements (both long term and interim) reached, and average amount of time and cost of mediation.

Susan Swaim Daicoff, "Families in Circle Process: Restorative Justice in Family Law" (2015) 53:3 Family Court Review 427–438.

> Daicoff analyzes the use of a circle process as a form of restorative justice, specifically in relation to family law, and offers commentary on reframing the legal profession to a healing profession – including the optimization of human well-being as an explicit goal (versus adjudicating or a focus on just legal rights/duties alone). Using cultural norms, such as the

African value of Ubuntu and the Indigenous approach to conflict resolution, Daicoff shows how the circle process is useful in the family law context. The 2008 Mills/Vastine/Newman Chicago Project is further examined as it utilized a peacemaking circle processes with families involved in family law court. Daicoff highlights the circle process was found to reduce anxiety, slow down the participants' interactions, reduce hostility, create a community within the participants by unifying them in common values and goals. Daicoff concludes that a circle process is the most innovative approach to resolving family law conflict.

Thomas L Shaffer & Robert F. Cochran, "Lawyers, Clients, and Moral Responsibility" (1994)

Provides the recommendation that lawyers receive ethical counselling training through ongoing practice and implementation of counselling in legal education. Doing so would ensure that lawyers better integrate their personal ethical principles into their legal practice through tools and skills that can involve the nonlegal considerations of a client's counselling. Such tools could consider those elements of trauma-informed counselling, financial considerations to the client, and limits to a lawyer's engagement with their ethical and legal bounds.

Appendix 6: The Law Society of British Columbia Practice Resource on ILA

The Law Society of British Columbia

Practice Resource

Independent legal advice checklist*

When giving independent legal advice, it is important to go much further than explaining the legal aspects of the matter and assessing whether the client appears to understand your advice and the possible consequences. You must also consider whether the client has capacity and whether the client may be subject to undue influence by a third party. Further, if the client has communication issues (e.g. limited knowledge of the English language), you should ensure that the client understands or appears to understand your advice and the related documents. You may need to arrange for a competent interpreter.

We recommend that you take notes during your meeting with the client and make a written record of your meeting. Consider writing a brief reporting letter that covers the essential matters that you discussed, including the nature, extent and scope of services that you have provided.

You may use the following checklist in two ways: (1) to remind yourself of questions to ask a client seeking independent legal advice, and (2) as a form of record of your meeting. Before you begin, see the *BC Code*. Especially consider rules 3.4-27 to 3.4-27.1, 3.4-32 to 3.4-33, Appendix A, paragraph 1(c) and commentary [9] to [11] and 3.6-1, commentary [2]. Also consider the rules regarding a "limited scope retainer" (a defined term in rule 1.1-1). Before undertaking a limited scope retainer, the lawyer must advise the client about the nature, extent and scope of the services that the lawyer can provide and *must confirm in writing* to the client as soon as practicable what services will be provided (rules 3.1-2, 3.2-1.1, 7.2-6 and 7.2-6.1.). Further, consider whether you must inform the client of the availability of qualified advisors in other fields who would be in a position to advise the client on the matter from a business point of view (rule 3.4-27.1(c)).

The requirement that a lawyer either must or should recommend to a person that he or she have independent legal advice comes up in a number of places in the Code, particularly in the conflict rules under section 3.4, but also in other locations (see rules 3.4-2, commentary [5], 3.4-4. to 3.4-6, 3.4-27 to 3.4-36, 3.4-39, 7.2-9, and 7.8-1; Appendix B, paragraph 3(a); and Appendix C, paragraph 7).

** As noted in the resource Giving ILA? Stop. Read this first., a checklist is a seminal risk management tool for the ILA lawyer. Each item in this model checklist is important. For additional tips and suggestions, read the annotated copy. Other resources that may be useful are "Limited scope retainer rule added to BC Code," Practice Watch, Benchers' Bulletin, Winter 2013; Managing the risk of a limited retainer, Insurance Issues, Summer 2010; Retainer agreement, and Witnessing a Signature? Stop. Read this first, Insurance Issues, Winter 2013.*

Model independent legal advice checklist

mm/dd/yyyy	Start time	Finish time	
Client's full name		Occupation	
Home address		City and Province	Postal code
Business address		City and Province	Postal code
Telephone – residence	Telephone–business	Telephone- cell	
Fax		Email	
Client's spoken languages		Written languages	
Family status			Age
Referred by	Reason for independent legal advice		
Security requested by lending institution			
The client has limited facility with English, so I obtained an interpreter whose name was:		If client wishes another person to be present during our meeting, consider implications, e.g. privilege, undue influence, unrepresented persons. Record name and interest of any person present.	
I reviewed the following documents:			

Part A — The client

I advised the client that the client has the right to independent representation ☐

I reviewed the current state of the client's health and capacity ☐

I reviewed the current state of the client's marriage ☐

I asked about domestic violence and was told: ☐

The client said that the reason for his or her consent to this transaction or agreement was:

I satisfied myself that the client did not appear to be subject to duress or undue influence and that the client was signing relevant documents freely and voluntarily, without pressure from anyone (see undue influence resource on Law Society website) ☐

Part B — I explained the following to the client

The nature and consequences of a mortgage ☐

The nature and consequences of a guarantee ☐

The effect of power and sale / judicial sale and foreclosure ☐

The effect of an action on the covenant and the liability for any insufficiency ☐

The consequences of his or her spouse's default ☐

The possible consequences of failure to honour the financial obligations (loss of her or his house, business and all other property) ☐

The possibility of obtaining security for the financial obligations ☐

That an indemnity will be worthless if the spouse declares bankruptcy ☐

The risks to the client if there is a breakdown of the marriage ☐

The client appeared to understand the advice given ☐

The availability of qualified advisors in other fields who might advise the client from a business point of view ☐

Part C — If the independent legal advice relates to a domestic contract

I obtained complete financial disclosure from both my client and the other side ☐

I determined that the document was sufficiently well-drafted to accomplish my client's objectives ☐

I ensured that the terms of the agreement were both certain and enforceable ☐

I ensured that, if the agreement is to be filed against property or as an order of the court, the statutory requirements for filing have been met ☐

I explained the final nature of the agreement ☐

I reviewed the risks and consequences of the agreement ☐

I discussed the effect of the agreement upon the client if her or his spouse dies first ☐

I explained all the clauses of the agreement ☐

I witnessed the client's signature on these documents ☐

The client appeared to understand the advice given ☐

The availability of qualified advisors in other fields who might advise the client from a business point of view ☐

Part D — When client signs contrary to advice

I advised the client in writing against signing the documents, but the client wished to proceed contrary to my advice ☐

I explained my advice in the presence of a witness (consider using a witness from your firm), whose name was:

_____ ☐

The client signed an acknowledgement, in the presence of a witness, that she or he was signing the documents against my advice ☐

I declined to witness the client's execution of the documents ☐

Part E — File management

I opened a file ☐

I followed client identification and verification procedures ☐

I placed this checklist, a copy of the document and my notes in my general independent legal advice file ☐

I took notes of my meeting(s) with the client and retained these ☐

I docketed the time spent advising the client ☐

I sent a reporting letter that included the nature, extent and scope of services provided and that outlined the terms of the agreement or obligation assumed, together with my account ☐

My advice was verbal only and I sent no reporting letter ☐

I accepted payment from the client or if another person paid my bill, the payment was made with full disclosure to the client and with the client's consent. The payment from the other person did not affect my loyalty to the client or professional judgment. ☐

Notes

_____

_____

_____