SOCIETY OF
NOTARIES
PUBLIC OF BC

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Ministry of the Attorney General
Victoria BC

Via email pld@gov.bc.ca

Dear Minister,

Re: Society of Notaries Public of British Columbia response to Legal Professions Regulatory Modernization

This is the written response to the Legal Professions Regulatory Modernization Initiative and the Ministry of the Attorney General's Intentions Paper. We thank the Ministry for the opportunity to comment on the initiative and the paper.

The Society of Notaries Public of BC (SNPBC) was registered as a society under the *Society Act* in British Columbia in 1926. Not unlike other professional societies, the scope of activities of the SNPBC has changed over time. Historically, government granted certain rights to professional associations that included activities such as disciplining a member of the profession. Throughout the mid 20th century, common law governments expanded and clarified the scope, responsibilities, and mandates of regulators under the auspices of professional self-regulation. This progression and model describe the genesis of the Society of Notaries Public of BC from an advocacy organization into the public interest regulator it is today.

Notaries Public have a long and storied history in this province. In fact, the first document registered in the provincial land title registry was submitted and registered by a Notary Public. Notaries Public in BC represent a 100-year experiment in access to legal services.

BC remains one of only two provinces[1] in which persons other than lawyers have the express statutory right to provide legal services and give legal advice directly to the public. By almost every measure, the provision of legal services by Notaries Public has been a highly successful experiment that has, within the limited scope of practice as set out in the *Notaries Act*, increased access, provided high quality legal services including the giving of legal advice, and protected parties' rights in real property transactions, personal planning, and a wide range of other services.

Within that 100-year history is a concerted effort by the legal profession to eliminate, and as that proved increasingly unlikely, marginalize Notaries Public. That marginalization extends to the Courts which, in our submission, have over-reached to limit the scope of practice despite clear language and intent in the *Notaries Act*.

It is only in recent years that the Law Society of BC has embraced, through an evaluation of harm to the public, and the implementation of the regulatory sandbox, a perspective that appears to indicate a willingness to address some of the challenges inherent in long standing structural barriers within the legal profession to "allowing" the provision of legal services by anyone other than a lawyer. Notwithstanding the recent developments undertaken by the Law Society, the legal profession has time and again demonstrated its unwillingness to embrace expanding access to justice and legal services.

It is our contention that this history is critically important to understand in the context of modernizing the regulation of the legal professions in British Columbia. A failure to appreciate and address the structural barriers to increase access to justice and legal services will likely result in the status quo of lawyers exerting control over the legal professions.

Prior to addressing the issue of board composition, it is necessary to address the issue of independence. In the context of modernization of the regulation of the legal professions,

[1] Quebec is the other province with independent Notaries Public.

there is firstly, independence of lawyers. We are of the opinion that the nature of independence should logically extend to all regulated legal professionals. Secondly is the matter of independence of the regulator. The intentions paper captures and we agree fully with respect to the importance of an independent bar.

With respect to the independence of the regulator, it is Government's discretion to extend the privilege of self regulation to any profession. By virtue of this discretion, the independence as it applies to a statutory regulator is qualified. Currently, the Attorney General sits as a Bencher of the Law Society. It is the intention of Government to remove the Attorney General on the new entity's governing board. The elimination of an elected government official from the regulatory entity significantly addresses a critical issue related to the independence of the new regulator.

The intentions paper further provides that the potential for government interference and influence will not be a factor by:

- establishing a board of directors on which the government-appointed members constitute a minority;
- giving the regulator the power to make rules for the regulation of legal service providers that would not need to be approved by or filed with government;
- maintaining the regulator's jurisdiction to adjudicate discipline matters involving regulated legal service providers; and
- establishing a regulator that continues to be self-funded.

The intention to establish a board of directors on which the government-appointed members constitute a minority does not fully address the issue of board composition. There will need to be consideration of and a balanced approach to the issue of the legal professionals who will comprise the majority of directors. A further issue will be the nature of appointment of the professionals.

With respect to the number of professionals we acknowledge the significant difference in the size of the licensee base as well as the complexity of practice and regulation in areas of law. There are convincing arguments that the model adopted under the *Health Professions Act* is not suitable for the regulation of the legal professions. That model being equal representation from each profession on the governing Board. However, we are strongly of the opinion that care must be taken to ensure that no one profession has an outright majority and can use that majority to limit the ability of other professions to increase access to justice and to provide legal services. A majority with the ability to limit the intent of the initiative is inconsistent with the public interest.

The other perplexing issue to be dealt with is the matter of electing versus appointing directors. We are strongly of the opinion that electing a majority of any profession would be maintaining the member model inherent in the *Societies Act*. Whereas we acknowledge that a fully appointed board of directors raises other issues of concern including who appoints and on what basis, the electoral model is an artifact of historical regulatory frameworks with a questionable record of success when considering the public interest.

It is in this context that we agree with and support the following intentions with a suggestion underlined in 3.6:

3.1 The regulator should be governed by a board composed of a statutory maximum number of directors, some of whom are elected by licensees, some of whom are appointed by the other members of the board, and some of whom are appointed by government.

3.2 The directors appointed by government should constitute a minority of the board, and the Attorney General should not sit as a member of the board.

3.3 Consideration should be given to a statutory requirement for Indigenous representation on the board.

3.4 The board and government should be required to follow nomination procedures that are fair, transparent, accountable, and independent.

3.5 Director elections and appointments should be staggered, so that gaps on the board (with respect to, for example, diversity, skills, type of legal service provider) can be identified and filled.

3.6 The board's role must be focused on strategic oversight.

For clarity and completeness, the SNPBC supports the following intentions believing that these intentions support an independent, forward looking regulatory organization (with underlined suggestions for consideration):

6.1 The statute should refer to regulated individuals as licensees and not members.

6.2 The statute should include public accountability mechanisms suitable to that of a regulator that regulates in the public interest and not that of a membership-driven association.

6.3 Licensees must not have the authority to bring forward resolutions that purport to direct the actions of the regulator's board.

6.4 Licensees must not have the authority to approve or reject the regulator's rules as determined by the board mandate to act in the public interest.

Finally, is the matter of size of the Board of directors. It is our opinion that the number of directors needs to be sufficient for good governance and oversight. The SNPBC reduced the size of its board from 16 to 12 in 2019. We note that regulators with a similar number of licensees to those anticipated under the new legal regulatory entity have boards with 12[2] to 15[3] directors. Given the complexities of regulating the legal professions we are of the opinion that the number of directors should not exceed 19 and would advocate for the number of directors to be 15 with a statutory requirement for indigenous representation.

[2] College of Oral Health Care Professionals of BC
[3] College of Physicians and Surgeons of BC

The issue of scope of practice including the definition of the practice of law will be critical to the regulator achieving the goal of increased access to justice. It is our position that to protect the public the provision of legal services must be grounded in competence to practice. Government has the opportunity to develop a statute that creates a responsive and effective regulatory organization with the tools to be nimble and active.

Given the historical context of Notaries Public in this province, we agree with the following intentions (suggestions underlined):

4.1 The statute should continue to include a definition of the practice of law, which will also constitute the scope of practice for lawyer licensees.

4.2 A modernized and reasonable scope of practice for notaries must be set out in statute. Consideration be given for the statute to include mechanisms to allow for the scope of practice for non-lawyers to be expanded without the need for legislative change.

4.3 The statute must authorize the delivery of legal services through licensed paralegals and the regulator be required to prescribe a reasonable scope or scopes of practice within a defined period of time.

4.4 The statute should enable the regulator to grant licensed paralegals and notaries a certified practice on a case-by-case, competency basis.

4.5 The statute should enable the creation of additional future categories of legal service providers that can be authorized to deliver specific legal services.

4.6 The statute should include a requirement for a future independent review of legal service provider regulation and its impact on access to legal services.

The Society of Notaries Public of BC recognizes the advantages to modernizing the regulatory framework for legal professionals in British Columbia. Creating a new, public interest focused regulator of legal professionals will require focus, leadership, and commitment by government and stakeholders. There will be opposition to the initiative as change can be difficult. This initiative is not change for change's sake, but a response to a failure to respond and act to address issues of access to justice.

We look forward to continuing to collaborate with the stakeholders in this initiative with the view to create a responsive, public interest focused regulator of legal professionals in British Columbia.

On behalf of the Board of Directors of the SNPBC

John Mayr
Executive Director