

Trauma-Informed Lawyering: Practicing Emotional Acknowledgment

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Abstract

This thesis seeks to improve the lives of lawyers and people who use legal systems by exploring complex human needs which can be masked, ignored, and even infringed upon by the legal system. As such, trauma-informed lawyering skills requires a commitment not just to the acquisition of skills, but also to the embodiment and practice of these skills with one's self as much as with others. This thesis seeks to illustrate how fragmentation and disconnection of the self from one's emotions impairs, rather than improves the lawyer's ability to advocate in the best interests of their clients. The true integration and internalization of such trauma-informed and emotional acknowledgment skills is a process that invites transformative change.

In order to achieve these outcomes, it is necessary to have a basic understanding of what trauma is, including its history and prevalence. Two types of trauma, intergenerational trauma and indirect trauma, will be discussed. The legal sector's connection to trauma – the way that trauma is embedded in legal practice - will be explored, with a focus on experiences of emotional suppression and detachment and how these can exacerbate trauma in legal work. The consequences of emotional suppression and detachment are also discussed along with recommendations for individual lawyers to address these. To benefit clients and lawyers, trauma-informed practice must become a mandatory dimension of legal work, rather than an optional skillset. Turning to the organizational level of legal practice, the current efforts of law societies to educate on trauma-informed practice are explored and analyzed. Although progress has been made, including the Université de Sherbrooke's Phase I Research Report surveying the psychological health determinants of legal professionals in Canada, more needs to be done to prepare lawyers to better respond to the challenges embedded in their work, and the impact on their own internal emotional lives. The thesis concludes with recommendations for organizations such as interdisciplinary research on trauma in law and creating accountability for how legal employers impact or exacerbate lawyers' mental health. Recommendations for future research on this topic include actively measuring the impacts of legal culture and legal systems as well as adjusting the priorities of such research towards well-being and social improvements rather than focusing solely on economic or productivity levels.

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culture because the work that lawyers do is vitally important but it should not come at the cost of our humanity.

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Table of Contents

<i>Trauma-Informed Lawyering: Practicing Emotional Acknowledgment</i>	1
<i>Chapter 1: Introduction to Trauma and Trauma-Informed Lawyering</i>	1
1.1 Why Trauma-Informed Practice Matters	1
1.2 Trauma Vocabulary	3
1.3 Why it is Vital for Lawyers to Learn About Trauma	6
1.4 Moving Forward as a Trauma-Informed Lawyer Towards a Trauma-Informed Legal Profession	8
<i>Chapter 2 Trauma: What it is and How it Connects to Lawyering</i>	10
2.1 Definitions of Trauma	10
2.1 a) Defining Trauma as a Subjective Experience	10
2.2 How Does a Brain Typically Develop and Operate?	13
2.3 What is Trauma?	15
2.3 a) Why an “Objective” View of Trauma is Inadequate When Working With Traumatized People in Law	16
2.4 The Prevalence of Trauma: From Adverse Childhood Experiences to Traumas in Adulthood	19
2.4 a) Lawyers’ Adverse Childhood Experiences and their Trauma.....	24
2.5 What is Intergenerational Trauma?	26
2.5 a) Lawyers and Intergenerational Trauma.....	29
2.6 What is Indirect Trauma?	30
2.6 a) Lawyers and Indirect Trauma.....	30
2.7 To Be Seen and Heard is a Human Need	33
2.7 a) Rejection in the form of Oppression: The Intersection of Trauma, Oppression, and the Legal System..	35
2.8 Conclusion	40
<i>Chapter 3: Detachment and Emotional Disengagement as a Barrier to Effective Responses to Trauma</i>	42
3.1 Law Has Always Included Emotions	45
3.2 When does the Attempt to Disengage Emotion from Reason Begin?	49
3.3 What is the Cost of this Fragmentation?	52
3.3 a) Suppression of All Emotions.....	52
3.3 b) Systemic Injustice	54
3.3 c) Implicit Bias	55
3.3 d) Risk Averse/Perfectionist Behaviour	58
3.3 e) Physical Health Impacts	60
3.3 f) Increase in Aggression, Decrease in Emotional Regulation	62
3.3 g) Negative Perspective.....	63
3.3 h) Mental Health.....	64
3.3 i) Isolation.....	66
3.3 j) Disconnection from Ethics and Values	68
3.4 How to Address Trauma in Legal Practice: Learning How to Practice Trauma-Informed Lawyering	69
3.5 Conclusion	74

Chapter 4: Current Endeavours Towards Trauma-Informed Legal Practice in Canada	77
4.1 Brief Overview of Law Societies’ Responsibilities to the Public Interest	80
4.2 Current Trauma Education Offerings from Canadian Law Societies	82
4.2 a) Federation of Law Societies of Canada.....	82
4.2 b) Law Society of Alberta	87
4.2 c) Law Society of British Columbia	89
4.2 d) Law Society of Manitoba	94
4.2 e) Law Society of New Brunswick.....	95
4.2 f) The Law Society of Newfoundland and Labrador.....	97
4.2 g) Nova Scotia Barristers’ Society	99
4.2 h) Law Society of Ontario	102
4.2 i) The Law Society of Prince Edward Island.....	103
4.2 j) Le Barreau du Québec.....	103
4.2 k) The Law Society of Saskatchewan.....	106
4.2 l) The Law Society of The Northwest Territories	109
4.2 m) Law Society of Nunavut	110
4.2 n) Law Society of Yukon	111
4.2 o) The Canadian Bar Association.....	111
4.3 Commentary and Analysis	114
4.3 a) Trauma-Informed Lawyering and Emotional Acknowledgment are Core Competency Skills	114
4.3 b) Requiring Organizations and Law Firms to Set Lawyers Up for Success in Addition to Individual Mental Health Services.....	117
4.4 Conclusion.....	119
Chapter 5: A Bridge From Knowledge to Action – Recommendations for Next Steps Towards Trauma-Informed Lawyering, Harm Reduction, and Healing.....	121
5.1 Recommendations for Law Societies in Canada	121
5.2 Recommendations for Future Research/Measurements of Impact	124
5.3 Conclusion.....	126
Appendix.....	130
BIBLIOGRAPHY.....	133

Trauma-Informed Lawyering: Practicing Emotional Acknowledgment

Chapter 1: Introduction to Trauma and Trauma-Informed Lawyering

1.1 Why Trauma-Informed Practice Matters

This thesis argues that trauma-informed lawyering practice is: 1) necessary, 2) that such practice involves individual change on the part of lawyers, and 3) that this shift requires the added support of law societies and employers. This thesis comes out on the heels of the Université de Sherbrooke's Preliminary Research Report, Part I which was released on October 27, 2022.¹ This report's troubling findings on the well-being of legal professionals across Canada are, unfortunately, not surprising. More than half of legal professionals surveyed for the report were found to have psychological distress and this thesis argues that these statistics can be addressed through greater understanding about trauma, the acknowledgment of emotions, and the implementation of trauma-informed lawyering skills. Understanding both emotions and trauma can potentially open the door towards greater empathy, compassion, and consideration from lawyers towards clients and towards themselves.

The definition of trauma-informed service will be explored in the next section and trauma-informed legal practice will be discussed in the next chapter. This thesis is intended as a launch point for pragmatic discourse about trauma-informed practice and argues that law societies are responsible for directing change in legal culture to promote and create a foundation of trauma-informed lawyering at a systemic level. In practice, law is a "one size fits all" system in which the users' unique life contexts are often misunderstood or overlooked by legal actors or the legal system. Narrow lenses embedded in law and legal practice often lead to misconceptions and misunderstandings of trauma and emotions, and ultimately to a denial of the humanity of individuals who encounter, use and even work within legal systems. By denying the vast range of human experiences, legal professionals potentially cause a lot of unnecessary harm for people.

¹ Nathalie Cadieux et al, "Research report (preliminary version): Towards a Healthy and Sustainable Practice of Law in Canada Phase I 2020-2022 National Study on the Psychological Health Determinants of Legal Professionals in Canada" (2022) Université de Sherbrooke, Business School, online: *Federation of the Law Societies of Canada* <https://flsc.ca/wp-content/uploads/2022/10/EN_Preliminary-report_Cadieux-et-al_Universite-de-Sherbrooke_FINAL.pdf> [Sherbrooke Report].

In order to reduce this harm to others and to themselves, lawyers must modernize their knowledge about human behaviour (including their own) and learn how to become trauma-informed in legal practice. An important initial step in this skill development is for lawyers to acknowledge their own emotions (this thesis refers to this concept as emotional acknowledgment) and emotional reactions to their clients as well as their clients' stories, lives, and legal matters.² Some lawyers will have trauma experiences similar to their clients, others will have no experience or exposure to such situations. Acknowledging emotional reactions that arise in any given situation is a critical initial step in being able to appropriately address different forms of trauma or triggering experiences as they arise.

If lawyers are supported by employers and law societies to apply the skills at the foundation of trauma-informed practice, self-care, and mental wellness, they will be more prepared and effective at dealing with the trauma that arises as part of legal practice. Such skills will be more impactful if they are learned before a lawyer is exposed to trauma through legal work. Currently, law societies in Canada offer a number of resources for lawyers related to trauma, mental well-being, and self-care. However, such resources focus largely on individual change, addressing the aftermath of exposure to trauma or work-related stress, and such courses are usually optional. These optional courses and expectations on individual lawyers to access them persist while at the same time, concerns about lawyers' rates of depression, anxiety, substance use, and psychological distress continue to plague the profession.³ Trauma-informed lawyering can support lawyers towards stronger connections to their client's humanity and emotional experiences without compromising their advocacy skills or experiencing burnout. By becoming

² Nancy Tam, "Non-Violent Communication" (Weeklong workshop delivered at the Indigenous Law Centre, College of Law, University of Saskatchewan, Saskatoon, January 14, 2020) [unpublished] (the term "emotional acknowledgment" is adapted from these teachings).

³ *Supra* note 1 at 69 (the report included statistics about stressors arising from COVID-19); "Report from the 2019 Annual Conference The Practice of Well-being: Exploring the Legal Regulator's Role" (October 17, 2019), online (pdf): *Federation of Law Societies of Canada* <<https://flsc-s3-storage-pub.s3.ca-central-1.amazonaws.com/2019ConferenceREPORTFin.pdf>> at 1; Connie J.A. Beck, Bruce D. Sales & G. Andrew H. Benjamin, "Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns among a Sample of Practicing Lawyers" (1995) 10:1 *JL & Health* 1; Paula Baron, "The Elephant in the Room: Lawyer Wellbeing and the Impact of Unethical Behaviours" (2015) 41:1 *Austl Feminist LJ* 87; Lawrence S. Krieger & Kennon M. Sheldon, "What Makes Lawyers Happy?: A Data-Driven Prescription to Redefine Professional Success" (2015) 83:2 *The George Washington Law Review* 554; Patrick R. Krill et al, "The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys" (Jan 2016) 10:1 *J Addict Med* 46; Olivia Ash & Peter H. Huang, "Loneliness in COVID-19, Life, and Law" (2022) 32 *Health Matrix* 55.

trauma-informed, lawyers can learn how to practice emotional acknowledgment, how to determine specific reasons behind their goals or actions, and how to exercise greater empathy and consideration towards themselves and the people they work with.⁴ Together, this can help reduce the harm that is often caused to clients and lawyers as part of legal practice as it addresses trauma head on rather than indirectly and ineffectively.⁵

1.2 Trauma Vocabulary

Trauma is a commonly used word that can have many definitions depending on the context in which it is used. For the purposes of this thesis, trauma is defined as a reaction that “results from an event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life-threatening and that has lasting adverse effects on the individual’s functioning and mental, physical, social, emotional, or spiritual well-being.”⁶

Trauma is not a new concept: the first observations of trauma date back to the late nineteenth century.⁷ Presently, in the healthcare sectors, many providers have started to implement thoughtful trauma-informed approaches.⁸ In that setting, a trauma-informed approach describes

⁴ For more on discerning reasons behind specific goals or actions, intention setting or focusing broadly on the present moment to help with staying true to one’s values and integrity, see Angelica Attard, “Set New Year’s Resolutions or Live With Intention Now?” (25 November 2020), online (blog): *Psychology Today* <<https://www.psychologytoday.com/ca/blog/human-beings-being-human/202011/set-new-years-resolutions-or-live-intention-now>>; Andrew Louisy & Erin Kapela, “Workshop 1 - Recreating Life Patterns”, online: *Time to Heal* <<https://www.timetohealcommunity.com/workshops>> at 23; State Bar of Wisconsin, “Lawyers at Risk: Be Intentional About Your Mental Health” (2016), online (video): *YouTube* <<https://www.youtube.com/watch?v=5OdvaHMnE6I>>.

⁵ See Heather Heavin & Michaela Keet, “Client-Centered Communication: How Effective Lawyering Requires Emotional Intelligence, Active Listening, and Client Choice” (2020) 22:2 *Cardozo J Conflict Resol* 199; Jerome Doraisamy, “Ego gets in the way of being client-centric” (25 March 2021), online (blog): *Lawyers Weekly* <<https://www.lawyersweekly.com.au/sme-law/31004-ego-gets-in-the-way-of-being-client-centric>>; Michael E Schatman, “Working to Avoid Collateral Emotional Harm to Clients: Cases and Recommendations for the Personal Injury Attorney” (2009) 2:2 *Psychol Inj and Law* 149; Owen D Jones et al, “Law and Neuroscience” (2013) 33:45 *J Neurosci* 17624 at 17626; Isabel Bilotta et al, “How Subtle Bias Infects the Law” (2019) 15:1 *Annual Review of Law and Social Science* 227; Helgi Maki & C Tess Sheldon, “Trauma-Informed Strategies in Public Interest Litigation : Avoiding Unintended Consequences Through Integrative Legal Perspectives” (2019) 90:2 *The Supreme Court Law Review* 65.

⁶ SAMHSA’s Trauma and Justice Strategic Initiative, “SAMHSA’s Concept of Trauma and Guidance for a Trauma-Informed Approach” (July 2014) U.S. Department of Health and Human Services at 7, online: <https://ncsacw.acf.hhs.gov/userfiles/files/SAMHSA_Trauma.pdf> [SAMHSA].

⁷ Shoshana Ringel & Jerrold Brandell, *Trauma: Contemporary Directions in Theory, Practice, and Research* (Thousand Oaks, California, 2012) at 1.

⁸ See Public Health Agency of Canada, “Trauma and violence-informed approaches to policy and practice”, (2 February 2018), online: *Government of Canada* <<https://www.canada.ca/en/public-health/services/publications/health-risks-safety/trauma-violence-informed-approaches-policy-practice.html>>;

the delivery of services with “an understanding of trauma and an awareness of the impact it can have across settings, services, and populations.”⁹ Trauma-informed service-delivery is viewed as requiring three elements: ‘1) realizing the prevalence of trauma; 2) recognizing how trauma affects all individuals involved with the program, organization, or system, including its own workforce; and 3) responding by putting this knowledge into practice.’¹⁰ Although many scholars and legal practitioners note that trauma is a common experience amongst legal clients, which transfers to lawyers,¹¹ none of the elements in the definition above are consistently present in legal practice nor in the professional development of lawyers.

Trauma is an individual and subjective experience that arises in a person’s subconscious mind to protect them from future pain and harm.¹² The interaction of trauma and law is problematic for several reasons. Law’s focus on “objectivity,” the idea that one can, with accuracy, externally judge another person’s experience as reasonable or unreasonable, can muddle lawyers’ understanding of trauma. An objective lens is at odds with how individuals experience trauma. Further, what may objectively be seen as a traumatic event can lead to a traumatic stress reaction in one person, but cause no reaction in another.¹³ Advances in neurobiology and neuroscience

Heavin, supra note 5; Marijke Melles, Armagan Albayrak & Richard Goossens, “Innovating health care: key characteristics of human-centered design” (2021) 33(S1) *International Journal for Quality in Health Care* 37; Christopher Menschner & Alexandra Maul, “Key Ingredients for Successful Trauma-Informed Care Implementation” *Centre for Healthcare Strategies* 1; *SAMHSA, supra* note 6; SAMHSA “TIP 57: Trauma-Informed Care in Behavioral Health Services SAMHSA Publications and Digital Products”, online: <<https://store.samhsa.gov/product/TIP-57-Trauma-Informed-Care-in-Behavioral-Health-Services/SMA14-4816>> [SAMHSA TIP 57].

⁹ *SAMHSA TIP 57, ibid* at xix.

¹⁰ *Ibid* [citation omitted].

¹¹ Jennifer Brobst, “The Impact of Secondary Traumatic Stress Among Family Attorneys Working with Trauma-Exposed Clients: Implications for Practice and Professional Responsibility” (2014) *Health and Biomedical L.* 1; Lisa Morgillo, “Do Not Make Their Trauma Your Trauma: Coping With Burnout as a Family Law Attorney” (July 2015) 53:3 *Family Court Review* 456 at 457; Andrew P Levin et al, “Secondary Traumatic Stress in Attorneys and Their Administrative Support Staff Working With Trauma-Exposed Clients” (Dec 2011) 199:12 *The Journal of Nervous and Mental Disease* 946; Grace Maguire & Mitchell K Byrne, “The Law Is Not as Blind as It Seems: Relative Rates of Vicarious Trauma among Lawyers and Mental Health Professionals” (2016) *The Australian and New Zealand Association of Psychiatry, Psychology and Law* 233.

¹² Christopher Wilson, Kimberly A Lonsway & Sergeant Joanne Archambault, “Understanding the Neurobiology of Trauma and Implications for Interviewing Victims” (2020) 43 *End Violence Against Women International* at 6.

¹³ Bessel van der Kolk, M.D., *The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma* (New York: Penguin Books, 2015) at 2-3 and 13; Peter Levine, *Trauma and Memory: Brain and Body in A Search for the Living Past A Practical Guide for Understanding and Working with Traumatic Memory* (Berkeley: North Atlantic Books, 2015) at xxi; Andrew Rasmussen et al, “The Subjective Experience of Trauma and Subsequent PTSD in a Sample of Undocumented Immigrants” (2007) 195:2 *Journal of Nervous & Mental Disease* 137–143; Michael Weinberg & Sharon Gil, “Trauma as an objective or subjective experience: The association between types of

and the study of changes occurring in the brain and body following trauma have shown that vast differences in responses to potentially traumatic events exist, and such differences are normal.¹⁴ Evidence supports that humans rarely have control over what will cause a traumatic reaction, given the degree to which our bodies and brains respond to stimuli on an instinctive level.

Before exploring further about trauma impacts on people, definitions of specific types of trauma need to be discussed. The most common types that arise in legal practice include acute stress disorder (ASD), post-traumatic stress disorder (PTSD), intergenerational trauma, and indirect trauma. ASD is “highly associated with the experience of one specific trauma rather than the experience of long-term exposure to chronic traumatic stress.”¹⁵ PTSD differs from ASD because ASD typically resolves sooner than PTSD which continues for a longer period, along with other differences.¹⁶ Intergenerational trauma is defined as “the effects of and responses to traumatic events [that] can be ‘transmitted across generations.’”¹⁷ Indirect trauma, vicarious trauma, or secondary trauma are often used interchangeably. Vicarious trauma often refers to specific cognitive changes such as in one’s own worldview and in their sense of self.¹⁸ Secondary trauma describes “trauma-related stress symptoms resulting from exposure to another individual’s traumatic experiences.”¹⁹ In this thesis, indirect trauma encompasses the different types of trauma that arise from someone else’s traumatic experience.²⁰ Where the word trauma is used on its own, this refers to trauma in a general sense that can include any of the above types. These terms are not to be confused with the definition of physical trauma or injury which refers to physical wounds caused by external forces.²¹

traumatic events, personality traits, subjective experience of the event, and posttraumatic symptoms” (27 October 2015) 21:2 *Journal of Loss and Trauma* 137.

¹⁴ Marinho Ribeiro & Maria Carolina, *Reimagining sexual assault law in Canada: a feminist, trauma-informed approach to restorative justice* (LLM Thesis, University of Victoria, 2021) [unpublished] at 67; *supra* note 12 at 6.

¹⁵ *SAMHSA TIP 57*, *supra* note 8 at 77.

¹⁶ *Ibid* at 79.

¹⁷ Lori Haskell & Melanie Randall, “Disrupted Attachments: A Social Context Complex Trauma Framework and the Lives of Aboriginal Peoples in Canada” (2009) 5:3 *Journal of Aboriginal Health* 48 at 52 [Haskell, Disrupted].

¹⁸ *SAMHSA TIP 57*, *supra* note 8 at xviii.

¹⁹ *Ibid*.

²⁰ Colin James, “Towards trauma-informed legal practice: a review” (2020) 27:2 *Psychiatr Psychol Law* 275 at 276.

²¹ “After Trauma, ‘What is Trauma?’”, online: www.aftertrauma.org/what-is-trauma/what-is-trauma (this can be confusing as it is possible for a person to suffer from physical trauma and psychological trauma at the same time or from the same event).

1.3 Why it is Vital for Lawyers to Learn About Trauma

Lawyers need to know about the complex relationship between trauma, emotions, and behavior of themselves and their clients. They also need to generally know how their own emotional lives and legal practice are affected by others' trauma. Trauma can affect how clients participate in dialogue with their lawyers, interfering with their ability to hear and absorb legal advice or engage in complex decision making. A person who has experienced trauma may try to avoid sharing their experience and may feel shame around the traumatic event.²² This can lead them to self-isolate, causing further harm. The complexity of trauma-related conditions is that if they are not addressed and the person does not reacclimate to perceiving the world as relatively predictable and safe, the body and brain may remain in a heightened state of stress, constantly scanning for signs of danger.²³

Traumatized people are at risk of experiencing more harm and more trauma as a result of the legal system. Legal systems often rely on outdated and inaccurate knowledge about human behaviour. In reality, most traumatized people do not fare well in their interactions with legal systems. Consider, for example, the traumatic life experiences often associated with family law (e.g.: parental alienation), criminal law (e.g.: sexual assault law matters), child protection and other legal practice areas.²⁴ For this reason, trauma-informed lawyering is essential and vital in every area of legal practice.

The prevalence of trauma is high and adversely impacts many people. It follows that most people who work within or become involved in legal systems are either experiencing the impacts of trauma directly or indirectly. Having knowledge about trauma can help lawyers understand and manage it before it adversely impacts their own work. Understanding trauma can help lawyers address it directly rather than leaving them to deal with the aftermath of indirect trauma or burnout without any guidance. Many lawyers are taking steps to practice in trauma-informed

²² *SAMHSA TIP 57*, *supra* note 8 at 36-37.

²³ *Kolk*, *supra* note 13 at 67.

²⁴ Melanie Randall & Lori Haskell, "Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping" (2013) 36:2 *Dalhousie Law Journal* 501–533 [Randall, "Trauma-Informed Approaches"].

ways, to reduce harm, to look after their own well-being, and to inform clients of the emotional and other consequences that arise from decisions on legal matters. Still, lawyers too often tend to disregard their own emotions and by extension, their clients' emotions.²⁵ To compassionately understand how a traumatized client may be experiencing the lawyer-client relationship, a lawyer requires knowledge about the mechanisms, pathways, and impacts of trauma, as well as the capacity to self-reflect, to identify and address emotions which are often avoided in conventional legal culture.

While law schools also have an obligation in their own domain, this thesis argues that the responsibility of educating current practicing lawyers on the prevalence of trauma and their role in preventing or perpetuating harm in practice rests with Canadian law societies. Their current optional approach to trauma-informed training suggests there is still much to be understood about the importance of these skills. Besides creating a better lawyer-client relationship and reducing harm for clients, understanding trauma and trauma-informed skills can help lawyers create a practice that is sustainable over the long-term, avoids burnout, and includes human-centered approaches.²⁶ When the word “sustainable” is used in this thesis, it means “meeting the needs of the present without compromising the ability of future generations to meet their own needs.”²⁷ In the context of trauma-informed lawyering and reducing harm, this means meeting the needs of those around the lawyer while balancing the needs of the client and other users of legal systems, within reason.

Trauma-informed lawyering skills ideally help the lawyer address the individual client as a person rather than solely addressing their legal matter. As stated by Myrna McCallum, a lawyer and trauma-informed practice educator, “Lawyers need to learn... ‘more about the human experience and what our clients can go through, but also how do we as lawyer navigate through

²⁵ *Heavin, supra* note 5 at 200; Louis H Hamel Jr. & J Timothy Davis, “Transference and Countertransference in the Lawyer-Client Relationship” (2008) 25:4 *Psychoanalytic Psychology* 590; Richard L Abel, “Lawyer self-regulation and the public interest: a reflection” (2017) 20:1 *Legal Ethics* at 120.

²⁶ *Heavin, supra* note 5 at 208-209; *Melles, supra* note 8 (human-centered design is a field “ensuring that solutions fit the dynamics of the (complex) sociotechnical system the user is part of).

²⁷ United Nations, “Sustainability” online: *United Nations* <<https://www.un.org/en/academic-impact/sustainability>>; see also Beatrice I J M Van der Heijden & Ans De Vos, *Handbook of Research on Sustainable Careers (Research Handbooks in Business and Management series)* (Cheltenham, UK: Edward Elgar Publishing, 2015) at 6-12.

this, how we regulate our own emotions.”²⁸ Bringing human experiences into legal practice is important in order to reduce harm as the opposite, disconnection, can lead people to rely largely on their biases. Such harms, which will be discussed below in chapter 3, can be further aggravated for people who are already traumatized in other ways.²⁹ Trauma-informed lawyering is also “a do-no-further harm, relational approach to the practice of law that benefits clients, lawyers and firms supporting these clients.”³⁰ The word “relational” requires an approach where both the client and the lawyer contribute to the legal work for a mutually beneficial working relationship.³¹ Currently, there remains a gap in how to implement this in legal practice, especially as compared to other disciplines like healthcare and mental health professions.

1.4 Moving Forward as a Trauma-Informed Lawyer Towards a Trauma-Informed Legal Profession

My contribution to the existing literature on trauma-informed lawyering is to highlight the disconnect between lawyers and their emotions, the links between emotional acknowledgement and trauma-informed practice, as well as law societies’ duty to mobilize change from an organizational level rather than an individual one. In the next chapter, trauma including PTSD, intergenerational trauma, and indirect trauma is discussed. The connection between trauma and law will be reviewed. The third chapter bridges the connection between trauma and emotions. It explores how the legal system encourages avoidance of emotions, the resulting consequences, and why emotions need to be acknowledged as suppressing them can increase a lawyers’ risk of indirect trauma, implicit bias, and poor health. It concludes with recommendations for the individual lawyer to address these consequences. In the fourth chapter, I review the Sherbrooke

²⁸ Zena Olijnyk, “Trauma-informed lawyering a useful tool in working with victims, survivors” (26 Aug 2021) online: *Canadian Lawyer Magazine* <<https://www.canadianlawyermag.com/resources/legal-education/trauma-informed-lawyering-a-useful-tool-in-working-with-victims-survivors/359277>>.

²⁹ Courtney E Ahrens, “Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape” (2006) 38:3–4 *Am J Community Psychol* 263, *Heavin, supra* note 5 at 199; Sarah Katz & Deeya Haldar, “The Pedagogy of Trauma-Informed Lawyering” (2015) 22:2 *Clinical L Rev* 359 at 368.

³⁰ Myrna McCallum, “The Trauma-Informed Lawyer” (date accessed: September 2021), online (podcast): *The Trauma-Informed Lawyer* <thetraumainformedlawyer.simplecast.com/>.

³¹ “Relational (adjective) definition and synonyms” online: *Macmillan Dictionary* <https://www.macmillandictionary.com/dictionary/british/relational>; Susan L. Brooks, “Using a Communication Perspective to Teach Relational Lawyering” (2015) 15:2 *Nev LJ* 477; Jill Howieson & Lynn Priddis, “A Relational Model of Family Lawyering: Exploring the Potential for Education, Practice and Research” (2014) 29:1 *Can J Fam L* 173.

report and discuss its findings and suggested solutions to address risk factors faced by legal professionals. I review Canada's law society websites for resources regarding trauma-informed education, mental well-being, and indirect trauma. I provide suggestions for gaps in these resources and call on Canada's law societies to establish the necessary groundwork towards trauma-informed lawyering that goes beyond understanding what the client brings to the table and includes what the lawyer brings to the table: their own emotions and individual context. In doing so, this sets the tone for taking the emotions and life experiences of people within the legal system seriously. Finally, I make recommendations for law societies and for future research and measurement of the impact of changes toward trauma-informed lawyering and emotional acknowledgment.

Most importantly, I hope to demonstrate why trauma-informed lawyering is empowering. By embodying the principles of trauma-informed lawyering, such as learning how to pay attention to one's self, one's emotions, and one's own intentions, lawyers can learn how to keep their humanity in their actions as they work through very challenging and at times, horrific human stories and situations. Acknowledging their emotions – their own humanity – will help lawyers learn how to exercise greater empathy and openness with clients without sacrificing their own well-being.

Chapter 2 Trauma: What it is and How it Connects to Lawyering

An important primary step of becoming trauma-informed is to learn about the complicated factors related to trauma. This chapter explores different definitions of trauma and discusses the impacts of trauma on the brain, body, and one's perception of the world. Several types of traumas are explored in detail including intergenerational trauma and indirect trauma. The former impacts across generations and is often associated with the horrific acts of colonization on Indigenous and First Nations people. Indirect trauma is a high risk for lawyers as they can be secondarily exposed (in various ways) to the traumatic experiences of others. Beyond understanding these definitions, lawyers will also need to learn why viewing another person's traumatic experiences from an objective view (instead of the client's subjective experience) can lead to misunderstandings and greater harm. What is especially misunderstood about trauma is that it is highly prevalent. In surveyed populations there is indication that minority groups experience trauma at higher rates (this is significant as Indigenous people are overrepresented in the criminal justice system and in child welfare systems).³² Given its general prevalence, it follows that trauma is also prevalent amongst lawyers, which will be discussed. This chapter will also explore the interconnection of racism, oppression, and trauma as these are critical pieces towards becoming trauma-informed: cultivating awareness of how different people experience (and are treated by) legal systems.

2.1 Definitions of Trauma

2.1 a) Defining Trauma as a Subjective Experience

The previously discussed definition of trauma is more inclusive and accessible as not everyone adversely impacted by trauma understands they are traumatized or they may not have the ability to seek help to address it. As a reminder, the definition of trauma shared in chapter 1.2 is: trauma that “results from an event, series of events, or set of circumstances that is experienced by an

³² Department of Justice Government of Canada, “Indigenous overrepresentation in the criminal justice system - JustFacts”, (9 September 2019), online: *Government of Canada* <<https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2019/may01.html>>; “Reducing the number of Indigenous children in care” (2 November 2018), online: *Government of Canada* <<https://www.sac-isc.gc.ca/eng/1541187352297/1541187392851>>.

individual as physically or emotionally harmful or life-threatening and that has lasting adverse effects on the individual's functioning and mental, physical, social, emotional, or spiritual well-being.”³³ It is the preferred definition out of the three discussed below as it supports the arguments made in this thesis: 1) that trauma is prevalent, 2) that the legal profession and legal systems can increase trauma, and 3) that the appropriate response for lawyers is to acknowledge how each person's experience is unique to that individual and can involve a variety of factors (including emotional and spiritual impacts). This definition also prioritizes the perspective of the person experiencing trauma which further supports taking their emotions and experiences seriously. This is part of a trauma-informed lawyering practice. As Peña, a legal scholar writes, “Regardless of whether one believes the impacts of trauma are real, the practices are helpful and should be used anyway. What harm can come from being more thoughtful and diligent, or compassionate and empathetic?”³⁴

The definition of trauma adopted in this thesis is from the Substance Abuse and Mental Health Services Administration (SAMHSA), an agency of the U.S. Department of Health and Human Services.³⁵ Since “trauma” is used differently in various contexts, a brief discussion of two other definitions of trauma from mental health contexts will show how these narrower definitions share similarities to a legal objective lens, and why this approach to trauma can be problematic in lawyering (discussed in greater detail in chapter 2.3). The SAMHSA definition does not focus on the events that caused the trauma but on the experience of the individual who survived the events. How people view or frame their trauma is significant in how they process it.³⁶ As well, social, spiritual, or emotional impacts are rarely considered and spiritual impact is arguably a crucial piece that considers different cultural needs.

A second definition (not relied on in this thesis) from the Diagnostic and Statistical Manual of Mental Disorders, 5th edition (DSM-5), is used by doctors in Canada, the United States, and other

³³ *Supra* note 6.

³⁴ Claudia Peña, “Trauma Abounds: A Case for Trauma-Informed Lawyering” (2019) 26:1 UCLA Women's LJ 7 at 16.

³⁵ SAMHSA, *supra* note 6 at 7 (definition current to March 22, 2022).

³⁶ David C Rubin and Nicole Feeling, “Measuring the Severity of Negative and Traumatic Events”, (2013) 1:4 Clinical Psychological Science at 375-389 (SAGE Journals), online: < <https://journals-sagepub-com.cyber.usask.ca/doi/full/10.1177/2167702613483112>>

countries; it views traumatic experiences narrowly from an external viewer's perspective.³⁷ The DSM-5 threshold for what amounts to trauma is: "events where the person experienced, witnessed, or was confronted with an event or events involving actual or threatened death or serious injury, or a threat to physical integrity of self or others. In cases of actual or threatened death of a family member or friend, the event(s) must have been violent or accidental." This definition is likely in line with the general public's perception of trauma, including the perception of many in the legal profession. However, it is important in this thesis and in lawyering to distinguish between trauma for the purpose of diagnosing PTSD and trauma in other forms. Different types of trauma are more prevalent and both cause far-reaching impacts. The bar for meeting the definition of trauma in the DSM-5 is higher for diagnostic purposes whereas trauma generally can be difficult to pinpoint as it is an experience unique to each person.³⁸

A third definition of trauma (not relied on in this thesis) used by the Centre for Addiction and Mental Health, Canada's largest mental health teaching hospital, is: "the lasting emotional response that often results from living through a distressing event. Experiencing a traumatic event can harm a person's sense of safety, sense of self, and ability to regulate emotions and navigate relationships. Long after the traumatic event occurs, people with trauma can often feel shame, helplessness, powerlessness, and intense fear."³⁹ This definition is broader and implies a person's unique and subjective experience, though it focuses on trauma arising from a single event.

³⁷ Cary S Kogan & Sabrina Paterniti, "The True North Strong and Free? Opportunities for Improving Canadian Mental Health Care and Education by Adopting the WHO's ICD-11 Classification" (2017) 62:10 Can J Psychiatry 690; American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5®)* (American Psychiatric Publishing, 2013) at 271.

³⁸ Note: the medical community is divided on the categorical methods used in the DSM-5 though delving deeper into this issue is outside the scope of this thesis. See A Bremness & Wanda Polzin, "Commentary: Developmental Trauma Disorder: A Missed Opportunity in DSM V" (2014) 23:2 J Can Acad Child Adolesc Psychiatry 142.

³⁹ "Trauma", online: *Centre for Addiction and Mental Health* <<https://www.camh.ca/en/health-info/mental-illness-and-addiction-index/trauma>>.

2.2 How Does a Brain Typically Develop and Operate?

First, this section will review how the brain operates generally without trauma in order to have a basis for comparison with how trauma disrupts the brain. While much of the brain remains a mystery, advances in neuroscience and technology in the last several decades have gleaned more information about how it operates. In general, brains operate from a “bottom to the top” capacity in which the brain develops in order of the parts that first evolved in the human species.⁴⁰ The first to evolve was the brain stem, also known as the animal or reptilian brain.⁴¹ This is a functioning part of a baby’s brain after birth and allows them to eat, sleep, wake, cry, urinate, and defecate.⁴² These functions occur mostly without thought unless the balance of the brain is disrupted.

The next to evolve, the limbic system, is also known as the mammalian brain because it is common to animals that live in community.⁴³ It is involved in behavioural and emotional responses: it monitors danger, decides what is pleasurable or scary, and determines survival needs.⁴⁴ For example, if a person is raised feeling safe, loved, and supported, their limbic system fosters the ability to create, imagine, cooperate, and explore.⁴⁵ If a person grows up feeling frightened, unwanted, and disconnected, their limbic system develops to manage feelings of fear, abandonment, and seeks coping methods to survive.⁴⁶ As such, early development plays a significant factor in how one is impacted by trauma throughout life, as will be discussed further in chapter 2.4.⁴⁷

⁴⁰ *Kolk, supra* note 13 at 55; Adrienne L Tierney & Charles A Nelson, “Brain Development and the Role of Experience in the Early Years” (2009) 30:2 *Zero to Three* 9.

⁴¹ *Ibid* at 56.

⁴² *Ibid*; “Brain Anatomy and How the Brain Works”, online: *Johns Hopkins Medicine* <<https://www.hopkinsmedicine.org/health/conditions-and-diseases/anatomy-of-the-brain>> [Hopkins]; “Fact Sheet: Brain map and functions” online: *Government of South Australia Health* <<https://www.sahealth.sa.gov.au/wps/wcm/connect/75b85d1a-34c8-4852-910c-0f38d5a97268/Fact+sheet+-+Brain+map+and+functions.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-75b85d1a-34c8-4852-910c-0f38d5a97268-nwJZ3oX>>.

⁴³ *Ibid*.

⁴⁴ “The limbic system” (10 November 2017), online: *The University of Queensland Australia Queensland Brain Institute* <<https://qbi.uq.edu.au/brain/brain-anatomy/limbic-system>>.

⁴⁵ *Kolk, supra* note 13 at 56.

⁴⁶ *Ibid*.

⁴⁷ *Tierney, supra* note 40; Vincent J Felitti, MD, “The Relation Between Adverse Childhood Experiences and Adult Health: Turning Gold into Lead” (2002) 6:1 *The Permanente Journal*, online: <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6220625/>> at 44.

Neuroscientists have researched how the brain has evolved into a more efficient system so that when a person perceives a threat, their brain processes information quickly and jumps to conclusions from rough similarities.⁴⁸ Ideally, this allows people to survive. This is different from how a brain operates in daily life, where a person is calm, relaxed, and can organize information into linear timelines.⁴⁹ Organizing information requires time and energy that may not be available in dangerous situations. Efficiency allows the brain to bypass logical processes and act.⁵⁰ Even outside of dangerous situations, our brains will operate efficiently.⁵¹ For example, with habits:

[D]espite our sense of control and purpose in our lives, a significant proportion of our daily behavior is actually driven by habit... Habits serve a critical purpose in making our behavior more efficient, reducing the decision burden we face each day and freeing up mental energy for more demanding tasks.⁵²

The efficiency of the brain bypassing rational systems (which take more time and energy to operate) when acting out habits also describes how trauma can cause the same bypassing. This will be explored more in the next section.

The next layer of the brain, the neocortex, is the latest to evolve.⁵³ The neocortex allows a person to learn things like how to sit still, communicate verbally, plan for the future, listen, and empathize.⁵⁴ Within this layer is a group of cells called the mirror neurons, which vicariously reflect another's actions and emotions.⁵⁵ Therefore, when a group of people are in sync with one another, they may stand or talk in similar ways. However, mirror neurons can also adversely impact someone when they experience a person's anger, for example.⁵⁶ The frontal lobe within the neocortex is connected to personality characteristics, decision making, conscious thought,

⁴⁸ *Kolk, supra* note 13 at 57; *Levine, supra* note 13 at 40.

⁴⁹ *Kolk, supra* note 13 at 68-69.

⁵⁰ *Ibid* at 60-61.

⁵¹ Alana I Mendelsohn, "Creatures of Habit: The Neuroscience of Habit and Purposeful Behavior" (2019) 85:11 *Biological Psychiatry* e49.

⁵² *Ibid*.

⁵³ *Kolk, supra* note 13 at 57.

⁵⁴ *Ibid* at 58; Chai M Tyng et al, "The Influences of Emotion on Learning and Memory" (2017) 8:1454 *Front Psychol* 1 at 14.

⁵⁵ N N Lebedeva et al, "The Mirror System of the Brain on Observation, Performance, and Imagination of Motor Tasks – Neurophysiological Reflection of the Perception of Another Person's Consciousness" (2019) 49:6 *Neurosci Behav Physiol* 714.

⁵⁶ *Kolk, supra* note 13 at 59.

and expression of emotion.⁵⁷ However, when the brain experiences strong emotional sensations, the older parts of the brain can override the rational parts. The more intense the emotions, the more likely it is the overriding will occur.⁵⁸ This can include mirror neurons which also help people relate to one another.⁵⁹ When the logical parts of the brain are overridden, this can also disrupt how a person perceives their world as a natural process that allows people to survive in the face of danger and traumatic events.⁶⁰

2.3 What is Trauma?

Trauma is a shift that impacts a person's ability to feel safe in everyday situations; it alters their life.⁶¹ Such a person can be difficult to work with or for in legal practice. They may not be in touch with the day-to-day experiences of their life because they are reliving some form of past traumatic events. Trauma impacts healthy brain function.⁶² It challenges the person's ability to reconcile their understanding of the world before their experience of trauma and their new perspective after it.⁶³ It is difficult to navigate these polarities, and in doing so, a person may resort to self-blame or denial in an attempt to reframe the traumatic experience(s) to fit with their previous world perceptions.⁶⁴ When unable to do so, this can lead to hyperarousal, which alters the way the person relates with others, who they trust or whether they feel safe.⁶⁵ This can manifest into feelings like cynicism, unworthiness or disempowerment.⁶⁶

Trauma can cause a person to lose their sense of self and impact their ability to create meaningful and consistent relationships which is at odds with how people seek connection.⁶⁷

⁵⁷ *Ibid* at 57-58; *Hopkins*, *supra* note 42.

⁵⁸ *Kolk*, *supra* note 13 at 60.

⁵⁹ Kimberly J Montgomery, Kimberly R Seeherman & James V Haxby, "The Well-Tempered Social Brain" (2009) 20:10 *Psychol Sci* 1211.

⁶⁰ Adriel Boals, "Trauma in the Eye of the Beholder: Objective and Subjective Definitions of Trauma" (2018) 28:1 *Journal of Psychotherapy Integration* 77.

⁶¹ *SAMHSA TIP 57*, *supra* note 8 at 18.

⁶² *SAMHSA*, *supra* note 6 at 7 (*SAMHSA's* definition of trauma with mental, physical, spiritual, emotional, or social well-being impacts).

⁶³ Ellen Gillander, *Bearing Witness to Crime: An Examination of Secondary Traumatic Stress and Vicarious Trauma among Attorneys* (Doctor of Psychology, William James College, 2018) [ProQuest] at 20.

⁶⁴ *Ibid*.

⁶⁵ *Ibid*.

⁶⁶ *Ibid* at 20-21.

⁶⁷ *Kolk*, *supra* note 13 at 13; *SAMHSA*, *supra* note 7 at 5.

Where a person has lost their sense of self and their world perception has been drastically altered, their nervous system and brain will then be wired to stay alert for the next perceived threat.⁶⁸ Therefore, there is no opportunity for the person to rest, heal, calm down, or feel as if they can safely connect with others.⁶⁹ This is exhausting and can lead an individual to rely on substances to cope or it can lead to the development of physical illnesses, as will be explored in detail in the next chapter.

Besides substance use, dissociation is another coping mechanism often used to deal with trauma impacts:

Traumatized people who dissociate learn to alter an unbearable reality by developing an ability to go into a trance state or a state of disconnection from their bodies or thoughts. This is the ‘dissociative state.’ Dissociation is defined as the failure to integrate information and experiences.⁷⁰

While in a dissociative state, a person may be physically present but their thoughts and emotions are disconnected. Any physical sensations they experience may occur without conscious awareness.⁷¹ While this response is meant to create self-protection for the individual, it can also become a chronic problem if used over long periods in daily life.⁷² Dissociation can lead the individual to experience further re-victimization because others may take advantage of their dissociative state.⁷³ It is outside the scope of the thesis to explore further but more research is needed on how legal processes may increase harm and trauma for individuals, especially those who dissociate and are required to testify at trial. This coping mechanism in particular challenges how law typically views matters with an “objective” lens.

2.3 a) Why an “Objective” View of Trauma is Inadequate When Working With Traumatized People in Law

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Haskell, Disrupted, supra* note 17 at 61.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid*, [citations omitted].

In the practice of law, viewing trauma narrowly to judge a person's experience as an outsider is inadequate as it encourages broad assumptions or biases. The next sections will discuss the prevalence of trauma and how the same traumatic event may severely impact one person and have little impact on another. It is unnecessary and unrealistic for lawyers to determine who is or is not traumatized (nor is it their job to do so). It is more practical for all lawyers to practice trauma-informed lawyering with everyone. To do so effectively, lawyers must understand that traumatized people do not necessarily know they are traumatized and do not have the ability to simply control their trauma symptoms. This includes lawyers adapting a broader understanding of trauma such as the chosen definition in this thesis which focuses on an individual's actual experience of trauma. It is a way of learning how to meet a potentially traumatized person where they are at. As lawyers have a great amount of power and control over what can happen to a client's file and, by extension, in a client's life, they are responsible for learning how their actions impact others, how trauma affects individuals, and what neuroscience knows about human behaviour. Understanding these factors will help lawyers better prepare themselves to work with a variety of clients.

To start with, there is a great deal of literature that calls into question whether anyone can remain truly "objective" in assessing someone else's experience. This includes legal literature that calls into question the use of the "objective" perspective in law.⁷⁴ Exploring this is outside of the scope of this thesis. However, these assertions are relevant as criticism of "objective" perspectives include how these views fall short of accurately imagining someone else's context. This is because as lawyers, "we need to understand that differences exist as do implicit biases that negatively affect treatment of diverse individuals."⁷⁵ Tying this together, this requires lawyers to approach clients with humility and patience, realizing they, as lawyers, do not have all the information about a client's life or why that client may wish for a particular outcome. In the context of trauma, when a client is unaware of their own trauma symptoms or the reasons behind their reactions, they may not have the language necessary to explain their motives to their

⁷⁴ Peter Papathanasiou & Patricia Eastal, "The Ordinary Person in Provocation Law: Is the Objective Standard Objective" (1999) 11:1 Current Issues in Crim Just 53; *Bilotta, supra* note 5.

⁷⁵ *Bilotta, supra* note 5 at 241.

lawyer. Applying an “objective” and clinical definition of trauma to such a client can cause greater harm to that client.⁷⁶

The following excerpt from a study supports that an “objective” perspective to measure trauma, even in a clinical sense, is inaccurate in predicting actual impacts of trauma:

[T]here is no ideal, purely analytic objective measure. ...[W]e lack the view of the all-knowing neutral narrator recording the event. In addition, for practical and ethical reasons, there is rarely a report made at the time of the trauma from either the person experiencing the event or a neutral observer. What we usually have is the memory reported by the person a considerable time after the trauma; for diagnosis the report occurs at least a month after the trauma. One might assume that the legal system would offer metrics of severity for claims of damages, but for PTSD it defers to mental health expert witnesses and the evaluation of their expert testimony by judges or jurors.⁷⁷

As demonstrated in this quote, in law or in a clinical setting, an accurate “objective” measure of trauma symptoms does not exist. Participants in the above study were comprised of undergraduate psychology students, some with previous diagnoses of PTSD and some without.⁷⁸ They rated a list of events according to how they believed a healthy person would judge them. Other participants were asked to rate the events as if they were personally experiencing them. The findings showed that the “objective” observers of traumatic events were consistent with *each other* in how they measured severity. However, their ratings failed to predict the severity of PTSD symptoms experienced by the survivors of the events.⁷⁹ This finding challenges how clinical practitioners diagnose PTSD and, by extension, how trauma cannot be judged or predicted by a solely “objective” viewpoint.⁸⁰

From these findings, researchers theorized that focusing on how an individual perceives their own trauma is important.⁸¹ This included consideration of the individual’s characteristics and whether they believed they had any control over their traumatic experience.⁸² Rather than

⁷⁶ Haskell, *Disrupted*, *supra* note 17 at 52.

⁷⁷ *Supra* note 36 at 376.

⁷⁸ *Ibid* at 377.

⁷⁹ *Ibid* at 387-388.

⁸⁰ *Ibid*.

⁸¹ *Ibid* at 386.

⁸² *Ibid*.

focusing objectively on the event, greater focus on the full context of the individual patient such as their genetic disposition, childhood history, adolescent development, and past experiences with trauma could be more effective with helping the patient.⁸³ As summarized by Boals, “It is important that clinicians remain mindful that an event does not necessarily have to be life-threatening to have a severe adverse impact on an individual.”⁸⁴ For example, stressful events that are not objectively traumatic but may lead to PTSD-like symptoms include: “being bullied at school, experiencing divorce, or having one’s sexual orientation become publicly known.”⁸⁵ Other relevant factors are whether the individual perceives the event as a central part of their identity, and how the traumatic event disrupts and challenges their core beliefs.⁸⁶ There may also be situations that are clinically viewed as traumatic (meaning they would be classified as traumatic using clinical diagnostic tools) but do not in fact adversely impact the individual.⁸⁷ These findings are a clear reminder that lawyers, armed with their knowledge, understanding of legal processes, and experience working with a variety of clients, still should not make “objective” conclusions about what an individual is personally experiencing or going through.

When a person experiences trauma in their life is also relevant to how they experience it. This is another reason why trauma can be very difficult to understand in a legal context as it affects people differently. Adults will often have a greater chance of recovering from trauma whereas a child who experiences trauma will have much higher risk of developmental impacts. “In children and youth, the altered trajectory of development from ongoing trauma from caregivers over several developmental periods is simply more profound and evident across a wider spectrum of developmental domains than adults.”⁸⁸

2.4 The Prevalence of Trauma: From Adverse Childhood Experiences to Traumas in Adulthood

The Adverse Childhood Experiences (ACE) study shed light on how childhood experiences shape an individual over the course of their entire life. It illuminates the prevalence of potentially

⁸³ *Ibid.*

⁸⁴ *Boals, supra* note 60 at 86.

⁸⁵ *Ibid.*

⁸⁶ *Ibid* at 78 and 86.

⁸⁷ *Ibid* at 84.

⁸⁸ *Supra* note 38 at 142 [emphasis in original].

traumatizing events and understanding this is key towards trauma-informed lawyering. The ACE test is a list of questions that asks whether potentially traumatic events occurred in the individual's life between the ages of 0-17.⁸⁹ The ACE test consists of 10 questions which are listed in Appendix A; they ask about violence, sexual abuse, and neglect.⁹⁰ The initial study was led by Dr. Vince Felitti and surveyed over 17,000 adult participants in the United States.⁹¹ The results showed that traumatic childhood experiences were much more common than previously thought with *one in every four adults* exposed to at least two categories of abusive experience and *one in 16 adults* to four categories. Where there was exposure to one category, the likelihood of experiencing another jumped to 80%.⁹² While the events listed are considered potentially traumatic and may not amount to trauma for every individual, these findings are still highly relevant due to their causal connection and connection to other health outcomes.

This study's origins started at an obesity clinic at Kaiser Permanente San Diego Department of Preventative Medicine when Dr. Felitti noticed the high dropout rate of participants in the program. This persisted despite their success with losing weight. After conducting interviews of nearly 200 people who dropped out, he discovered that many were victims of childhood abuse. Obesity was not the root problem for those who dropped out.⁹³ Rather, it was a protective mechanism from the aftermath of trauma and childhood abuse.⁹⁴ This illuminated how separate studies of an individual's experiences can easily miss the root causes or their connections.

The study also found that a person's ACE score connected to their health outcomes. Someone who experienced four ACE events were roughly four times more likely to develop chronic obstructive pulmonary disease.⁹⁵ Someone with four or more ACEs were roughly five times

⁸⁹ "Violence Prevention, Fast Facts, What are adverse childhood experiences?" online: *Centers for Disease Control and Prevention*

<<https://www.cdc.gov/violenceprevention/aces/fastfact.html#:~:text=Adverse%20childhood%20experiences%2C%20or%20ACEs,in%20the%20home%20or%20community>>.

⁹⁰ "Original ACE Questionnaire - Trauma-Informed Care Implementation Resource Center - Resource" (3 March 2020), online: *Trauma-Informed Care Implementation Resource Center*

<<https://www.traumainformedcare.chcs.org/resource/original-ace-questionnaire/>>.

⁹¹ *Felitti, supra* note 47.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Felitti, supra* note 47 at 45.

more likely to have depression than someone with an ACE score of zero.⁹⁶ For those who scored higher, their likelihood of having attempted suicide increased by twelve times.⁹⁷ For women who had an early history of abuse and neglect, they were seven times more likely to be sexually assaulted in adulthood.⁹⁸ This research produced strong evidence to show the connections linking early experiences to trauma, negative impacts on childhood development and growth, as well as future outcomes of poor health and abuse. In functional magnetic resonance imaging (fMRI) scans, there were measurable differences in the amygdala of people with ACE scores and those who scored zero.⁹⁹ These illustrate how people exposed to higher amounts of adversity may also engage in high-risk behaviour, showing how childhood adversity can impair the development of the brain, the hormone system, and the body's immune system.¹⁰⁰

On describing the importance of the ACE Study, Dr. Felitti asserts:

The ACE Study reveals a powerful relation between our emotional experiences as children and our adult emotional health, physical health, and major causes of mortality in the United States. Moreover, the time factors in the study make it clear that time does *not* heal some of the adverse experiences we found so common in the childhoods of a large population of middle-aged, middle-class Americans. One doesn't "just get over" some things.

...[W]e found many other measures of adult health to have a strong, graded relation to what happened in childhood: hepatitis, heart disease, fractures, diabetes, obesity, alcoholism, occupational health, and job performance.¹⁰¹

While stress is a normal part of daily life, when stressful experiences become overwhelming either to the point of trauma or in addition to existing trauma, the brain's ability to remain logical is compromised. Reliving traumatic events can lead to major increases of cortisol and adrenaline.¹⁰² Overactive secretion of these hormones can contribute to physical ailments, behavioural issues, and for those with childhood trauma, as much as a 20-year difference in life

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Kolk, supra* note 13 at 87.

⁹⁹ Nadine Burke Harris, M.D., "How childhood trauma affects health across a lifetime" (17 February 2015), at 00h:07:40s, online (video): *YouTube TEDMed* < <https://www.youtube.com/watch?v=95ovIJ3dsNk>>. at 00h:07:40s.

¹⁰⁰ *Ibid* at 00h:07:20s and 00h:09:00s.

¹⁰¹ *Felitti, supra* note 47 at 44 and 46.

¹⁰² *Supra* note 99 at 00h:08m:20s.

expectancy.¹⁰³ Children are particularly sensitive to repeated stress activations because their brain functions and bodily functions are still developing.¹⁰⁴

ACEs affect people from all demographics. The original group surveyed by Dr. Felitti and his team was comprised of 70% Caucasian participants and 70% of the group were college educated.¹⁰⁵ Drawing from this, roughly 7 out of 10 people in systemically privileged groups experienced events that met the threshold of an adverse childhood experience. The percentage for people belonging to systemically disadvantaged groups is even higher and perhaps even more so if the ACE questions reflected the unique experiences of marginalized groups (such as adverse impacts on spirituality, self-identity, or cultural connection).¹⁰⁶

The United States' National Survey of Children's Exposure to Violence found that within the last year the study was conducted, roughly 60% of children aged 17 or younger had been exposed to violence. One in 10 of these children had been exposed to violence five or more times in the past year.¹⁰⁷ This included incidents of violence in relation to physical assault, bullying, sexual victimization, child maltreatment and neglect, property victimization, and witnessing any indirect victimization. It did not include the broader categories as noted by the ACE questionnaire.

A Canadian study found that among people aged 45 to 85 years, roughly 62% of over 44,000 participants had exposure to at least one ACE.¹⁰⁸ The results showed that participants with lower income and lower educational attainment experienced greater early life adversity.¹⁰⁹ These connections suggest that the more ACEs one experiences, the more likely these have an adverse

¹⁰³ *Ibid* at 00h:00m:50s; Neil Schneiderman, Gail Ironson & Scott D Siegel, "STRESS AND HEALTH: Psychological, Behavioral, and Biological Determinants" (2005) 1 *Annu Rev Clin Psychol* 607.

¹⁰⁴ *Supra* note 99 at 00h:09m:20s.

¹⁰⁵ *Ibid* at 00h:13m:27s.

¹⁰⁶ Melissa T Merrick et al, "Prevalence of Adverse Childhood Experiences From the 2011-2014 Behavioral Risk Factor Surveillance System in 23 States" (2018) 172:11 *JAMA Pediatrics* 1038; Paul Lanier, "Racism is an Adverse Childhood Experience (ACE)" (2 July 2020), online: *The Jordan Institute for Families* <<https://jordaninstituteforfamilies.org/2020/racism-is-an-adverse-childhood-experience-ace/>>.

¹⁰⁷ David Finkelhor et al, "Children's Exposure to Violence, Crime, and Abuse: An Update" (2015) *Office of Juvenile Justice and Delinquency Prevention Juvenile Justice Bulletin* 1 at 5.

¹⁰⁸ Divya Joshi et al, "Prevalence of adverse childhood experiences among individuals aged 45 to 85 years: a cross-sectional analysis of the Canadian Longitudinal Study on Aging" (2021) 9:1 *cmajo* E158.

¹⁰⁹ *Ibid* at E164 to E165.

impact on one's ability to pursue education and higher income later in life.¹¹⁰ These research results matched other Canadian studies on ACEs regarding “adolescents who reported nonheterosexual orientation [as they] were at greater risk of being maltreated.”¹¹¹ Gender nonconforming behaviours are frequently noticed first by the adults around the child and before the child is aware of their own sexual identity. As such, it is possible that adults around this child use maltreatment to repress such behaviours.¹¹² This study was limited as the sample did not include individuals living on Indigenous or First Nations' reserves, territories, or in institutions. As well, the participants had higher education and household incomes than the average population. As such, the prevalence of ACEs is likely underestimated as the study sample did not represent Canada's diverse population.¹¹³

All of the research discussed above shows that trauma is incredibly prevalent. The findings from the two studies above are consistent with other similar studies done across Canada.¹¹⁴ Even though the ACEs study brought forward the importance of a person's childhood experiences and the connection to physical health, it is not perfect. Some criticisms about the ACEs include that it overlooks socioeconomic conditions,¹¹⁵ it is misused to screen for diagnosis rather than research,¹¹⁶ it overlooks racism, colonial impacts, and historical trauma as adverse experiences,¹¹⁷ it does not include the experiences of LGBTQ2S+ community members, and that

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ Andrea Gonzalez et al, “Childhood and family influences on depression, chronic physical conditions, and their comorbidity: Findings from the Ontario Child Health Study” (2012) 46:11 *Journal of Psychiatric Research* 1475; Tracie O Afifi et al, “Child abuse and mental disorders in Canada” (2014) 186:9 *CMAJ* E324; S McDonald, D Kingston & S Tough, “Adverse Childhood Experiences In Alberta, Canada: A Population Based Study” (2014) 99:Suppl 2 *Archives of Disease in Childhood* A371.

¹¹⁵ Gary Walsh, “Adverse Childhood Experiences: a social justice perspective” (15 May 2019), online: *The University of Edinburgh* <<https://blogs.ed.ac.uk/CRFRresilience/2019/05/15/aces-a-social-justice-perspective/>>.

¹¹⁶ See Karen de Sá & Nadra Nittle, “ACES Questioned: California's Screening Plan Draws Criticism” (19 August 2020), online: *The Imprint* <<https://imprintnews.org/child-welfare-2/painful-questions-critics-question-california-universal-aces-screening/46670>> (citing Bruce Perry, a neuroscientist at Northwestern University's School of Medicine who states that the ACE is too simplistic as a screening tool; it is for epidemiology studies and public awareness campaigns).

¹¹⁷ *Lanier, supra* note 106; Joshua Mersky et al, “Disparities in adverse childhood experiences by race/ethnicity, gender, and economic status: Intersectional analysis of a nationally representative sample” (2021) 117 *Child Abuse & Neglect* 105066; Jessie I Lund, *Adverse childhood experiences, executive functions, and substance use in an Indigenous residential treatment program* (Doctor of Philosophy in Clinical Psychology, Lakehead University, 2021) [unpublished].

even when used carefully, it risks oversimplification of a person’s unique experience.¹¹⁸ Despite these critiques, it is clear that adverse childhood experiences are a useful measure, that ACEs can lead to trauma, and that ACEs and traumatic impacts are common. The prevalence of both is just one reason of many to support the need for trauma-informed lawyering.

2.4 a) Lawyers’ Adverse Childhood Experiences and their Trauma

Knowledge about the prevalence of trauma is SAMHSA’s first key element in a trauma-informed approach.¹¹⁹ While knowledge about the prevalence of trauma experienced by clients is key, lawyers must also understand that members of the profession themselves are not exempt from trauma. As part of trauma-informed lawyering, a lawyer must understand what potential traumas or adversities they carry with them into their legal practice. Since ACEs are so prevalent, it follows that lawyers may also have adverse childhood experiences. As Karen Oehme and Nat Stern urge, “law schools and the legal profession should educate law students and attorneys about the impact of prior trauma on behavioral health... Until such knowledge is widespread, many lawyers will be plagued by their own trauma histories – to the detriment of individuals, families, communities, and the legal system.”¹²⁰ The prevalence of mental/behavioural issues and substance use amongst lawyers is likely connected to work-related stress, indirect trauma, and ACEs.¹²¹ Rather than avoid addressing one’s prior mental health, trauma impacts, or ACEs, it would be highly beneficial for lawyers to proactively learn about their own history, values, intentions, and develop their interpersonal skills.¹²² This will help

¹¹⁸ UK, Welsh Government, *Review of Adverse Childhood Experiences (ACE) policy: report* (2021 Health and Social Science) online: <<https://gov.wales/sites/default/files/pdf-versions/2021/3/3/1615991408/review-adverse-childhood-experiences-ace-policy-report.pdf>>.

¹¹⁹ SAMHSA TIP 57, *supra* note 8.

¹²⁰ Karen Oehme & Nat Stern, “*Improving Lawyers’ Health by Addressing the Impact of Adverse Childhood Experiences*” (2018) 53:4 U Rich L Rev 1311.; see also Carly B Dierkhising & Christopher E Branson, “Looking Forward: A Research and Policy Agenda for Creating Trauma-Informed Juvenile Justice Systems” (2016) 5:1 Journal of Juvenile Justice 14 at 18 (on training lawyers and judges about how threats towards compliance can trigger or reactivate PTSD symptoms for youth, creating opposition).

¹²¹ Note: besides substance use, behaviours can also become addictive as a coping mechanism. Behaviours such as those related to work addiction or social media, are harder to detect as these are accepted by and highly encouraged by society); see Aurora Scabia, “Workaholism: An Addiction or a Quality to be Appreciated” (2014) 05:03 J Addict Res Ther, online: <<https://www.omicsonline.org/open-access/workaholism-an-addiction-or-a-quality-to-be-appreciated-2155-6105-5-187.php?aid=30501>>; Mark Griffiths, “Behavioural addiction: An issue for everybody?” (1996) 8 Employee Counselling Today 19.

¹²² Susan Swaim Daicoff, “Expanding the Lawyer’s Toolkit of Skills and Competencies: Synthesizing Leadership, Professionalism, Emotional Intelligence, Conflict Resolution, and Comprehensive Law Leadership Roundtable

lawyers learn how to avoid or alleviate psychological distress and trauma.¹²³ Without recognizing these factors or learning trauma-informed skills, lawyers may be more inclined to disconnect from their emotions, disconnect from their values, misunderstand or harm their clients, or look to external forms of recognition (such as court success rates or class rankings) to determine their own self-worth.¹²⁴ Where self-worth and self-identity are informed by external recognition, lawyers may end up on a slippery slope of disconnecting from their own feelings, integrity, and ethics (which will be explored further in the next chapter). A lack of focus on intrinsic rewards like self-satisfaction, or acting within one's integrity, can actually increase the risk of mental health issues.¹²⁵

As noted by Rebecca Howlett and Cynthia Sharp, ACEs and trauma ought to matter to lawyers because:

By understanding and managing our own traumas, we will be better able to advocate for our clients and ourselves. Given the prevalence of ACEs in the general population, many attorneys will experience long-term negative health outcomes if their own childhood traumas go unacknowledged and thus, unresolved. ACEs can make us more sensitive to stress overall, including intensified reactions to relatively minor stressors, let alone the high-stress environment of practicing law. In addition, lawyers will inevitably encounter clients who are experiencing unresolved trauma and who can benefit from trauma-informed practices.¹²⁶

More research needs to be done to illuminate the prevalence of lawyers with ACE scores and trauma symptoms. How ACEs and trauma affects lawyers' experience and participation in the legal profession is important to understand.

Articles" (2012) 52:3 Santa Clara L Rev 795; Christine Doucet, "Law Student, Heal Thyself: The Role and Responsibility of Clinical Education Programs in Promoting Self-Care" (2014) 23:1 Journal of Law and Social Policy 136.

¹²³ *Ibid.*

¹²⁴ Emma Jones, "Transforming legal education through emotions" (2018) 38:3 Legal Studies 450 at 471.

¹²⁵ *Oehme, supra* note 120 at 1330.

¹²⁶ Rebecca Howlett & Cynthia Sharp, "The Legal Burnout Solution: How Childhood Trauma Impacts Lawyers and Their Clients" (19 April 2022), online: *ABA American Bar Association* <https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2022/april-2022/legal-burnout-solution-how-childhood-trauma-impacts-lawyers-their-clients/>.

2.5 What is Intergenerational Trauma?

Intergenerational trauma, also called historical trauma, is where “the effects of and responses to traumatic events can be ‘transmitted across generations.’”¹²⁷ It is “the effect of a previous unresolved trauma passed on to subsequent generations of an individual’s family, community, and culture.”¹²⁸ Psychiatry scholar Dr. Lori Haskell and legal scholar Melanie Randall assert that a narrow definition of trauma as a framework is inadequate to understand the complicated ways that collective trauma arises in communities and thus intergenerational trauma is a necessary term.¹²⁹ In the study of epigenetics, evidence supports that experiences in life can alter a person’s genetic expression.¹³⁰ Studies suggest it is possible for the trauma experienced by Indian Residential School students¹³¹ to be carried through their genetics and into that of future generations:

In considering additional factors relevant to historical trauma that should be investigated, [...] biological factors might contribute to intergenerational effects of traumatic experiences. In this regard, stressful encounters may result in epigenetic changes in which the expression of certain genes might be suppressed, and these suppressed genes, [...] could potentially be transmitted from one generation to the next.¹³²

Genetic research over the past several decades shows that all eggs in the human ovary are present by the time a female baby is born.¹³³ Therefore, an unborn female child may have all of the eggs they will ever develop as early as 5 months into their mother’s pregnancy.¹³⁴ For a male fetus, the cells that go on to develop sperm are present before they are born.¹³⁵ Thus, there could be three generations developing together in the same body and in the same environment.

¹²⁷ Haskell, *Disrupted*, *supra* note 17 at 52.

¹²⁸ Katie Cowan, “How Residential Schools led to Intergenerational Trauma in the Canadian Indigenous Population to Influence Parenting Styles and Family Structures over Generations” (2020) 12:2 CJFY 26.

¹²⁹ Haskell, *Disrupted*, *supra* note 17 at 49.

¹³⁰ Victoria Craig et al, *Trauma-Informed Legal Practice Toolkit* (Golden Eagle Rising Society, 2020), online: *Golden Eagle Rising Society* <<https://www.goldeneaglerising.org/docuploads/Golden-Eagle-Rising-Society-Trauma-Informed-Toolkit-2021-02-14.pdf>> at 19.

¹³¹ Haskell, *Disrupted*, *supra* note 17 at 50.

¹³² Amy Bombay, Kimberly Matheson & Hymie Anisman, “The intergenerational effects of Indian Residential Schools: Implications for the concept of historical trauma” (2014) 51:3 *Transcult Psychiatry* 320.

¹³³ Caleb E Finch & John C Loehlin, “Environmental Influences that May Precede Fertilization: A First Examination of the Prezygotic Hypothesis from Maternal Age Influences on Twins” (1998) 28:2 *Behavior Genetics* 6 101.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

Considering the possible impacts of stress and trauma on a pregnant person, it makes sense that trauma and adversity impacts can span many generations.¹³⁶ The teaching of “seven generations” is apt as it is held by many Indigenous people and states that “the actions and decisions made today will impact the generations to come.”¹³⁷

Intergenerational trauma also illuminates how trauma spreads within a community.¹³⁸ For Indigenous and First Nations people, not all experiences are the same and cannot be generalized. Concurrently, intergenerational trauma has adversely shaped many Indigenous and First Nations communities and continues to have serious and harmful impacts on future generations.¹³⁹ Many Indigenous and First Nations people have either experienced trauma personally, witnessed their loved ones experience it, or have descended from family members who experienced it.¹⁴⁰ For some Indigenous and First Nations people, all of the above may apply.¹⁴¹ As summarized by Cowan:

The children of residential school students became victims of abuse as their parents became abusers because of the experiences faced at the schools. The treatment that Indigenous children received in residential schools led to severe social issues in terms of historical trauma, which transmits to later generations because of their inability to address and cope with previous traumas in Indigenous populations.¹⁴²

Over the past several decades, intergenerational trauma has been studied a great deal in connection with Indigenous people in Canada. As the country continues to discover the remains of Indigenous and First Nations children and adults buried in unmarked graves at the site of Residential School grounds, Canada is once again starkly reminded that no matter how much we

¹³⁶ Nayra C Rodríguez-Soto et al, “The impact of prenatal maternal stress due to potentially traumatic events on child temperament: A systematic review” (2021) 63:7 *Developmental Psychobiology* e22195; Mariann A Howland et al, “Prenatal maternal psychological distress and fetal developmental trajectories: associations with infant temperament” (2020) 32:5 *Development and Psychopathology* 1685.

¹³⁷ Jennifer Nutton & Elizabeth Fast, “Historical Trauma, Substance Use, and Indigenous Peoples: Seven Generations of Harm From a ‘Big Event’” (2015) 50:7 *Substance Use & Misuse* 839 at 839; James R Moran & Marian Bussey, “Results of an Alcohol Prevention Program with Urban American Indian Youth” (2007) 24:1 *Child & Adolescent Social Work Journal: C & A* 1 at 5.

¹³⁸ Kristen L Syme & Edward H Hagen, “Mental health is biological health: Why tackling ‘diseases of the mind’ is an imperative for biological anthropology in the 21st century” (2020) 171:S70 *American Journal of Physical Anthropology* 87 at 104.

¹³⁹ *Supra* note 128.

¹⁴⁰ *Ibid* at 28.

¹⁴¹ *Ibid*.

¹⁴² *Ibid* [citations omitted].

avoid it, our history is one of genocide and trauma that *continues* to have an effect on Indigenous and First Nations communities.¹⁴³ The graves are physical evidence and undeniable reminders that the trauma from residential schools and colonization continues to have a profound effect on people and particularly on Indigenous and First Nations people: “Historical trauma affects the individual, the family and the community, with these three levels interacting and perpetuating the effects onto future generations.”¹⁴⁴ This is not to say that every Indigenous and First Nations person is traumatized. As noted by Evans-Campbell: “[T]here is considerable variability in individual responses to traumatic events and exposure does not necessarily trigger symptoms of dysfunction.”¹⁴⁵ However, the impact of trauma from colonialism is undeniably far reaching and devastating as the way a person behaves when traumatized creates behaviour that impacts everyone around them. The way a person grows up around this behaviour is also hugely harmful and spreads throughout a community.

Dr. Maria Yellow Horse Brave Heart-Jordan argues that the Lakota (Teton Sioux) have suffered from impaired and ongoing grief as a result of the cumulative trauma due to “cataclysmic events” such as “the assassination of Sitting Bull, the Wounded Knee Massacre, and the forced removal of Lakota children to boarding schools.”¹⁴⁶ She also includes the tuberculosis epidemic, the loss of land, autonomy, and self-governance as sources of trauma. She compares the features she notices in Lakota people who survived with those of Jewish Holocaust survivors and descendants.¹⁴⁷ Likewise, it is arguably true that Indigenous communities in Canada have also experienced similar grief and trauma of an ongoing and debilitating nature.¹⁴⁸

¹⁴³ Jana G. Pruden, “Discovery of children’s remains at Kamloops residential school ‘stark example of violence’ inflicted upon Indigenous peoples” *The Globe and Mail* (May 28, 2021), online: <<https://www.theglobeandmail.com/canada/article-bodies-found-at-kamloops-residential-school-site-in-bc/>>.

¹⁴⁴ *Haskell, Disrupted*, *supra* note 17 at 69.

¹⁴⁵ Teresa Evans-Campbell, “Historical Trauma in American Indian/Native Alaska Communities: A Multilevel Framework for Exploring Impacts on Individuals, Families, and Communities” (2008) 23:3 *J Interpers Violence* 316 at 318.

¹⁴⁶ Maria Yellow Horse Brave Heart-Jordan, *The return to the sacred path: Healing from historical trauma and historical unresolved grief among the Lakota* (Doctor of Philosophy, Smith College School for Social Work) at 6.

¹⁴⁷ *Ibid* at 92; see E Ethan Nebelkopf & Mary Phillips, *Healing and mental health for Native Americans: speaking in red*, (Walnut Creek, CA: AltaMira Press, 2004) at 7; Andrew Kirby, “From Homeland to Wasteland: the politics of the American city in the 21st century” (2005) 22:1 *Cities* 1; Les B Whitbeck et al, “Conceptualizing and Measuring Historical Trauma Among American Indian People” (2004) 33:3–4 *American Journal of Community Psychology* 119; Renée Hoffart & Nicholas A Jones, “Intimate Partner Violence and Intergenerational Trauma Among Indigenous Women” (2018) 28:1 *International Criminal Justice Review* 25.

¹⁴⁸ *Haskell, Disrupted*, *supra* note 17; *supra* note 128; *Lund, supra* note 117; *Nutton, supra* note 137.

Similar to adults who are traumatized, children born with intergenerational trauma can become hypervigilant and highly reactive even if there is no danger.¹⁴⁹ If the child also has ACEs, that may increase the risk for adverse mental and physical health substantially. Additionally, the way a child is raised by potentially traumatized caregivers also shapes the rest of their lives: “Complex post-traumatic stress is multidimensional and pervasive because it is often the result of ongoing damaging and neglectful experiences, which are sometimes compounded by childhoods that lack consistent, predictable and attuned parenting.”¹⁵⁰ Research supports that mental and substance use can impact over generations: “Having a biological mother who met lifetime criteria for SUD [substance use disorder] or an internalizing disorder about doubles the odds of her child meeting criteria for a psychiatric disorder.”¹⁵¹ This strongly supports that intergenerational trauma is passed down generations in many ways through genetics, disrupted family systems, and loss (of people, culture, language, teachings, governance, identity, etc.).¹⁵² This section on intergenerational trauma is only a quick summary of a vast field of research and the impact of this on many Indigenous and First Nations people. It is outside of the scope of this thesis to go into greater detail about the impact of intergenerational trauma and legal practice. More research on this would be beneficial towards developing trauma-informed lawyering courses.

2.5 a) Lawyers and Intergenerational Trauma

How lawyers may inherit intergenerational trauma from their own family histories or legacies must also be considered as part of trauma-informed lawyering. Whether it is connections to ancestors who played a role in Canada’s genocide of Indigenous people, settlers who escaped war, famine, or the family history that stays in the dark, unknown and unacknowledged; intergenerational trauma may be passed on in these contexts as well. Understanding one’s own individual and familial context, where possible, would encourage lawyers to acknowledge their

¹⁴⁹ *Ibid.*

¹⁵⁰ *Haskell, Disrupted, supra* note 17 at 54.

¹⁵¹ Les B Whitbeck et al, “Diagnostic Prevalence Rates From Early to Mid-Adolescence Among Indigenous Adolescents: First Results From a Longitudinal Study” (2008) 47:8 *Journal of the American Academy of Child & Adolescent Psychiatry* 890 at 898.

¹⁵² *Haskell, Disrupted, supra* note 17 at 50.

own history, cultivate compassion and empathy for themselves, and by extension, cultivate the same for clients. It is possible to do so without crossing professional boundaries leading to inappropriate interactions with clients. It is outside the scope of this present work to discuss the impact of intergenerational trauma on lawyers. However, suggestions towards acknowledging one's own context and emotions will be discussed further in chapter 3.4. Lawyers knowing about their possible intergenerational trauma, where possible, can help further trauma-informed lawyering skills and foster empathy, compassion, and greater understanding in the legal profession which will reduce harm for people who use legal systems.

2.6 What is Indirect Trauma?

This thesis borrows a term used by Colin James, “indirect trauma,” to describe the range of symptoms that fall under secondary trauma or vicarious trauma.¹⁵³ Indirect trauma encompasses what is known as “secondary trauma” as well as what is known as “vicarious trauma.” Secondary trauma is defined as “trauma-related stress symptoms resulting from exposure to another individual’s traumatic experiences.”¹⁵⁴ Vicarious trauma refers more specifically to cognitive changes like a shift in worldview or a sense of self that arises as a result of exposure to the trauma of others.¹⁵⁵ Some scholars refer to the concept of “secondary traumatic stress,” which “mirrors PTSD and is used to describe the presence of PTSD-like symptoms of intrusion, avoidance, and arousal among individuals who have been indirectly exposed to trauma.”¹⁵⁶ Essentially, secondary trauma can be the same as PTSD (as defined in chapter 1.2) in symptoms but the trauma causing these symptoms was indirect.¹⁵⁷ Many sources use these terms (secondary trauma, vicarious trauma, secondary traumatic stress) interchangeably.

2.6 a) Lawyers and Indirect Trauma

¹⁵³ *James, supra* note 20 at 278.

¹⁵⁴ *SAMHSA TIP 57, supra* note 8 at xvii.

¹⁵⁵ *Ibid* at xviii.

¹⁵⁶ *Ibid* at 15 [citation omitted].

¹⁵⁷ *Ibid*.

In the course of their work, lawyers may witness photos, video, audio recordings, and other highly graphic material, sometimes on a regular basis.¹⁵⁸ Further, the reality of clients who are traumatized is that they may share graphic details, whether it relates to their legal matter or not. Hearing these stories and witnessing a client's anguish can be enough to amount to indirect trauma for the lawyer. Yet, while medical and mental health professionals are often trained to understand indirect trauma and learn to use a number of tools, including safe spaces to debrief and discuss tough experiences, lawyers do not typically have access to or utilize the same resources.¹⁵⁹ The current mental health resources available to lawyers, while necessary, do not seem to be meeting lawyers' mental well-being needs. The Sherbrooke Report, which surveyed lawyers across Canada, found that roughly 49% of 6,710 professionals did not seek help even though they realized they needed it.¹⁶⁰ Further, the focus of some of the mental health resources available is on the aftermath of indirect trauma rather than prevention. As Dr. Rachel Remen stated: "The expectation that we can be immersed in suffering and loss daily and not be touched by it is as unrealistic as expecting to be able to walk through water without getting wet."¹⁶¹ Knowing that trauma is prevalent, preventative measures to address trauma in legal practice would allow for practical and healthier solutions.

Otherwise, the consequences of lawyers avoiding the risk of indirect trauma are vast and can create a ripple effect of negative impacts including:

...[D]ecreased efficacy, motivation and productivity, and increased absenteeism and truancy. For attorneys, this professional risk may be exacerbated, as it has the potential to lead to life-altering detrimental consequences for clients including convictions, or loss thereof, jail sentences, and deportation or risk of violence in the context of immigration law...¹⁶²

¹⁵⁸ See, for example "“This was demeaning’: Body part as evidence in Cindy Gladue murder trial comes under fire”, *National Post* (30 March 2015), online: <<https://nationalpost.com/news/canada/this-was-demeaning-body-part-as-evidence-in-cindy-gladue-murder-trial-comes-under-fire>>; I Lisa McCann & Laurie Anne Pearlman, “Vicarious traumatization: A framework for understanding the psychological effects of working with victims” (1990) 3:1 *Journal of Traumatic Stress* 131; Lila Petar Vrklevski & John Franklin, “Vicarious Trauma: The Impact on Solicitors of Exposure to Traumatic Material” (2008) 14:1 *Traumatology* 106; *Brobst, supra* note 11.

¹⁵⁹ See e.g. *McCann, supra* note 158 at 146.

¹⁶⁰ *Supra* note 1 at 55.

¹⁶¹ *Supra* note 120 at 1322, citing *Physician Health and Well-Being* (2011) Queens University School of Medicine, online: <<http://www.collaborativecurriculum.ca/en/modules/CanMEDS-professional/canmeds-professional-physicianhealth-01.jsp>>.

¹⁶² *Supra* note 63 at 7-8 [citation omitted].

Traumatized lawyers are simply less competent to carry out their professional due diligence and practice in accordance with their ethics and values. This is in addition to any trauma or ACEs that may apply in the lawyer’s personal life or the lives of their loved ones. Thus, if a lawyer is consistently consumed by the chronic needs and expectations of their clients and/or employers, their emotional capacity to empathize and regulate emotions significantly decreases.¹⁶³ The practice of law “is conducive to the creation of substantial psychological distress.”¹⁶⁴ An Australian study found that lawyers who try to detach themselves in order to avoid psychological distress still experience the distress.¹⁶⁵ The researchers noted that the surveyed lawyers did not have the skills or training to manage this distress and developed an over-reliance on denial and avoidance to keep distress at bay.¹⁶⁶ This is unsustainable and unhealthy.

Psychological distress is defined as an early warning signal when stress is perceived to exceed the resources available to the individual, compromising their wellness.¹⁶⁷ The Sherbrooke Report found that 59.4% of the legal professionals surveyed were in psychological distress.¹⁶⁸ In the United States, lawyers self-reported more indirect traumatic stress and burnout symptoms than mental health or social workers.¹⁶⁹ These symptoms included avoidance of anything that reminded them of traumatic material, sleep issues, irritability, lack of focus, and low level of pleasure and interest in previously important activities.¹⁷⁰ In a 2011 study, of 307 lawyers (Wisconsin public defenders) 74.8% were functionally impaired, 38% had significant depression symptoms, and 11% had PTSD symptoms.¹⁷¹ More than 30% of the lawyers had indirect traumatic stress with “significant symptoms.”¹⁷² In a ten month follow-up with the participants, their symptoms largely remained the same; suggesting that unaddressed symptoms of indirect trauma are consistent.¹⁷³ These statistics are alarming and the way these distressed lawyers

¹⁶³ *Ibid* at 10.

¹⁶⁴ *Ibid* at 44.

¹⁶⁵ Patricia Weir, Liz Jones & Nicola Sheeran, “Australian lawyers’ experience of exposure to traumatic material: a qualitative study” (2021) 28:3 *Psychiatr Psychol Law* 1 at 15.

¹⁶⁶ *Ibid*.

¹⁶⁷ *Supra* note 1 at 27-28.

¹⁶⁸ *Ibid*.

¹⁶⁹ *Supra* note 63 at 46 [citations omitted].

¹⁷⁰ *Ibid*.

¹⁷¹ *Ibid* at 47.

¹⁷² *Ibid*.

¹⁷³ *Ibid* at 48

impact those around them must be considered and addressed. These considerations must form a part of trauma-informed lawyering in order to proactively prepare lawyers to address any matters or emotions before they amount to psychological distress or adversely impact well-being.

2.7 To Be Seen and Heard is a Human Need

In general, traumatized people need to learn to live in the present so they no longer feel trapped by the trauma they experienced in the past.¹⁷⁴ This includes a need to be validated, seen, and heard. Otherwise, invalidation can lead that person to stop seeking help at all. This causes isolation and pain from feeling misunderstood or ignored.¹⁷⁵ On the other hand, if a traumatized person speaks to someone who acknowledges their feelings and validates their experience, they may feel more empowered to tell others, make a complaint to the police if desired, or seek mental health help.¹⁷⁶ Even if others do not validate the survivor's experience, having the support of the first person contributes towards a foundation of resilience.¹⁷⁷

In a Saskatchewan survey, sexual assault survivors reported that if they confided in someone, this usually happened within the first one to three days. If the survivor did not share their experience with anyone in the first few days, it often took them two years or more to share their experience with someone else.¹⁷⁸ This may be motivated by guilt, shame, or fear that the listening party will not see or hear them and what they experienced. Thus, how a lawyer reacts to a potentially traumatized person's experience can be a significant factor in how and when they address their trauma. Ideally, the lawyer will have the ability to empathize and listen to the person's account rather than discounting it or meeting them with skepticism.

¹⁷⁴ Kolk, *supra* note 13; Haskell, *Disrupted*, *supra* note 17.

¹⁷⁵ Patricia Yancey Martin & R Marlene Powell, "Accounting for the 'Second Assault': Legal Organizations' Framing of Rape Victims" (1994) 19:4 Law & Social Inquiry 853; Eric M Werner, "Avoiding the Second Assault: A Guidebook for Trauma-Informed Prosecutions Notes & Comments" (2021) 25:2 Lewis & Clark L Rev 573.

¹⁷⁶ Kate Chenier, "'Cold Feet': The attrition of historical child sexual abuse cases reported to the police in a Northern Canadian Territory" (presented at European Association of Psychology and Law conference, Finland, June 2018) [unpublished] at 22.

¹⁷⁷ Christina Bethell et al, "Positive Childhood Experiences and Adult Mental and Relational Health in a Statewide Sample: Associations Across Adverse Childhood Experiences Levels" (2019) 173:11 JAMA Pediatrics E1.

¹⁷⁸ Saskatchewan, Status of Women Canada, *Sexual Violence in Saskatchewan: A Survey Report 2019*, (report), online: < <http://sassk.ca/wp-content/uploads/2019/05/Sexual-Violence-in-Saskatchewan-Survey-Report-May-13-2019.pdf> > at 34.

To be seen and heard, and thereby validated, are *needs* that must be met in order for one to make sense of their experiences. On the other hand, rejection is proven to lead to physical pain:

The importance of social acceptance and connection is reinforced by our brain chemistry, and the pain that results from social rejection and disconnection is real pain. In a 2011 study funded by the National Institute of Mental Health and by the National Institute on Drug Abuse, researchers found that, as far as the brain is concerned, when a person experiences social rejection, the sensations they feel are similar to the sensations of physical pain.”¹⁷⁹

Social rejection and physical pain feel distressing and activate the same neural pathways in the brain. The researchers who wrote the above quote recruited individuals who felt intensely rejected. These participants recently experienced an unwanted break-up, which researchers termed “powerfully elicited” rejection.¹⁸⁰ Participants were asked to view a picture of their ex-partner. The fMRI images showed “activation in these regions was highly diagnostic of physical pain, with positive predictive values up to 88%.”¹⁸¹ This further supports the link between physical sensations and one’s emotional experience.¹⁸² Applying these concepts to a traumatized person who already feels pain and distress due to trauma and has reduced capacity to manage daily stress, it follows that being rejected can be especially devastating.

As humans are neurobiologically hardwired to be social creatures, we have evolved to seek connection and empathy through external perspectives. When people are in a traumatized state, they need to feel connection and safety with other people. Otherwise, a person who experiences rejection may not see this as disconnection from their experience but rather, disconnection or rejection of one’s *self* from the greater group.¹⁸³ Dr. van der Kolk describes what traumatized people need: “Each patient demands that we suspend our sense of what is normal and accept that we are dealing with a dual reality: the reality of a relatively secure and predictable present that lives side by side with a ruinous ever-present past.”¹⁸⁴ All of the above highlights the importance

¹⁷⁹ E Kross et al, “Social rejection shares somatosensory representations with physical pain” (2011) 108:15 Proceedings of the National Academy of Sciences 6270.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² *Ibid* at 6273.

¹⁸³ Gabor Maté, *When the body says no: the cost of hidden stress* (Toronto: Alfred A. Knopf Canada, 2003) at 172; see also Haskell, *Disrupted*, *supra* note 17 at 67.

¹⁸⁴ Kolk, *supra* note 13 at 195.

of acknowledging the experiences of traumatized survivors as well as the potential discomfort of those around the survivor who witness their pain. This further underscores how an objective view of trauma using a narrow definition can be harmful. It is possible to strike a balance and exercise tools to avoid indirect trauma. Acknowledgement of trauma and one's own personal context is one step towards achieving this balance.

2.7 a) Rejection in the form of Oppression: The Intersection of Trauma, Oppression, and the Legal System

Oppression is a form of rejection on a social scale and oppression and trauma feed into each other in cyclical ways. If a traumatized person involved in the legal system fails to receive trauma-informed services, they will be particularly susceptible to harm and retraumatization that can become magnified by oppression. Trauma-informed practice can address systemic barriers directly by teaching lawyers how to anticipate and adjust for these challenges, thereby helping the client to become empowered and mitigate risks for harm.¹⁸⁵ It is an accepted fact that racism, discrimination, and its resulting impacts can amount to trauma.¹⁸⁶ This is because racial and LGBTQ2S+ based differences have been observed to coincide with higher rates of trauma and PTSD.¹⁸⁷ Lawyers and judges, by not learning trauma-informed skills and by not considering the unique contexts of individuals, risk unjust outcomes for users of legal systems as well as greater harm to individuals. Such unjust outcomes may extend beyond a legal decision and into that individual's life, their perception of the world; it can impact how they relate to others, and can impact how they relate to institutions (legal, medical, or otherwise).

For example, studies have found that young girls and women are often socially conditioned to consider the feelings of others at the expense of their own feelings and desires.¹⁸⁸ They learn to

¹⁸⁵ *Ribeiro, supra* note 14 at iii.

¹⁸⁶ Monnica T Williams et al, "Assessing racial trauma within a DSM-5 framework: The UConn Racial/Ethnic Stress & Trauma Survey" (2018) 3 *Practice Innovations* 242; Leah Keating & Robert Muller, "LGBTQ+ based discrimination is associated with PTSD symptoms, dissociation, emotion dysregulation, and attachment insecurity among LGBTQ+ adults who have experienced Trauma" (2020) 21:1 *Journal of Trauma and Dissociation* 124.

¹⁸⁷ *Williams, supra* note 186.

¹⁸⁸ Deborah L Tolman et al, "Looking Good, Sounding Good: Femininity Ideology and Adolescent Girls' Mental Health" (2006) 30:1 *Psychology of Women Quarterly* 85.

be inauthentic to themselves by ignoring their own emotions, intuitions, and bodily sensations.¹⁸⁹ This can lead to feelings of disempowerment over their bodily autonomy and feelings of dissociation from their body.¹⁹⁰ If this person then experiences sexual assault, the resulting trauma could cause greater damage than it would for someone without this context. Further, despite Canada’s legislation and the legal education around stereotypes related to sexual assault, these stereotypes remain pervasive and adversely impact survivors.¹⁹¹ Survivors of sexual assault may experience further harm when they are not believed, are questioned by the legal system, are unable to voice what happened or what they are feeling, or make sense of the traumatic event(s) for the convenience of the legal system.¹⁹² As noted by Eric Werner on how Crown prosecutors can better support sexual assault complainants, “statutory protections [for victims] should be seen as a floor, not a ceiling, and prosecutors should endeavor to go beyond the statutory requirements in the pursuit of justice for victims.”¹⁹³ Therefore, sexual assault law is one area of practice where the context of the victimized individual is relevant. If they are a woman, a member of the LGBTQ2S+ community, or if they are a person of colour, additional systemic barriers to justice will exist. These barriers include misunderstandings about how racism or discrimination may further increase an individual’s trauma and impact their perspective of the traumatic events, or how these personal factors will impact how they are treated by legal professionals or other professionals within the criminal justice system. Where such barriers exist in response to race, sex, gender, or other characteristics and impair access to justice, this “will further trauma, harm, and inequities among those who engage with it.”¹⁹⁴ Such barriers may ultimately impede a person’s legal matter, their healing, and their way of life.

As Indigenous and First Nations people are highly overrepresented in the criminal justice system and in child welfare systems, it is even more relevant for lawyers in these fields to understand the connection between trauma and oppression.¹⁹⁵ Trauma may be magnified by the realities of

¹⁸⁹ *Ibid.*

¹⁹⁰ Maureen C McHugh, “What Do Women Want? A New View of Women’s Sexual Problems” (2006) 54:5–6 *Sex Roles* 361.

¹⁹¹ Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill-Queen’s Press - MQUP, 2018) at 94.

¹⁹² Katharine Jenkins, “Rape Myths and Domestic Abuse Myths as Hermeneutical Injustices” (2017) 34:2 *Journal of applied philosophy* 191.

¹⁹³ *Werner, supra* note 175 at 578.

¹⁹⁴ *Ribeiro, supra* note 14 at iii.

¹⁹⁵ *Supra* note 33.

racial inequality, including the lasting and continuing impacts of colonialism. Numerous surveys, statistics, and reports from various levels of government and academic publications show that Indigenous women are among the most vulnerable population in Canada. They are statistically most likely to experience violence and sexual assault; this likelihood increases if they were previously a child in the care of the government.¹⁹⁶ This is highly alarming since 52.2% of children in government care are Indigenous yet only account for 7.7% of the child population in Canada.¹⁹⁷ Violence against Indigenous women is so dire that the United Nations recommended Canada set up a nationwide inquiry into the horrifying number of missing and murdered Indigenous women and girls (an ongoing crisis).¹⁹⁸ In Saskatchewan, a report from 2019 indicates that 19.4% of sexual assaults were perpetrated on Indigenous people when they only make up 16.3% of the province's population.¹⁹⁹ The National Inquiry into Missing and Murdered Indigenous Women and Girls found that our country's roots in colonization continues to contribute towards violence enacted upon Indigenous and First Nations people.²⁰⁰

Haskell and Randall connect trauma to specific abuses perpetrated upon Indigenous people in North America, including relocation, starvation, neglect, and disconnection of Indigenous people from their lands, spirituality, language, cultural practices, and kinship ties.²⁰¹ These ongoing and overlapping abuses are forms of developmental trauma with the same impacts as described previously, that is diminished capacity to deal with daily life stressors and difficulty “maintaining intimate relationships with partners, children and other family members.”²⁰² The

¹⁹⁶ Douglas A Brownridge, “Understanding the Elevated Risk of Partner Violence Against Aboriginal Women: A Comparison of Two Nationally Representative Surveys of Canada” (2008) 23:5 J Fam Viol 353; Statistics Canada Government of Canada, “Violent victimization and perceptions of safety: Experiences of First Nations, Métis and Inuit women in Canada” (26 April 2022), online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2022001/article/00004-eng.htm>>; Kelly Geraldine Malone, “Indigenous women more likely to face violence if they were children in care: report” *CBC News* (1 May 2022), online: <<https://www.cbc.ca/news/canada/manitoba/indigenous-women-violence-government-care-statistics-canada-1.6437701>>.

¹⁹⁷ Government of Canada Indigenous Services Canada, “Reducing the number of Indigenous children in care” (2 November 2018), online: <<https://www.sac-isc.gc.ca/eng/1541187352297/1541187392851>>.

¹⁹⁸ James Anaya, United Nations General Assembly Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples*, UNHRC, 27th Sess (2014), online: <<https://digitallibrary.un.org/record/733435>>.

¹⁹⁹ *Supra* note 178 at 66; Statistics Canada, “Focus on Geography Series 2016 Census” (10 April 2019), online: <<https://www12.statcan.gc.ca/census-recensement/2016/as-sa/fogs-spg/Facts-PR-Eng.cfm?TOPIC=9&LANG=Eng&GK=PR&GC=47>>.

²⁰⁰ National Inquiry into Missing and Murdered Indigenous Women and Girls, “Executive Summary” (2018), online: <<https://www.mmiwg-ffada.ca/wp-content/uploads/2018/05/MMIWG-Executive-Summary-ENG.pdf>> at 4.

²⁰¹ Haskell, *Disrupted*, *supra* note 17 at 68-69.

²⁰² *Ibid.*

impacts of child abuse and neglect compounds and evidence supports that repeatedly experiencing these has devastating consequences:

Chronically traumatized people tend not to have any baseline state of physical calm. In attempts to calm themselves, individuals will often rely on coping measures that are self-destructive, such as self-injury, drug use or eating disorders. They can also exhibit suicidal thoughts and difficulty modulating sexual impulses, along with heightened risk-taking behaviour. Children who experience abuse or neglect are likely to have problems with emotional regulation, self-concept, social skills, and academic motivation. Studies have demonstrated that severe depression, substance abuse, impulsiveness, hyperactivity, and aggression are long-term outcomes of abuse.²⁰³

Adding to the above challenges, internalized racism may also play a factor for the traumatized individual. Racism experienced by a person may be internalized to the point that they carry the oppressor's thoughts and stereotypes and apply these to their own self as well as those around them.²⁰⁴ Further discussion on this is outside the scope of this thesis. However, a basic understanding of the devastating impacts of racism is one of many important trauma-informed skills that lawyers require to reduce harm.

Trauma can intersect with the oppression of people in complicated and nuanced ways. Trauma-informed lawyering skills offer a positive way to address these far-reaching impacts. Indigenous and First Nations people may stand to benefit the most if lawyers reduce harm through trauma-informed lawyering. This is particularly the case with criminal law practice and child welfare matters in which there is a clear overrepresentation of Indigenous and First Nations people. This is a broad generalization of the experiences of Indigenous people in Canada which does not begin to properly address the varied contexts, cultures, and backgrounds of the many different Indigenous and First Nations people affected by colonialism. The consequences of colonialism continue to have a ripple effect on not only Indigenous communities but also on our larger community as a whole.

²⁰³ *Ibid* at 60.

²⁰⁴ See E J R David, Tiera M Schroeder & Jessicaanne Fernandez, "Internalized Racism: A Systematic Review of the Psychological Literature on Racism's Most Insidious Consequence" (2019) 75:4 *Journal of Social Issues* 1057 (discussion on how racism becomes internalized and creates oppression towards self and others).

Additionally, it is important to consider the lawyer's role as officer of the court when legal systems contribute to retraumatization and harm.²⁰⁵ For example, in the context of sexual assault law, "the needs of the [medical and legal] systems and rape survivors may run counter to one another. Whereas the survivor needs to be believed and supported, the legal system needs to win cases and the emergency room needs to treat emergent patients. These conflicting needs often result in insensitive and unresponsive treatment of rape survivors."²⁰⁶ This quote highlights the divergent intentions of each party that can cause more harm to survivors (sometimes more than the traumatic event).²⁰⁷

While sexual assault is an important example to highlight the risk of retraumatization and harm for clients, other areas of law also require trauma-informed lawyering skills to mitigate the risks to both clients and lawyers. To illustrate this, the Sherbrooke Report measured amounts of psychological distress and burnout in lawyers across different legal practice areas. Rates of lawyers with psychological distress ranged from 50.2% to 62.5% across practices such as criminal law, labour employment law, and business, corporate, and commercial law. Further, legal professionals with the highest proportions of psychological distress included women, those under 35 years of age, those living with a disability, those identifying as members of the LGBTQ2S+ community, articling students, and those identifying as Indigenous or other minority group.²⁰⁸ As Myrna McCallum has stated, if a lawyer is working with people, then trauma-informed lawyering skills is a requirement.²⁰⁹ Acknowledging trauma (and psychological distress) in the profession would foster collective responsibility from the legal profession

²⁰⁵ Michaela Keet, Heather Heavin & Shawna Sparrow, "Anticipating and Managing the Psychological Cost of Civil Litigation" (2017) 34:2 Windsor Yearbook of Access to Justice 73 at 77; Edward J Hickling, Edward B Blanchard & Matthew T Hickling, "The Psychological Impact of Litigation: Compensation Neurosis, Malingering, PTSD, Secondary Traumatization, and Other Lessons from MVAS Symposium: Who Feels Their Pain - The Challenge of Noneconomic Damages in Civil Litigation: Eleventh Annual Clifford Symposium on Tort Law and Social Policy" (2005) 55:2 DePaul L Rev 617; Michael E Schatman, "Working to Avoid Collateral Emotional Harm to Clients: Cases and Recommendations for the Personal Injury Attorney" (2009) 2:2 Psychol Inj and Law 149.

²⁰⁶ *Ahrens, supra* note 29 at 271.

²⁰⁷ See Rebecca L Stotzer, "Law enforcement and criminal justice personnel interactions with transgender people in the United States: A literature review" (2014) 19:3 Aggression and Violent Behavior 263; *supra* note 175 at 856 ("[W]omen whose [sexual assault] cases were prosecuted were less well off psychologically six months after the rape than were those whose cases were not prosecuted, attributing this result to the effects of an adversarial legal system that subjects rape victims to challenge and duress.").

²⁰⁸ *Supra* note 1 at 27 and 201.

²⁰⁹ Aidan Macnab, *Trauma-informed approach necessary in every legal practice area, says Myrna McCallum* (2021), Law Times News, online: < <https://www.lawtimesnews.com/resources/legal-education/trauma-informed-approach-necessary-in-every-legal-practice-area-says-myrna-mccallum/355698>>.

because it would: 1) empower lawyers to proactively address client trauma, 2) proactively address racism, oppression, and their own exposure to the trauma as it occurs, and 3) teach them to notice and interrupt moments when they may be contributing to someone else's trauma or oppression.²¹⁰

Law and system reform are generally accepted as necessary to better protect the interests of those who require legal services. Most would likely agree that such reform can be daunting and overwhelming. This thesis argues that effective legal and system reform starts with the individual lawyer examining their own self, their emotions, learning trauma-informed lawyering skills, and learning how law and systems may adversely impact the people who use legal systems. These people include litigants, complainants, witnesses, and accused. By being aware of how legal systems can impact oppressed and traumatized people, lawyers can learn how to prevent further harm where possible. An added benefit is that lawyers will also learn how to reduce the amount of indirect trauma they experience.

2.8 Conclusion

The SAMHSA definition of trauma--a reaction that arises from an event, series of events, or a set of circumstances experienced as harmful with lasting adverse effects--serves as a useful framework for legal professionals to cultivate trauma-informed lawyering skills in a universal way. These skills will help lawyers foster empathy and compassion for clients while also fostering these emotional skills for their own experiences in and out of legal work. Knowing how a brain typically develops and operates and how trauma can impact or disrupt development, depending on when trauma is experienced, is key information for trauma-informed legal professionals. It illustrates how trauma can severely impair the way an individual makes decisions or how they relate to other people or institutions. Specific forms of trauma, such as intergenerational trauma, are particularly important for lawyers to understand, especially for areas of practice that typically involve Indigenous and First Nations clients. To practice without this knowledge is very risky and irresponsible as lawyers will miss the opportunity to better

²¹⁰ *Supra* note 20 at 290; *supra* note 34; *Doucet*, *supra* note 122.

prepare their clients for harms arising from legal processes. Other legal professionals may also exacerbate racism and trauma. Likewise, indirect trauma is important for lawyers to understand so they can recognize it if it comes up in the course of their legal work. This recognition could also dispel stigmas related to mental well-being and trauma in law. Taken together, these forms of trauma as well as ACEs (childhood events that have adverse impacts on the individual's life) are very prevalent, suggesting they are also prevalent amongst lawyers. Acknowledging these facts will help lawyers become more aware of their own stress levels, their own reactions to stress, and foster emotional acknowledgment. As it stands, emotional disengagement, avoidance of trauma related topics, and attempting to cope by working harder is creating a bleak picture for the health of legal professionals both at present and into the future.²¹¹

²¹¹ *Supra* note 165 at 3 and 14; *supra* note 1.

Chapter 3: Detachment and Emotional Disengagement as a Barrier to Effective Responses to Trauma

A lawyer's personal and subjective understanding of emotions is heavily determinative of their capacity to become trauma-informed in legal practice. There is a connecting line that runs through emotional suppression, lawyers' mental health, and trauma-informed practice skills that this chapter highlights. Legal scholar Susan Swaim Daicoff suggests that, to avoid psychological distress and become more effective, lawyers would benefit from: 1) identifying and following their own intrinsic values; and 2) developing their interpersonal skills and competencies.²¹² To fulfill these suggestions arguably requires a great deal of self-awareness, including emotional acknowledgment as part of trauma-informed lawyering.

By acknowledging emotions, lawyers are more likely able to deal with and adapt to the complexities of their clients' needs, while balancing legal analysis skills, ethics, and moral reasoning.²¹³ Yet, legal actors are often left believing that they must ignore or avoid their emotions if they wish to be successful. Objectivity and rationality are heralded in law.²¹⁴ Additionally, lawyers may even be encouraged to set aside their own values and ethics to do what is perceived to be in a client's best interests. These are sacrifices that may be "portrayed as a necessary trade-off between the well-being of lawyers and the preservation of analytical rigor."²¹⁵ Such false beliefs deny the reality that law is brimming with emotions,²¹⁶ and they deny the lawyer the opportunity to develop skills that nurture authenticity and well-being.

Practicing law without understanding the functions of emotions arguably leads to more stress in the profession than is otherwise necessary. Understandings of human behaviour have significantly changed over the past several hundred years, responding to advancements in the

²¹² *Supra* note 122 at 809 [citations omitted].

²¹³ *Ibid*; Susan A Bandes, "Feeling and Thinking Like a Lawyer: Cognition, Emotion, and the Practice and Progress of Law" (2021) 89 *Fordham Law Review* 2427; *Heavin*, *supra* note 5 at 202.

²¹⁴ *Roe v. Wade*, 410 U.S. 113, 116 (1973) ("Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection."); "How much emotion should a judge show in the courtroom?", *CBC News* (5 August 2018), online: <https://www.cbc.ca/news/canada/ottawa/court-emotion-ottawa-judge-1.4773448>; *Maki*, *supra* note 5 at 82.

²¹⁵ *Bandes*, *supra* note 213 at 2439-2440.

²¹⁶ Robin West, "Law's Emotions" (2016) 19:4 *Georgetown Law Faculty Publications and Other Works* 339.

field of neuroscience. However, the gap between what is known by modern day trauma researchers and legal actors is vast despite the considerable neuroscience evidence and research supporting findings on trauma. Emotions are now understood to:

...Influence the way we screen, categorize, and interpret information; influence our evaluations of the intentions or credibility of others; and help us decide what is important or valuable. Perhaps more important, *they drive us to care* about the outcome of our decision making and motivate us to take action, or refrain from taking action, on the situations we evaluate.²¹⁷

Due to the centrality of emotions to the experience and impact of trauma, “emotion” is explored here as a centerpiece in the preparation of lawyers towards trauma-informed practice. For clarity, emotion is defined as: “[A] set of evaluative and motivational processes, distributed throughout the brain, that assist us in appraising and reacting to stimuli that are formed, interpreted, and communicated in a social and cultural context.”²¹⁸ As for the role of emotions:

Perhaps most important, [emotions] drive us to care about the outcome of our decision making and motivate us to take action, or refrain from taking action, on the situations we evaluate. In short, the current consensus across disciplines is that emotions are not, as folk knowledge would have it, occasional, intense, unpredictable moods that interfere with a steady state of rationality. They are dynamic processes that are integral to decision making.²¹⁹

As noted by Lily Lu:

[M]ore recent studies have proven emotions to be much more systematic and rationally based than originally thought, as well as a key component of proper cognitive and social functioning in individuals. Emotions are now more appropriately defined as the unconscious process by which the brain determines the value of a stimulus and initiates an appropriate bodily response. *Rather than just being an irrational process, emotions are actually essential in the unconscious evaluation of events and stimuli which is critical in contributing to the health and survival of an individual.* According to Damasio, emotions result from a history of evolution that has utilized such a process to attend to or fulfill one’s internal needs, life-regulation mechanisms, and motivations. Furthermore, emotions have been found to be essential in processes that were originally seen as purely cognitive, such as decision making, social functioning, and learning.²²⁰

²¹⁷ Susan A Bandes & Jeremy A Blumenthal “Emotion and the Law” (Oct 2012) Annual Review of Law and Social Science 161 at 164 [emphasis added].

²¹⁸ *Ibid* at 163.

²¹⁹ *Ibid*.

²²⁰ Lily Lu, “Emotional insight: Discovering the nature of prejudice development and reduction through emotional mechanisms” *Exposé Magazine*, online: <<https://projects.iq.harvard.edu/expose/book/emotional-insight-discovering-nature-prejudice-development-and-reduction-through>> [emphasis added, citations omitted].

Yet, lawyers are generally encouraged and often (explicitly or implicitly) taught to avoid and disengage from their own emotions.²²¹ The disengagement from emotions is detrimental when done over a long period of time as it has serious adverse impacts for one's mental and physical health, as will be explored in chapter 3.3 e). Further, research supports that expression and sharing of negative emotions in healthy ways can promote relationships and that relationships are what help people live healthier lives.²²² Conversely, if an individual suppresses or disengages from negative emotions as an attempt to cope with overwhelming situations, this may contribute towards social isolation and feelings of loneliness. Research has also shown that suppressing one's emotions may lead to less ability to control one's self later on, challenging the belief that by suppressing emotions, a legal professional can and ought to remain in control and unbiased.²²³ For the purposes of this thesis, emotional suppression or disengagement is "a tendency to inhibit the expression of emotion... [through] intentionally avoiding distressing feelings by thinking of other things or holding things in."²²⁴ For a lawyer, this can cause a ripple effect of adverse impact on their client's experience of the law (and beyond), on legal systems, and on community more generally.

Despite the advancements made towards understanding trauma, emotions, and how both develop in the brain, legal culture and practice continues to rely heavily on the belief that reason and emotions must remain separate to fulfill professional expectations.²²⁵ On the contrary, when emotions are processed and acknowledged in healthy ways, they can help a lawyer become more adaptable and resilient in the face of very stressful situations.²²⁶ This can include learning how to

²²¹ *Bandes, supra* note 213 at 2429.

²²² Steven M Graham et al, "The Positives of Negative Emotions: Willingness to Express Negative Emotions Promotes Relationships" (2008) 34:3 *Pers Soc Psychol Bull* 394; Liz Mineo, "Over nearly 80 years, Harvard study has been showing how to live a healthy and happy life" (11 April 2017), online: *Harvard Gazette* <<https://news.harvard.edu/gazette/story/2017/04/over-nearly-80-years-harvard-study-has-been-showing-how-to-live-a-healthy-and-happy-life/>>; *Heavin, supra* note 5 at 205.

²²³ Malte Friese et al, "Suppressing emotions impairs subsequent stroop performance and reduces prefrontal brain activation" (2013) 8:4 *PLoS One* e60385.

²²⁴ Benjamin P Chapman et al, "Emotion suppression and mortality risk over a 12-year follow-up" (2013) 75:4 *Journal of Psychosomatic Research* 381; see also Robert J Waldinger & Marc S Schulz, "Facing the music or burying our heads in the sand?: Adaptive emotion regulation in midlife and late life" (2010) 7:4 *Research in Human Development* 292.

²²⁵ *Bandes, supra* note 213 at 2428.

²²⁶ See e.g. *supra* note 165 at 13.

self-reflect, that is to develop one’s ability to consider one’s own thinking and learning.²²⁷ Otherwise, lawyers are at risk of not recognizing their own emotions, not recognizing the experiences or emotions of their clients, and not taking time to consider one’s own reactive thinking processes.

This chapter will begin by focusing on the topic of emotions in law, how they have always intersected, and how the fragmentation of one’s emotional self from their rational self starts as early as law school. I will then discuss the adverse impacts that arise from a fragmentation of self and emotional disengagement, exploring the emotional costs, mental health costs, and how this connects with systemic injustice. This chapter will support the argument that current legal practice norms are unhealthy and unsustainable. These components are important to understand as part of trauma-informed practice because one of the more common coping mechanisms for trauma is dissociation from one’s own emotions and bodily experience, as touched on in chapter 2.3.²²⁸ When lawyers disassociate, disengage or suppress emotions, they may increase their risk of indirect trauma or create harm for clients.²²⁹

3.1 Law Has Always Included Emotions

As discussed in the last section, emotions are at the core of how people make decisions, and how people evaluate themselves and others. Decision making and evaluative skills are integral parts of legal practice and it follows that emotions are as well. Yet, the belief that the functions of the brain can be separated or that law is a system sanitized of emotions continues to dominate in legal systems, culture, and practice.²³⁰ As stated by Terry A. Maroney,

²²⁷ Brea Lowenberger, *Operationalizing and Assessing the Reflective Exercises in Legal Education: Towards a Pedagogy of Reflective Practice* (Master of Laws Thesis, University of Saskatchewan, 2017) [unpublished] at 6 [citations omitted].

²²⁸ Haskell, *Disrupted*, *supra* note 17 at 53 and 61.

²²⁹ See Sarah Buhler, “Troubling Feelings: Moral Anger and Clinical Legal Education” (2014) 37:1 Dalhousie Law Journal 397 at 417-418 (recognizing one’s own feelings of moral anger will help lawyers and law students realize they may inadvertently be engaging in “heroic legal interventions” to personally ‘feel better’ about the “systemic roots” of the challenges experienced by clients and their communities, thereby creating more entrenched power relations and disconnection between lawyers and clients).

²³⁰ *Supra* note 63 at 44; Patricia Mindus, “When is lack of emotion a problem for justice? Four views on legal decision makers’ emotive life” (2021) 0:0 Critical Review of International Social and Political Philosophy 1; Terry A Maroney, “Law and Emotion: A Proposed Taxonomy of an Emerging Field” (2006) 30:2 Law and Human Behavior 119.

In contemporary Western jurisprudence [...] [a] good judge should feel no emotion; if she does, she puts it aside. To call a judge emotional is a stinging insult, signifying a failure of discipline, impartiality, and reason.

Insistence on judicial dispassion is a cultural script of unusual longevity and potency. But not only is the script wrong as a matter of human nature—emotion does not, in fact, invariably tend toward sloppiness, bias, and irrationality—it is also not quite so monolithic as it appears. Legal theorists, and judges themselves, sometimes have asserted that judicial emotion is inevitable, and perhaps, to be welcomed.²³¹

Patricia Mindus expands on this by reviewing different perspectives on emotions and their role in legal decision makers' lives. One of the perspectives that she advocates for is that, "Emotion is conceived of as a cognitive ability and as similar to a skill."²³² Seeing emotions as a skill rather than a weakness is key towards improving law's understanding of human behaviour. By appreciating the value of emotions, lawyers can learn how to accept, acknowledge, and work with emotions as part of legal practice. This is foundational for trauma-informed practice.

The purpose of law generally is to apply rules to interactions between humans in society and to secure justice where needed.²³³ It is an attempt to govern how humans behave with each other, and impart ideas about how humans ought to behave as ideal citizens, without the "interference" of emotions. The belief that emotion in law is a weakness dates back to at least the late 1600's from the King's Bench.²³⁴ Lord Bingham in *The Rule of Law*, references a set of resolutions authored by Sir Matthew Hale, a Chief Justice of the King's Bench from 1671 to 1676. Lord Bingham notes that, "[T]his list, made around 350 years ago, is significant because it lays down guidelines which would still be regarded as sound rules for the conduct of judicial office."²³⁵ The following excerpts from the list of resolutions provides a summary of how many lawyers and judges perceived emotions in the 1660s:

4. That in the execution of justice, I carefully lay aside my own passions, and not give way to them however provoked.

²³¹ Terry A Maroney, "The Persistent Cultural Script of Judicial Dispassion Essay" (2011) 99:2 Calif L Rev 629.

²³² Mindus, *supra* note 230.

²³³ William M Sullivan, ed, *Educating lawyers: preparation for the profession of law*, 1st ed Preparation for the professions series (San Francisco: Jossey-Bass, 2007) at 2.

²³⁴ Tom Bingham, *The Rule of Law* (London: Penguin UK, 2011) at 20-21.

²³⁵ *Ibid.*

5. That I be wholly intent upon the business I am about remitting all other cares and thoughts as unseasonable and interruptions.
6. That I suffer not myself to be prepossessed with any judgment at all, till the whole business and both parties be heard.
7. That I never engage myself in the beginning of any cause, but reserve myself unprejudiced till the whole be heard.
- ...
10. That I be not biased with compassion to the poor, or favour to the rich in point of justice.²³⁶

The Rule of Law was published in 2010 and Lord Bingham notes that through this list, “[Hale] knew that he should try to exclude his personal feelings, avoid taking up any partisan position and suspend judgment until all the evidence and both parties had been heard.”²³⁷

Cognitive research now shows that emotions and implicit biases (biases that are subconsciously held and not controlled by the conscious mind) cannot simply be set aside.²³⁸ Issues relating to implicit bias will be explored in more detail in chapter 3.3 c). It is interesting and important to note that implicit biases - and emotions - are both dimensions of human engagement which are typically suppressed or avoided in the legal profession. They both have significant power at the subconscious level. The impact of cognitive biases and emotion upon cognition, behavior, and decision-making ought to be equally important to the legal profession: ignoring either leads to the harmful impacts discussed in chapter 3.3.

Yet, Lord Bingham’s appreciation for Sir Hale’s view of emotions underscores how many experienced legal professionals still believe in what Bandes and Blumenthal termed, “folk knowledge” or the belief that emotions can be kept separate from legal reasoning.²³⁹ It also does not leave room to consider the impact that emotional suppression can have on an individual’s

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ *Supra* note 217; see e.g. Evan M Lowder, Bradley R Ray & Jeffrey A Gruenewald, “Criminal Justice Professionals’ Attitudes Toward Mental Illness and Substance Use” (2019) 55:3 *Community Ment Health J* 428; Russell Pearce, Eli Wald & Swethaa Ballakrishnen, “Difference Blindness vs. Bias Awareness: Why Law Firms with the Best of Intentions Have Failed to Create Diverse Partnerships” (2015) 83 *Fordham Law Review* 2407; *Bilotta, supra* note 5.

²³⁹ *Supra* note 217 at 163.

health. It does not consider the reality that law is fueled and inspired by emotion,²⁴⁰ including often deeply-held emotions connected to primal fears, dread through imagination or past experience, and hopes people may have about community.²⁴¹

Much has been written about the principle of objectivity and the way it belies the human variables in judicial decision making. This is highlighted by a study that found the emotional states of judges influenced their decision-making.²⁴² The researchers noted the amount of favourable decisions made by judges before and after they took a meal break. Favourable rulings were made for roughly 65% of cases but this percentage dropped gradually to zero as their sittings continued. After their meal break, favourable decision rates returned to roughly 65%.²⁴³ While there may have been other variables that lead to these results, the findings are significant. They highlight the vulnerabilities that lawyers and judges naturally have: that they are human beings who have emotions and needs that must be met in order for them to do their best work. Acknowledgment of such biases, emotions, and needs, rather than avoidance or ignorance, can help legal professionals anticipate them rather than unconsciously operating on them which can cause harm to others and to one's self.

Generally, people have trouble recognizing when their emotions contribute towards implicit bias, clouds their memories, or impacts their perceptions.²⁴⁴ As discussed, emotions are “like an unseen lens that colors all our thoughts, actions, perceptions, and judgments.”²⁴⁵ They are a part of basically everything a lawyer does in their legal career. Additionally, most people tend to minimize the effects of their emotions, and inaccurately predict how they or someone else will be emotionally affected in the future by negative events, or even by positive events.²⁴⁶ This demonstrates that people are often deficient at predicting the extent of their emotions.

²⁴⁰ See also Patrick J Carlton, “A New Synthesis for Law and Emotions: Insights from the Behavioral Sciences” (2015) 47:4 *Ariz St LJ* (on the history of emotions and the law).

²⁴¹ *Supra* note 216 at 341.

²⁴² S Danziger, J Levav & L Avnaim-Pesso, “Extraneous factors in judicial decisions” (2011) 108:17 *Proceedings of the National Academy of Sciences* 6889.

²⁴³ *Ibid*; see also Jennifer K McCormack & Kristen A Lindquist, *Feeling hangry? When hunger is conceptualized as emotion*. (Master of Arts in the Department of Psychology and Neuroscience, University of North Carolina at North Chapel Hill, 2016) [unpublished].

²⁴⁴ *Supra* note 217 at 166.

²⁴⁵ *Ibid*.

²⁴⁶ *Ibid*.

Teaching or encouraging people (including lawyers and judges) to disregard their own emotions by setting them aside is irresponsible. In one study, mock jurors were told to disregard emotionally charged evidence. The jurors were unable to do so and were more prone to reach guilty verdicts and impose longer sentences.²⁴⁷ This study supports that attempting to disregard emotional reactions arising from legal work, like reviewing evidence, is ineffective. What may be more effective is teaching jurors to acknowledge their emotions and clarify how their emotional reactions may interfere with their ability to reach a fair verdict. Avoiding the presence of emotions in law (and by extension, the prevalence of trauma) is arguably irresponsible, especially as neuroscience confirms that emotions are fundamental to develop reason and to care about the outcomes of one's decisions. Understanding and acknowledging emotions will help legal professionals move towards reducing harm and trauma in law whereas avoiding and disengaging causes further harm and implicit biases.²⁴⁸

3.2 When does the Attempt to Disengage Emotion from Reason Begin?

A great deal of research and writing has been devoted towards the dissatisfaction many lawyers have with their chosen profession. Many researchers have determined that this dissatisfaction can begin as early as law school while others have found that law students' mental health is often adversely impacted while attending law school.²⁴⁹ There are many reasons for this, one of which is that law school is where people start to learn that the ideal lawyer is expected to fragment themselves from their emotions as well as their own values (the connection between values and emotions is discussed in the next paragraph).²⁵⁰ This passage pinpoints a significant issue in teaching law students to abandon their own emotions (and therefore, their ethical values):

In legal education we create lawyers who believe that their role in the administration of justice is almost entirely cognitive and that their own ethical values are irrelevant or improper to bring to the arena of justice. We create lawyers who learn to compartmentalize their professional and personal lives. *We*

²⁴⁷ *Ibid.*

²⁴⁸ *Bilotta, supra* note 5 at 240 (how policies promoting “colourblindness,” intended to counter overt bias, actually lead to harsher judgments of diverse employees due to implicit biases. These policies undermine their own intended purpose).

²⁴⁹ *Krieger, supra* note 3; *supra* note 124.

²⁵⁰ *Supra* note 124.

create lawyers who are incomplete as professionals, and who therefore treat their clients as incomplete human beings. They may be able to solve problems in their own lives with the fullness of emotional, moral, and analytical judgment but they bring only the latter to bear when helping clients to solve their legal problems. We should not be surprised, then, that there is dissatisfaction with the way in which the legal system solves problems.²⁵¹

Ethical values are connected to emotions as the latter moves people towards engaging in ethical action and prosocial movements.²⁵² However, this is compromised in legal practice and in law school. For example, Elizabeth Mertz observed the emotional suppression of first year law students.²⁵³ This suppression came from both professors and fellow students who appeared to equate emotions with distractions.²⁵⁴ Thus, law students learned that anger or feelings about injustice were incompatible with how the legal system operates and with one's ability to successfully argue for either side of a case.²⁵⁵

Research on mental health decline for lawyers points to the culture and expectations placed upon people beginning in law school.²⁵⁶ Law students find themselves challenged by their personal identity and beliefs when they discover these often do not match the ideal lawyer identity expected of them.²⁵⁷ The ideal is often communicated both expressly and implicitly: that the student must learn to think in an exclusively logical way, to set aside their emotions and personal values in the interests of their client.²⁵⁸ In order for law students to meet their professional goals, "they will either change how they see themselves as people to accommodate their identity as lawyers, or they will engage in greater role distancing by creating a professional identity they conceive as separate from who they are as a person."²⁵⁹ This can happen when law students

²⁵¹ Daisy Hurst Floyd, "Lost Opportunity: Legal Education and the Development of Professional Identity Symposium Issue: A Century Later: Answering Roscoe Pound's Call for Change in the Administration of Justice" (2007) 30:3 Hamline L Rev 555 at 558 [emphasis added].

²⁵² Sophia S Jeong, Cong (Timothy) Sun & Ping Ping Fu, "Softening the Hearts of Business Students: The Role of Emotions in Ethical Decision Making" (2020) 44:3 Journal of Management Education 278 at 282.

²⁵³ Elizabeth Mertz, *The language of law school: learning to "think like a lawyer"* (Oxford, Oxford [England] ; New York: Oxford University Press, 2007) at 127-128.

²⁵⁴ *Ibid.*

²⁵⁵ *Supra* note 229 at 405 [citation omitted].

²⁵⁶ Kathryn Young, "Understanding the Social and Cognitive Process in Law School that Creates Unhealthy Lawyers" (2021) 89:6 Fordham Law Review 2575 at 2584.

²⁵⁷ *Ibid.*

²⁵⁸ *Bandes, supra* note 213.

²⁵⁹ *Supra* note 256 at 2484-2485.

experience a deep disillusionment with how law operates in reality; finding that the law is at odds with their “desire to reform the legal system, increase equality, and/or serve the public interest.”²⁶⁰

For example, one study interviewed first year law students across the United States at various universities. Student participants noted their frustrations with how the legal system seemed to favour people who made the strongest argument as opposed to favouring the fundamental principles of justice.²⁶¹ By extension, this favours people who have more financial resources to hire lawyers who make the stronger argument. Law students are often placed in a no-win situation of choosing whether to keep their own identity, values, and integrity, or to conform and increase their potential for success in their newly chosen career.²⁶² Ultimately, this can lead students to feel as if they have little to no efficacy in the practice of law which translates to feelings of disempowerment.

Without emotional acknowledgment, law students and lawyers may instead focus on external markers of success (such as grades or court outcomes) to inform how they “ought” to feel about something rather than how they actually feel. Law school experiences may contribute to distancing and lead students to feel disempowered and fragmented from the desires that lead them to choose law initially. In the aforementioned survey of U.S. first year law students, researchers pointed to the curved marking method as the source of undue stress that undermined any efforts the schools made to create a collegial and safe learning environment for students.²⁶³ In breaking down how curves negatively impacted law students, they found that, “Students’ sense of academic self-efficacy—the sense that they have the ability to exert control over outcomes—is significantly diminished when grades are curved.”²⁶⁴ As law schools focused more on how students compared to their peers rather than how well they individually performed, it fostered a pattern of comparison against other students in which other people’s success was directly proportionate to one’s own lack of success.²⁶⁵ These inconsistent messages can further

²⁶⁰ *Ibid* at 2483.

²⁶¹ *Ibid*.

²⁶² *Ibid*.

²⁶³ *Ibid* at 2587.

²⁶⁴ *Ibid*.

²⁶⁵ *Ibid* at 2585.

exacerbate students' feelings of confusion, frustration, and disempowerment which adversely impacts their sense of identity.²⁶⁶ All of this can become even more difficult to process if students and lawyers do not have awareness of their emotions.

Another law school experience that contributed to disengagement was the disregard of real life events in classrooms. Given the major events that occurred over the past two years including the death of Ruth Bader Ginsburg, the murder of George Floyd by former police officer, Derek Chauvin, the decision to drop criminal charges against the officers who shot and killed Breonna Taylor, and COVID-19, students from the study commented on the disconnect between these real world events and their law school's limited or complete lack of acknowledgment of the same:

[The] disconnection between the classrooms and important real-world events challenges law school's ability to function as a source of professional integration. It sends the implicit message that doctrine is one thing and real-world law is another. This division tracks with many students' feelings (and many practicing lawyers' conventional wisdom) that 'foundational' or 'bar' classes are disconnected from the practice of law. This dynamic forces students into one kind of separation between different selves: their selves as people who care about the world and their law student selves. Such a separation can hinder role integration, which is a crucial process for young professionals' identity development.²⁶⁷

Such a division of self can be damaging, dangerous, and likely continues well after law school. A fragmentation of self means that the individual is creating distance from their emotions by suppressing them or avoiding them. However, this is ineffective to process emotions healthily and is not conducive to a sustainable and healthy future practice.

3.3 What is the Cost of this Fragmentation?

3.3 a) Suppression of All Emotions

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid* at 2582.

Legal scholars and practitioners are more recently discussing the costs of thinking like a lawyer:²⁶⁸

The logical thinker may find it easier – and even necessary – to remain detached while practicing law. But intellectual distancing also can prevent individuals from being in touch with life’s emotional palette... ‘Eventually, they pay the price, not only with burnout but heart attacks, a lowered immune system and a toll on their psyche.’²⁶⁹

With respect to “life’s emotional palette”, suppressing less desirable emotions such as discomfort, fear, or anger may also lead to suppression of desirable emotions such as joy, relief, or compassion²⁷⁰ which can impact an individual’s mental well-being. Losing the feeling of hope, in particular, can go hand in hand with symptoms of burnout or indirect trauma.²⁷¹ One study observed refugees who were diagnosed with PTSD to determine whether they were able to numb certain emotions while still experiencing others.²⁷² The findings suggested that emotional numbing primarily affected emotions that normally arise from positive experiences.²⁷³ Unpleasant stimuli, on the other hand, lead to hyperarousal.²⁷⁴ In other words, their ability to healthily address unpleasant situations decreased and lead to reactions that were disproportionate to the original stimulus. While this study only involved people with PTSD, it is an example of how emotional disengagement adversely impacts all emotions, not simply the unpleasant ones. It can also decrease one’s tolerance for negatively associated experiences, disrupting how people normally respond to daily life stressors.

²⁶⁸ See *Bandes*, *supra* note 213; Trish Crawford, “A left turn out of law: Struggles with work-life balance fuel exodus of women lawyers from firms across Ontario”, *Toronto Star* (26 February 2011), online: *ProQuest* <<https://www.proquest.com/docview/853865673/abstract/BB5FA656FFC74459PQ/1>>; *supra* note 256 at 2576; Adrienne Drell, “Chilling Out: While the lawyer’s persona of being logical and argumentative may be the stuff of classic comedies — in real life these traits can be anathema to personal relationships” (1994) 80:10 *ABA Journal* 70; Craig Gustafson, “Bruce Lipton, PhD: The Jump From Cell Culture to Consciousness” (2017) 16:6 *Integr Med (Encinitas)* 44 (how a negative belief relates to the placebo effect, a consequence that can lead to illnesses, disease, or death as cells will give allegiance to the way the human body orients itself, even if that ends up being self-sabotage behaviour); MI Ramírez-de los Santos et al, “Relation between personality dimensions and symptomatology of depression in skin cancer patients” (2021) 15:1 *BioPsychoSocial Med* 18.

²⁶⁹ *Drell*, *supra* note 268 at 70.

²⁷⁰ *Ibid.*

²⁷¹ Gillander, *supra* note 63 at 13 and 35.

²⁷² Aida Spahic-Mihajlovic, John W Crayton & Edward J Neafsey, “Selective numbing and hyperarousal in male and female Bosnian refugees with PTSD” (2005) 19:4 *Journal of Anxiety Disorders* 383.

²⁷³ *Ibid* at 399.

²⁷⁴ *Ibid.*

3.3 b) Systemic Injustice

In addition to adverse effects on how one experiences positive emotions, the ideal that a lawyer ought to be adversarial, competitive, rational, emotionally detached, and individualist is costly in much broader and systemic ways.²⁷⁵ For example, where reason is prioritized and emotions are disengaged from or suppressed, the individual doing so is less aware of their emotions, and less likely to reflect on why they may react emotionally to certain situations. Arti Pushottam Makwana and their research team found that participants who were emotionally intelligent--with strong emotion management skills--were less likely to express ethnic prejudice, more likely to feel positively about immigrants and refugees, and less likely to have homophobic attitudes.²⁷⁶ This is because those who had strong emotion management (and by extension, acknowledged their emotions) also had higher levels of empathy, allowing them to empathize with people outside of their familiar group.²⁷⁷

The U.S law students from the study referenced in chapter 3.2 made note of gender and racial inequality in class which pointed to broader structural issues in their schools. For example, several female students observed how, when they spoke up in class, they were ignored or dismissed while a white male student shared the same idea a moment later and received credit for it.²⁷⁸ Others noticed how white male students were treated more favourably compared to students of colour or female students.²⁷⁹ Such fast everyday interactions equate to the implicit message that certain students do not have the same standing as others and reinforces to students who are women and/or people of colour that they have little control over how legal systems will interact with them.²⁸⁰ On the flip side, it reinforces to white male students how acceptable it is for them to take up space to the detriment of other students' law school experience. The schools' reinforcement of this inequality mirrors the ways in which students are taught to disconnect from their empathy or compassion, which may encourage disconnection with students (and in the

²⁷⁵ Patricia Weir et al, "A diary study of Australian lawyers working with traumatic material" (2022) 29:4 *Psychiatry, Psychology and Law* 1 at 2.

²⁷⁶ Arti Purshottam Makwana et al, "Are emotionally intelligent people less prejudiced? The importance of emotion management skills for outgroup attitudes" (2021) 51:8 *Journal of Applied Social Psychology* 779.

²⁷⁷ *Ibid* at 788.

²⁷⁸ *Supra* note 256 at 2591 and 2592.

²⁷⁹ *Ibid*.

²⁸⁰ *Ibid* at 2593.

future, clients) they do not easily relate to.²⁸¹ For students who belong to traditionally marginalized groups, they may try to “toughen up” and ignore or suppress the ways they experience prejudice or racism in school in order to fit in, which also contributes to emotional disengagement.²⁸² This is potentially one of the factors that leads to unhappiness in the legal profession and the exodus of women from the profession, especially from private practice.

Applying Makwana’s findings to the ways law students experience gender and racial inequality in classrooms, it is possible that law students who are encouraged to detach from their emotions are also unknowingly reducing their capacity to empathize with people outside of their familiar group. Furthermore, lawyers who are disengaged from their emotions may unknowingly try to “save” their clients from difficult situations. This can include circumstances where the lawyer believes they know what is best for the client without respecting the client’s stated needs. It can create situations where lawyers seek to make themselves feel better about unjust challenges that arise in the legal system.²⁸³ This can further demarcate the power imbalance between a lawyer and client and further disconnect them from working together collaboratively and in accordance with trauma-informed lawyering principles.

3.3 c) Implicit Bias

Implicit bias (also termed implicit prejudice or subtle bias) in law relates to how legal systems and legal actors interact with clients and users of the system depending on the user’s racial background, economic status, and gender.²⁸⁴ This can contribute towards systemic injustice and is tied to emotions and the suppression of emotions. As Lu states:

Far from being an entirely irrational process, emotions actually serve as key processes that inform an individual’s cognitive processes at an unconscious level,

²⁸¹ See Wald, *supra* note 238.

²⁸² See also Susannah Alleyne, “Letter From the Law Society: The Well-being Matrix: Why Equity, Diversity and Inclusion are Essential to a Healthy Legal Profession – Law Society of Alberta”, (29 June 2021), online: *Law Society of Alberta* <<https://www.lawsociety.ab.ca/letter-from-the-law-society-the-well-being-matrix-why-equity-diversity-and-inclusion-are-essential-to-a-healthy-legal-profession/>> (how Alleyne, as a private practice lawyer, engaged in “performative professionalism that often requires the stifling of one’s authentic self.”); Linda Robertson, “What Law Firms Can Do to Stop the Exodus of Women”, online: *The Canadian Bar Association* <<https://www.cba.org/Publications-Resources/CBA-Practice-Link/Work-Life-Balance/Women-and-Law/What-Law-Firms-Can-Do-to-Stop-the-Exodus-of-Women>>.

²⁸³ Buhler, *supra* note 229 at 417-418

²⁸⁴ Bilotta, *supra* note 5.

which indicate how essential it is to consider emotions in analyzing implicit prejudices. The fact that the amygdala is involved in experiencing prejudice further indicates that some emotion-based approach to implicit prejudices is necessary to understand the processes behind such biases.²⁸⁵

Since emotions are connected to reason and one's "unconscious evaluation of events and stimuli," then emotions are also connected to one's ability to form implicit biases. Analyzing implicit biases from the perspective of emotions, researchers have found that "implicit prejudices are so resistant to change because the development of such prejudices is deeply rooted in an emotional learning process that is perpetuated by a subtly prejudiced society and is largely out of conscious control."²⁸⁶ Given that implicit biases and emotions arise from an unconscious level, it makes sense that they are closely connected to each other in how they influence human behaviour.

Neuroscience has further demonstrated that prejudice in the brain often activates the same systems that activate the emotion of fear. Therefore, "a fear response to racial stimuli does not seem to serve the same useful purposes... emotions arise to serve some purpose, those purposes may not necessarily be adaptive or desirable, as in the case of prejudice."²⁸⁷ Such emotions that give rise to implicit biases may be false alarms for a stimulus, such as being afraid of a person of colour, and can trigger bodily responses such as avoidance, increased heart rate, or a rush of adrenaline.²⁸⁸ Where implicit biases remain unnoticed (and are suppressed along with emotions), they could be acted upon in the legal profession causing very harmful consequences. Implicit biases can alter the way a person processes social information or evidence. They can also distort memory, and all of this can happen without the perceiver's awareness which can make it much more difficult to correct even where the individual is consciously working towards unbiased thinking.²⁸⁹

²⁸⁵ *Supra* note 230.

²⁸⁶ *Ibid.*

²⁸⁷ *Ibid* at 4 [citations omitted]

²⁸⁸ *Ibid.*

²⁸⁹ *Bilotta, supra* note 5 at 234.

Despite the fact that changing implicit biases is much more difficult than changing conscious biases, it remains possible and necessary.²⁹⁰ A study regarding training of biases suggests that where biases are modified, this can also change the individual's emotional expression, their reaction to stress, and can potentially reduce anxious moods.²⁹¹ It takes a great deal of self-awareness, vulnerability, and patience to work towards noticing such biases, and this includes any emotions connected to these biases. This is the work that so many anti-racist advocates and authors speak about when they are asked how systemic injustice or colonialism can be dismantled.²⁹² It is also likely what Honourable Judge Steven Point meant when he said, “Transformation and change doesn't begin out there. It begins in here, '...pointing to his heart and head. 'Individually, changing yourself.'”²⁹³ This was said at the closing of his keynote address on the topic of Truth and Reconciliation. Learning how to acknowledge emotions healthily can also help lawyers work towards fulfilling The Truth and Reconciliation Calls to Action in a meaningful and lasting way.

Such work requires practice and discipline to consciously decide to interrupt implicit biases, consider the emotions behind them, and work against unconsciously acting on them. It may also be a matter of paying attention to when implicit biases interfered after the fact and having the courage to share this with those affected in order to be accountable for it. Otherwise, that lawyer may not only risk cutting off their client and missing key information that is important to the legal matter, but they will also impair the trust and collaborative relationship that could otherwise develop.²⁹⁴ However, the slow and, at times, painfully direct work to develop self-awareness around biases may present challenges as it involves short-term discomfort towards long-term growth. As many lawyers may be more comfortable with remaining “reason” focused,

²⁹⁰ Tanya B Tran, Matthias Siemer & Jutta Joormann, “Implicit interpretation biases affect emotional vulnerability: A training study” (2011) 25:3 *Cognition & Emotion* 546; Bundy Mackintosh et al, “Induced Biases in Emotional Interpretation Influence Stress Vulnerability and Endure Despite Changes in Context” (2006) 37:3 *Behavior Therapy* 209.

²⁹¹ Mackintosh, *supra* note 290 at 209.

²⁹² See e.g. Layla F Saad, *Me and white supremacy: combat racism, change the world, and become a good ancestor* (Napreville, Illinois: Sourcebooks, 2020).

²⁹³ “Truth and Reconciliation Symposium: truth-telling and sparking change” (24 November 2017), online: *The Law Society of British Columbia* <<https://www.lawsociety.bc.ca/about-us/news-and-publications/news/2017/truth-and-reconciliation-symposium-truth-telling-en/>>.

²⁹⁴ Heavin, *supra* note 5 at 201.

they may be less open to acknowledging their emotions or to experience what they have worked so hard to suppress, perhaps over the course of decades.

3.3 d) Risk Averse/Perfectionist Behaviour

Another cost of emotional suppression is coping with unhealthy perfectionist and risk aversion traits. Thomas S. Greenspon, a licensed psychologist, distinguishes the difference between the “pursuit of excellence” and the personality trait, “perfectionism.”²⁹⁵ For those pursuing excellence, this opens up possibilities for continued growth and feels vitalizing and energizing. For those with unhealthy perfectionist traits, the individual typically feels deadened, hopeless, anxious, and is afraid of making mistakes.²⁹⁶ As noted in chapter 3.2, where the suppression of emotions occur, individuals may start to focus on external markers of success to determine how they “ought” to feel rather than paying attention to how they actually feel. This means emotional suppression can feed into overly focusing on external markers of success and perfectionism.

Additionally, research supports that individuals with unhealthy perfectionist beliefs are more likely to have negative beliefs about emotions, leading them to suppress them.²⁹⁷ Along with perfectionism, emotional suppression may also bring on depression symptoms.²⁹⁸ Perfectionism is ultimately the manifestation of a fear of not being personally acceptable to others and the anxiety that comes with it causes the individual to self-sabotage their own opportunities for success and creates more stress than is necessary.²⁹⁹ For lawyers, unnecessary stress is a hinderance to practicing law effectively. Trauma-informed practice with information on how to acknowledge emotions can be a buffer against unhealthy perfectionism and depression.

²⁹⁵ Thomas S Greenspon, “Is There an Antidote to Perfectionism?” (2014) 51:9 Psychology in the Schools 986 at 988.

²⁹⁶ *Ibid* at 989.

²⁹⁷ Lisa Tran & Katharine A Rimes, “Unhealthy perfectionism, negative beliefs about emotions, emotional suppression, and depression in students: A mediational analysis” (2017) 110 Personality and Individual Differences 144 at 146.

²⁹⁸ *Ibid* at 146.

²⁹⁹ *Supra* note 295 at 989 and 991.

Risk averse behaviour in lawyers is a quality associated with perfectionism.³⁰⁰ A lawyer with unhealthy perfectionism may become risk averse or “present biased,” that is, have “the tendency to overvalue the short-term and hyperbolically discount long-term outcomes.”³⁰¹ Therefore, an individual who is “present biased” may take steps to avoid consequences in the present, deferring them to the long-term.³⁰² This is opposed to preferring long-term net benefits even where the short-term consequences are temporary. Present bias leads the individual to stick to their familiar perspective and position, becoming risk averse.³⁰³ An example of present bias would be a lawyer who feels overwhelmed by their case load and knows there is at least one file with an upcoming limitation date. Instead of reviewing that file to make a note of the limitation date, they avoid looking at the file altogether and avoid contacting the client to let them know the progress of their legal matter. Yet, looking at the file sooner rather than later allows the lawyer to avoid long-term consequences such as missing the limitation date or a client making a complaint against their lawyer for misconduct. Ignoring the file may allow the lawyer to feel less stressed in the present but may lead to neglect of a client’s file and impact the lawyer’s career, risking even more stress in the long-term than in the present.³⁰⁴

Further, where an individual feels overwhelmed when making a choice, they may become indecisive and make either default decisions (underscoring the risk averse behaviour) or poor decisions.³⁰⁵ This short-sightedness was summarized by Timothy Terrell and James Wildman: “[L]awyers have sought a cure for a disease before agreeing on its nature, symptoms, and causes. We want to be happy in our professional lives without investigating seriously why many of us are unhappy. We want, in short, to moralize without examining our morals.”³⁰⁶ Continuing in this vein, many legal professionals seek to address injustice without addressing the root causes for it, they seek impartiality in law without addressing their own biases, and they seek balance and well-being in legal practice without understanding their own needs or emotions. As such,

³⁰⁰ *Supra* note 20 at 279.

³⁰¹ Julian Christensen et al, “Human Capital and Administrative Burden: The Role of Cognitive Resources in Citizen-State Interactions” (2019) SSRN Journal, online: <<https://www.ssrn.com/abstract=3481440>> 1 at 10.

³⁰² *Ibid.*

³⁰³ *Ibid.*

³⁰⁴ *Waldinger, supra* note 224 at 293-294.

³⁰⁵ *Supra* note 301.

³⁰⁶ Susan Daicoff, “Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism” (1997) 46:5 *American University Law Review* 1337 at 1341.

there is often an emphasis on short-term benefits and less awareness of how current actions shape long-term outcomes.³⁰⁷ This also applies to broader organizations such as law firms that prioritize short-term outcomes such as monetary profits over long-term sustainability through, for example, increased investment in responsibly training, mentoring, and supporting new lawyers.³⁰⁸

Rather than focusing solely on short-term monetary profits and billable hours, the pressures of which are shown to increase psychological distress,³⁰⁹ consideration ought to be broadened to consider one's values, intentions, relationships, and long-term sustainable careers. These non-monetary benefits are often ignored by law firms as they require the investment of money, time, and energy in the short-term towards the payoff of long-term sustainability that could benefit the lawyers, law firm, profession, legal system, and society more generally.³¹⁰ This short-sightedness may be one reason why disillusionment and unhappiness is occurring in firms at all levels.³¹¹ As such, this can lead lawyers of various levels to leave firms feeling discouraged and disconnected from their original values and intentions behind becoming a lawyer.³¹² Heavin and Keet argue that, as part of discussing legal options with clients, "Legal interest needs to be considered within the context of broader factors, such as the client's values, relationships, and concerns."³¹³ The same is true for lawyers and how they structure their practice.

3.3 e) Physical Health Impacts

³⁰⁷ See also Susan Grover, "Personal Integration and Outsider Status as Factors in Law Student Well-Being Humanizing Legal Education Symposium - Direct Application with Students" (2007) 47:2 Washburn LJ 419 at 421 (there is a tendency for law students to sacrifice meaningful hobbies outside of law, they feel pressured to abandon attributes fundamental to their own wellbeing).

³⁰⁸ Ben Heineman, David Wilkins & William Lee, *Lawyers as Professionals and Citizens: Key Roles and Responsibilities in the 21st Century* (Harvard Law School Center on the Legal Profession, 2014) 1 at 38.

³⁰⁹ Martine Gingués, *Comparaison Entre les Femmes et les Hommes Quant aux Stresseurs à L'origine de la Détresse Psychologique Chez les Avocat(E)S Québécois(Es) : Étude du Rôle Direct et Indirect Des Heures Facturables* (Thesis, Masters in Intervention and Organizational Change, Université de Sherbrooke, 2020) [unpublished]; *supra* note 1 at 111.

³¹⁰ *Supra* note 308 at 39.

³¹¹ *Ibid.*

³¹² Crawford, *supra* note 268.

³¹³ Heavin, *supra* note 5 at 212.

Emotional suppression can lead to physical health impacts; this is supported by the “health-status paradox,” where research findings from the United States challenge the inference that once a lawyer finds professional success, such as acquiring a partnership within a law firm, they will also enjoy better overall health and well-being. The findings show the opposite: that the more status one attains within the legal profession, the poorer their health tends to be or the higher their risk of depression as compared to lawyers with less professional status.³¹⁴ The researchers attributed this to higher levels of overwork and higher likelihood that they experience negative effects on their personal relationships and social activities (“work-life conflict”).³¹⁵ Higher levels of overwork and work-life conflict are directly connected with depressive symptoms and risk of poor health.³¹⁶

In studying this paradox, researchers cited the ‘power of ordinary’ to describe the ‘cumulative effects of structural givens in daily life’.³¹⁷ In the context of legal practice, the structural givens are overwork and work-life conflict. Where such givens are considered ordinary for lawyers, especially in large private firms, they also become principal indicators for patterns of depression and health.³¹⁸ The researchers conclude that, based on their findings, law employers, and in particular, law offices, need to learn how to mitigate work-life conflict for lawyers if they hope to retain associates.³¹⁹ Their findings showed that “large-firm lawyers report a lower probability of good health and a higher probability of poor health relative to those in the public sector *and* those in solo practices and small firms.”³²⁰ Therefore, it becomes relevant to ask: what is the intention of achieving higher status if it leads to these adverse impacts? How one lawyer defines “success” may be different from another. Making space for and acknowledging emotions can help a lawyer determine what success means and get clear on what drives them towards certain goals, rather than potentially expending energy, time, and well-being towards achieving a goal only to realize it may not have been what they desired in the first place. Acknowledging one’s

³¹⁴ Jonathan Koltai, Scott Schieman & Ronit Dinovitzer, “The Status–Health Paradox: Organizational Context, Stress Exposure, and Well-being in the Legal Profession” (2018) 59:1 J Health Soc Behav 20 [citations omitted].

³¹⁵ *Ibid* at 26.

³¹⁶ *Ibid* at 32

³¹⁷ *Ibid*.

³¹⁸ *Ibid*; Ingo Forstenlechner & Fiona Lettice, “Well paid but undervalued and overworked: The highs and lows of being a junior lawyer in a leading law firm” (2008) 30:6 Employee Relations 640 at 641.

³¹⁹ *Supra* note 314 at 33.

³²⁰ *Ibid* [emphasis original].

emotions can also help a lawyer examine daily ordinary experiences and whether such daily givens are contributing to work-life conflict.

Other studies have found evidence of emotional suppression contributing to physical illness. One study examined participants over the span of 12 years, reviewing the connection between emotional suppression and cancer and cardiovascular mortality.³²¹ They found significant associations between higher levels of emotion suppression and mortality related to cancer.³²² With cardiovascular disease, the evidence was not as strong but a connection was found, nonetheless.³²³ These results support that emotional suppression leads to unhealthy behaviours leads to unhealthy behaviours and contributes to poor health. More research is needed to determine whether the health-status paradox also applies to Canadian lawyers.

3.3 f) Increase in Aggression, Decrease in Emotional Regulation

Emotional suppression can also impact a person's level of aggression. A research study investigated whether sleep deprivation affected one's ability to suppress their own emotions. The hypothesis was that sleep deprivation would deplete a persons' ability to suppress emotions and lead to more aggressive outbursts from their study participants.³²⁴ Rather, they found that it was emotional suppression that impacted aggression rather than sleep deprivation.³²⁵ Participants who were told to suppress their facial expressions and internal emotions to remain neutral were more likely to behave aggressively later on as compared to those who were allowed to express their emotions; this was the case no matter how much sleep they had.³²⁶ Thus, another possible cost arising from emotional suppression for lawyers is a reduced ability to manage one's emotions. This seems ironic since emotional suppression is exercised in an attempt to achieve this outcome. It is therefore important to understand that there is a difference between emotional

³²¹ *Supra* note 224.

³²² *Ibid* at 383-384.

³²³ *Ibid*.

³²⁴ Kathleen D Vohs et al, "Ego Depletion Is Not Just Fatigue: Evidence From a Total Sleep Deprivation Experiment" (2011) 2:2 Social Psychological and Personality Science 166.

³²⁵ *Ibid*.

³²⁶ *Ibid* at 171; University of Texas at Austin, "Psychologists find the meaning of aggression: 'Monty Python' scene helps research" (2011) ScienceDaily, online: <<https://www.sciencedaily.com/releases/2011/03/110323105202.htm>>.

suppression and learning how to acknowledge and manage one's emotions healthily, which will be covered in chapter 3.4.

3.3 g) Negative Perspective

Emotional suppression can lead to a decrease in one's ability to consider positive perspectives and outcomes and increase negative perspectives. Recall in chapter 3.2 in which the study on U.S. law students found that they felt disempowered. Feeling disempowered does not mean that, in fact, the students were without any power to shape their own law school experience. In other words, using discernment, it is possible for an individual to observe and acknowledge that they feel disempowered but they do not have to believe they are, in fact, disempowered. This is the difference between positive perspective (recognition of feelings of disempowerment but not believing this is fact – an example of metacognition) and negative perspective (feeling disempowered and believing this must be fact).

To illustrate this further, one study found that law school students had poor metacognitive skills, that is, the ability to think critically about one's own perceptions and the emotions attached to these.³²⁷ While this study focused on law students, it is reasonable to assume that if law students are not typically taught reflective practice or metacognitive skills, then lawyers, on average, also do not have strong metacognitive skills.³²⁸ For example, if I am representing a client who is difficult to reach on a criminal matter and they do not respond to my phone calls or e-mails, how I describe this context can change how you view the client. I could tell you how I took this matter on a *pro bono* basis, how I spent many hours working on this file, and yet, the client continues to take my help for granted by ignoring and avoiding me. Or, I could tell you how this client has struggled throughout their life due to past events outside of their control and has a great deal of responsibilities besides this legal matter; that they want to resolve this matter but in their list of priorities, this file is not as important compared to their need to provide food and shelter for their children. Both perspectives may be true, or both may be entirely false. The

³²⁷ Patti Alleva & Jennifer A Gundlach, "Learning Intentionally and the Metacognitive Task" (2015) 65:4 J Legal Educ 710 at 722–725.

³²⁸ Brea Lowenberger, "Advancing rigorous reflective practice in legal education through assessment: a guide for educators" (2019) 53:4 The Law Teacher 446 at 448.

former perspective would likely bring up emotions like annoyance, frustration, or resentment. The latter may bring up emotions such as concern, sadness, or anxiety.

Being resilient and having strong metacognitive skills means being able to understand that emotions and perspectives are not the same as fact, to learn how to apply current skills to new situations, and to evaluate any given situation as it arises by acknowledging one's own emotions, validating them, but not giving way to them or acting on them. This gives the individual lawyer (or law student) "conscious control" over their experience.³²⁹ In the above example, it means I can better notice how I feel about the client and their file and take responsibility for my emotions so that I avoid behaving unprofessionally with the client the next time I speak with them. Having a sense of measured and conscious control or empowerment over one's own actions is, ironically, a desired effect of suppressing one's emotions in the first place. Thus, the difference between emotional suppression and emotional acknowledgment with metacognition is that the former pushes emotions into the background (temporarily) while the latter brings emotions into the foreground and allows the individual to face what comes up directly in a measured way. This further underscores how emotional suppression increases the risk of psychological distress and trauma through fragmentation of self, and disconnection from one's values as it impacts self-efficacy and increases negative perspectives.

3.3 h) Mental Health

As alluded to in the previous sections, emotional suppression impacts a person's mental health. Emotional suppression is a form of rigidity that often coincides with expectations of perfection, self-imposed isolation, self-sabotage behaviours, which relate to poor mental health. Susan A. Bandes writes about the consequences of setting emotions aside in both law practice and law school. She makes the distinction between an emotion-free legal system and the *perspective* that the legal system is emotion free or that one can banish their own emotions.³³⁰ She writes that the latter is a denial shared by lawyers and law students in how they handle emotions.³³¹ This

³²⁹ *Supra* note 227 at 6.

³³⁰ *Bandes*, *supra* note 213.

³³¹ *Ibid.*

distinction is important to keep in mind because being able to discern between what is one's own perspective and what is fact is vital in law and yet, lawyers' perspectives are often mistaken as fact. In this vein and as alluded to in the last section: "law students have a lower aptitude in metacognitive thinking in relation to their peers in other professional fields. Internal, conscious reflection is a prerequisite to the development of metacognitive skills, that is, the ability to 'think about one's thinking and learning.'"³³²

In a study with attorney participants who specialize in post-conviction appeals for clients on death row, Bades describes how these lawyers feed into an internalized pressure to present themselves as "hard-as-nails litigators who can absorb terrible losses with no need for emotional support."³³³ The consequence of this internalized pressure was that these lawyers would underestimate the pain their colleagues felt and assume that their own pain meant they were weak and their reactions to their work were exceptional. Recall that the Sherbrooke Report found that 59.4% of legal professionals surveyed were in psychological distress. As well, 36.4% of legal professionals with less than 10 years of experience had depressive symptoms, 52.1% of legal professionals aged 35 and under experienced anxiety symptoms, and even more alarming, 24% of legal professionals shared that they had suicidal thoughts since beginning their legal practice.³³⁴ Lawyers are more likely to experience indirect trauma than mental health professionals because they score low when it comes to emotional stability.³³⁵ The American Bar Association found in 2016 that lawyers have the highest rate of major depressive disorder and alcohol abuse.³³⁶ These were significantly higher rates than compared to doctors despite the necessary life and death decisions expected within the medical profession. All these findings support the need for more resources to help lawyers process the stress that arises from legal work and to improve their overall mental health. More research on how such support would compare to medical and mental health sectors could help illuminate why lawyers' statistics in mental health have remained dire.

³³² Brea Lowenberger, *Operationalizing and Assessing the Reflective Exercises in Legal Education: Towards a Pedagogy of Reflective Practice* (University of Saskatchewan, 2017) [unpublished] at 6 [citations omitted].

³³³ Bades, *supra* note 213 at 2442.

³³⁴ *Supra* note 1 at 34 and 40.

³³⁵ Maguire, *supra* note 11.

³³⁶ Bades, *supra* note 213 at 2442.

3.3 i) Isolation

The high pressure that leads lawyers to avoid seeking help is a consequence of the ways in which the profession and legal culture individualizes this sort of pain. This can be conflated with a lawyer's reputation, which can also lead them to avoid sharing their experiences.³³⁷ The way many law societies encourage lawyers to reach out for mental health support leads to other challenges. Lawyers who are already struggling may find it very difficult to speak with employers about their mental health or to reach out to mental health services provided by law societies (this will be explored further in chapter 4.3). As such, self-isolation often occurs because it is part of what lawyers perceive to be necessary in order to maintain their professional identity. As Bandes writes, "What is most pernicious about the plight of our profession is how thoroughly the aversion to emotional awareness is imbedded in our very self-conception."³³⁸ Speaking about the work of lawyers who practice criminal law, she writes:

In the conventional view the very acknowledgment of our work's emotional aspects – of the pain we cause, the pain we experience, the costs of the dissonance between role and conscience, the empathy or revulsion we may feel toward particular clients and how we ought to deal with it - seems at odds with law's essence as a rational and rigorous discipline. In short, acknowledging the role of emotion may brand one as not merely weak, but downright unlaywerlike.³³⁹

This can ring true for lawyers in any field of practice though lawyers who practice criminal law and/or family law may identify more with the above passage. Still, even in corporate or business law, emotion plays a part as does emotional suppression. The consequences of being alone with deep emotional pain that can arise as part of practice are severely underestimated. In 1938, scientists started to track the health of 268 Harvard sophomores during the Great Depression; their intention was to find out what could lead to healthy and happy lives.³⁴⁰ They found that close relationships were better predictors of how happy the participants were, more so than

³³⁷ *Ibid* at 2443.

³³⁸ *Bandes*, *supra* note 213 at 2443.

³³⁹ Susan Bandes, "Repression and Denial in Criminal Lawyering" (2006) 9:2 Buffalo Criminal Law Review 339 at 342.

³⁴⁰ Liz Mineo, "Over nearly 80 years, Harvard study has been showing how to live a healthy and happy life", (11 April 2017), online: *Harvard Gazette* <<https://news.harvard.edu/gazette/story/2017/04/over-nearly-80-years-harvard-study-has-been-showing-how-to-live-a-healthy-and-happy-life/>>; "Harvard Second Generation Study" online: *harvardstudy* <<https://www.adultdevelopmentstudy.org>>.

measures of physical health, money, or fame.³⁴¹ One of the researchers concluded, “Loneliness kills, [...] It’s as powerful as smoking or alcoholism.”³⁴²

Bandes notes that emotional suppression, taking on the form of “intellectualization (paying attention to external reality to avoid expression of inner feelings) and isolation (leaving the idea in consciousness but stripping it of all emotional effect)” is rewarded in law but the cost is steep.³⁴³ The more these coping mechanisms are used, the more likely that the lawyer will also use them outside of their professional relationships which can lead to “psychic numbing, repression, and denial of a more permanent sort.”³⁴⁴ The following quote from Andrew Benjamin, a lawyer and clinical psychologist out of Seattle, describes this cost: “All of a sudden you are involved in intellectualizing or rationalizing every thought you have and then you become distanced emotionally from your loved ones, your colleagues and even your clients. You are distanced from your own feelings, and you kind of lose your humanity.” Taken together, this internalized isolation fueled by emotional suppression and over-rationalizing can lead to significant mental health costs as well as physical health costs to the individual lawyer. It can also negatively affect the lawyers’ relationships with their friends, family, and clients.

The knowledge about the legal profession’s overall poor well-being and poor quality of relationships (which directly affects one’s sense of connection) is not new. As early as in the mid-90’s, lawyers in the United States started to realize that the same skills that make them successful advocates were often ones that came at a cost in their personal lives. An article from 1994 outlined the experiences of different lawyers who found their abilities in law, such as thinking rationally or engaging in emotional suppression, were leading to turmoil in their personal relationships.³⁴⁵ “Occupational traits are not inevitably personality characteristics, but lawyers, like other professionals, frequently find that a career choice intensifies or perverts qualities that are considered desirable vocational assets.”³⁴⁶ The key word here is “intensifies”.

³⁴¹ *Mineo*, *supra* note 340.

³⁴² *Ibid* [citation omitted].

³⁴³ *Bandes*, *supra* note 213 at 2444.

³⁴⁴ *Drell*, *supra* note 268 at 72; see also Andreas Maercker et al, “Is Acknowledgment of Trauma a Protective Factor?: The Sample Case of Refugees from Chechnya” (2009) 14:3 *European psychologist* 249 (evidence to support that social acknowledgment can be a protective factor for traumatized people).

³⁴⁵ *Drell*, *supra* note 268.

³⁴⁶ *Ibid* at 70.

Law schools and the legal profession may intensify already present qualities and bring out tendencies to suppress and over-analyze one's emotions or the emotions of others around them, increasing their likelihood of isolation, rather than acknowledging, accepting, and healthily processing the emotions.

3.3 j) Disconnection from Ethics and Values

With respect to ethics, there is evidence to support that emotional suppression impairs a person's connection to their ethics. As illustrated, by disengaging from one's emotions, the individual denies opportunities to increase self-awareness. Self-awareness supports interpreting one's own ethics and values.³⁴⁷ A lack of self-awareness can impair one's ability to acknowledge emotions that would signal unethical behaviour. Acting unethically has also been observed to adversely impact the well-being of the person who enacts it in addition to anyone on the receiving end of it. This can contribute to a cycle of ill-health.³⁴⁸ Instead, by learning how to acknowledge emotions, lawyers can learn that their experiences of hardship, stress, and pain are not insurmountable and they can also learn the necessary vocabulary to describe their own emotions, which increases their ability to recognize potential unethical behaviour. This way, they will learn how to put a voice to their internal struggles without wasting energy or time ruminating on how to keep emotions suppressed. Further, disconnection from one's ethics and values can come with having privilege, as lawyers have. Having more privilege can more easily allow people to spare themselves from accountability which can become an obstacle to reduce harm and practice trauma-informed lawyering. Becoming more aware of one's own emotions can address this obstacle proactively and continuously to keep one's self accountable in daily interactions. This work is ongoing. More research on this and on lawyer's emotions, how they connect to ethics, and how both are impacted by legal education and legal culture would help put words to the nuances endemic in legal practice.

³⁴⁷ *Bandes*, *supra* note 213 at 2429; *supra* note 217 at 175; *supra* note 306 at 1402-1403; *supra* note 332 at 14.

³⁴⁸ *Baron*, *supra* note 3 at 108.

3.4 How to Address Trauma in Legal Practice: Learning How to Practice Trauma-Informed Lawyering

A note to the legal professionals who may review this: This section uses the second person narrative intentionally to directly address individual lawyers who may read this. The second person narrative is “a mental and cultural tool for co-operation, co-participation, and co-action.”³⁴⁹ In order to promote trauma-informed lawyering principles as a necessary part of legal practice, individual lawyers will benefit from co-operating, co-participating, and co-acting on these initiatives together. I desire to start this initiative with the following recommendations, to invite the individual lawyer reader to consider their own role in transforming their legal practice to become more trauma-informed. Finally, I acknowledge individual lawyers have different contexts and experiences and some recommendations may not be useful or applicable. I encourage you, the legal practitioner, to explore other professions and the sources cited in this thesis to find out what might work best to help you address trauma and harm as it arises in legal practice (and perhaps in your life).

First of all, I recommend that you challenge your typically held perceptions. Your relationship with your own emotions, level of empathy, and ability to engage in trauma-informed lawyering is all malleable. For example, your level of self-esteem is linked to the way you feel about yourself which impacts your overall mental and emotional well-being.³⁵⁰ These are interrelated factors. In one study, participants were randomly assigned to undergo positive or negative interpretation bias training.³⁵¹ After the training, researchers found that participants who received positive bias training created a protective effect on their self-esteem while those who received negative bias training noticeably decreased their level of self-esteem. This demonstrates that implicit cognitive biases (which are emotion-eliciting responses) can be trained and positive bias can be used to strengthen self-esteem.³⁵² As such, you can empower yourself to adopt different

³⁴⁹ Magdalena Rembowska-Pluciennik, “Enactive, Interactive, Social—New Contexts for Reading Second-Person Narration” (2022) 30:1 Narrative 67.

³⁵⁰ Anne Gold, “Why Self-Esteem Is Important for Mental Health” (12 July 2016), online: *National Alliance on Mental Illness* <<https://www.nami.org/Blogs/NAMI-Blog/July-2016/Why-Self-Esteem-Is-Important-for-Mental-Health>>.

³⁵¹ *Tran*, *supra* note 290.

³⁵² *Ibid.*

perspectives, learn how to acknowledge and manage your emotions, and become more trauma-informed at the same time.

Second, by learning how to become more trauma-informed in legal practice and learning how to acknowledge your own emotions, I recommend you approach this learning with the understanding that these teachings will lead to feelings of discomfort and likely defensiveness. These are normal reactions whenever a person confronts their own biases and long-held patterns. It is important to remember that there is no easy solution. Learning how to meet individuals where they are at (listening with empathy, while reserving judgment), whether it be opposing counsel, a self-represented litigant, a managing partner, a client, or yourself ultimately means that you will benefit greatly from learning ways to work through uncomfortable and awkward situations, re-evaluate your motivations for your actions often, while also learning how to set clear and healthy boundaries for your own sake.³⁵³ Empathy and unlearning requires humility and acceptance that learning how to meet individuals where they are at also means learning how to read and question your own initial reactions and what they mean. These are ongoing lessons that are a part of life.

Third, I recommend exploring what motivates you towards growth and better practices in both your own life and in legal work. It may be difficult to confront and work towards accepting the ways in which we practiced in the past, particularly if these ways lead to harmful experiences for others. Yet, a significant factor in accepting the current harms within legal practice is to look at them honestly, knowing that this will bring up feelings of discomfort and unease. Remembering the intentions behind changing patterns, such as creating a healthier and safer legal practice or learning how to relate and work differently with clients with less stress, can serve as a reminder for why it is important to confront what you may typically avoid. In this way, where a lawyer learns to acknowledge their emotions and to practice trauma-informed skills, they will also be taking accountability for their actions in the past, the present, and committing to do better in the future. As Judge Point stated, transformation can only start internally with one's self.³⁵⁴ There is an overabundance of evidence and information to show that the way lawyers traditionally

³⁵³ See e.g. *Louisy*, *supra* note 4.

³⁵⁴ *Supra* note 293.

practice is causing harm. It is time to use this information to motivate us to do better, starting at the individual level. This is the work that will move us towards reconciliation, the actions that will match the words from law societies' public statements about how they commit to improving the legal profession by closing access to justice gaps that exist for Indigenous and First Nations people.

Fourth, I recommend addressing stigma at all levels and especially within yourself, where necessary. Besides feelings of discomfort, defensiveness, and unease, another barrier to accepting emotions, learning trauma-informed practice, and seeing the humanity in clients is stigma, both internally and externally. Specifically, stigma is found to be a significant barrier to lawyers who tend to isolate their experiences and avoid talking about topics such as mental health. By staying quiet about these experiences, organizations will not have the opportunity to respond in kind which may only aggravate existing problems.³⁵⁵ If you find yourself feeling isolated in your mental health struggles, you may find that, as a starting point, sharing your experiences with a trusted counsellor, close friend, or colleague leads to feelings of connection and reduces stigma. For a lot of people, sharing about negative experiences or tough feelings in a healthy way (rather than sharing and feeling stuck in a negative perspective) is not easy and it would be well worth the effort of researching how to do this or taking courses to help do so. It is important that whoever you share this information with has the capacity to listen and remain present rather than becoming preoccupied with solving something for you. These challenges do not have to be borne alone and should not be. Opening up in vulnerable ways can be incredibly difficult but, as discussed, the cost of staying silent and isolated can lead to significant stress which can spiral into psychological distress, indirect trauma, or contribute to physical health issues, among other consequences. Quite simply, opening up to others can be the difference between merely surviving and thriving.

Fifth, I strongly recommend practicing curiosity in everyday legal practice as this can help you question your intentions behind your actions without judgment and self-reflect on why you practice the way you do or why certain emotions may be coming up. This may include reconsidering what the typical lawyer-client relationship ought to look like, what it feels like to

³⁵⁵ *Supra* note 20 at 283.

cut off a client, or whether there is more balance that can be created between you, a client, and your work in general. Self-reflective practice can foster curiosity through metacognitive skills, where you are more apt at observing your own actions.³⁵⁶ As every human encounter will trigger emotional responses, you can learn to develop skills to recognize and analyze these responses, including self-reflective practice. You can set aside dedicated time in a work week or workday to consider your recent interactions with clients and anyone else, whether this takes the form of dictating a verbal stream of thoughts or journaling. Self-reflective practice can also help you develop language to describe what you are feeling, which can also help with learning how to share vulnerably with friends, colleagues, and in time, employers. Sheets with emotions listed on them can help you name emotions as you experience them. Such helpful aids are easily accessible on the internet.³⁵⁷

While this chapter largely focused on emotional suppression and emotional acknowledgment, it is important to touch on what this chapter was not able to cover. It is possible for you to engage in both emotional suppression as well as over-empathizing as emotions are complex and nuanced. Where an individual over-empathizes, this may also lead to burnout. Emotional suppression and over-empathizing are similar as the individual engaging in either coping mechanism is not setting healthy distance between themselves and their work (too much distance or not enough distance). Trauma-informed work on the other hand can help you learn how to healthily support your own emotional state while you are supporting the emotional state and needs of your clients. Further, it is noted throughout this thesis that emotional acknowledgment is a primary step towards trauma-informed practice and healthier legal practice.

Acknowledgment is an initial step towards greater change but it is not enough to only be aware, you must also cultivate emotional intelligence. Here, emotional intelligence is defined as the ability to reason about emotions, to use emotions to enhance thinking, accurately perceive emotions in yourself and in others, and to self-reflect in order to promote your own emotional

³⁵⁶ *Supra* note 227; *Heavin*, *supra* note 5 at 207.

³⁵⁷ See e.g. “Feelings and Needs List” (February 2022), online: *Wise Heart* <<https://static1.squarespace.com/static/5be714f2aa49a1b04c9fbac7/t/6203d436b0a00827ec0a2223/1644418102652/F+%26+N+List+February+2022.pdf>>; “Feelings vs Interpretation”, online: *Wise Heart* <<https://static1.squarespace.com/static/5be714f2aa49a1b04c9fbac7/t/5c06f8a3352f538785110a5b/1543960739787/Wise+Heart+Feelings+vs+Interpretations.pdf>>.

growth.³⁵⁸ Emotional intelligence skills are a way to help you analyze what does and does not work for you in legal practice (and in life) and to work towards creating internal balance for yourself (as opposed to imbalance such as emotional suppression or over-empathizing). While these topics are significantly connected to trauma-informed lawyering, it is outside the scope of this thesis to lay out the many the pieces that can help cultivate these skills. This is not to detract from the importance of emotional intelligence along with emotional acknowledgment.³⁵⁹

With the above recommendations, I encourage you to seek out more information, research, and literature on trauma-informed practice. This may include signing up for trauma-informed lawyering courses several times, as these are often challenging concepts to put into practice with a lot of new information to take in all at once. This is particularly the case as trauma and its impacts on the brain, such as dissociation and memory loss, raises inconsistencies with beliefs about human behaviour within law or legal practice.³⁶⁰ Your research on trauma can include looking for interdisciplinary resources or seeking perspectives or books written by people who have lived with trauma. Continually learning about trauma and trauma-informed practice can help create a solid foundation from which to draw from over time. In my view, learning about trauma, unlearning the disconnection of my thoughts from my emotions, and learning about trauma-informed skills is similar to tending to a garden. The new patterns, habits, and ways of thinking take time to plant, germinate, and grow. Such lessons have developed for me over years and the opportunities to learn about trauma, empathy, and emotions continue to arise. I suggest self-reflection on any emotions you experience as you take these courses and review the literature.

Other possibilities towards emotional acknowledgment, mindful intentions, and trauma-informed lawyering may include eye movement desensitization and reprocessing (EMDR), peer counselling groups, coaching sessions, or meditation.³⁶¹ This list is not exhaustive. What all of

³⁵⁸ Pedro Barosa, “The Significance of Emotional Intelligence to Trial Lawyers” (2017 September) UNICRI 39.

³⁵⁹ See Ronda Muir, *Beyond Smart : Lawyering with Emotional Intelligence* (Chicago, IL: American Bar Association, 2018).

³⁶⁰ *Supra* note 130 at 19;

³⁶¹ “What is EMDR? Eye Movement Desensitization and Reprocessing Therapy” (15 February 2015), online: *EMDR Institute, Inc* <<https://www.emdr.com/what-is-emdr/>>.; Jon Krop, *Mindfulness for Lawyers - A Short Handbook*, online: *Lawyer Wellbeing* <https://lawyerwellbeing.net/wp-content/uploads/2020/02/Mindfulness_Attorney-Handbook_Jon-Krop.pdf>.

these recommendations generally have in common is that they are different ways to help you learn how to work through any discomfort that arises while in a relatively calm state, to stay stable in who you are even as you face challenging and stressful situations.³⁶² Through sitting still and paying attention to the emotions that arise without adding thoughts or narratives to what you are feeling, you will slowly learn to acknowledge what your emotions are. Noticing where you feel the emotions in your body, what that is like, and how you describe it can help bring presence and mindfulness into your body. It can help you ground yourself into the present moment, rather than what you may expect to happen in the future or what you think should have happened in the past. For some people, this may also be achieved by exploring in nature or exercising.

There are many ways to approach the necessary work of shifting to trauma-informed lawyering and I urge you to find out what works for you on an individual basis by trying different methods. There is no “one size fits all” approach to learning how to transform one’s legal practice to reduce harm and create sustainability over the long-term. Above all else, no matter what you try, I hope you are gentle with yourself in your learning and unlearning as these are difficult to carry out and, in my experience, required me to confront facets of myself that I have purposefully avoided for years. In doing so, however, I am learning how to see myself as a flawed (human) individual and still hold myself in high regard, no matter what happens around me.³⁶³

3.5 Conclusion

The costs outlined in this chapter are by no means a complete list of the consequences that may arise as lawyers suppress their own emotions nor is the previous section a complete list of possible ways to build one’s trauma-informed practice. As a review, the consequences discussed are: the suppression of and disengagement from enjoyable emotions, oversensitivity to negatively associated experiences, contribution to systemic injustice, status quo, and implicit bias, a disconnection from one’s own self, a perception of disempowerment, risk averse

³⁶² See e.g. *Louisy*, *supra* note 4.

³⁶³ Terry Real, “Relationship Grid Assessment Result”, online: *Terry Real* <<https://terryreal.com/grid-assessment-result-2/>>.

behaviour or preference for short-term outcomes while losing sight of long-term goals or intentions, poorer physical health, unhealthy coping methods to manage emotions, inability to self-examine or self-reflect, internalized feelings of isolation, adverse mental health impacts, and impairment of one's own ethics.

These insights about the costs of emotional suppression and fragmentation in lawyers complicates lawyers' abilities to practice in trauma-informed ways. It means that trauma-informed lawyering skills require a lot of empathy and self-work from lawyers who may lack capacity to consider these concepts due to high stress levels. It means lawyers will need to learn how to sit in the discomfort of acknowledging and feeling one's own difficult emotions rather than pushing them away. This includes understanding that, at times, something that may feel unfamiliar or uncomfortable in the short-term could, in fact, lead to better outcomes in the long-term, thereby making short-term discomfort worth enduring. In practice, this includes avoiding making snap judgments about clients based on their emotions, mental health, financial status, or racial background, and instead taking the time to listen, ask clarifying questions, and check in with one's self for any biases or assumptions. Otherwise, misunderstandings can even arise over something as simple as differing definitions of the same word.

Finally, it is important to remember that lawyers have unique privileges as part of their occupation, including unique powers. Such powers and privileges must be balanced by greater personal responsibility on the part of lawyers. If lawyers remain disconnected from their emotions and continue to bear the brunt of the many costs associated with emotional suppression, trauma-informed practice will not fulfill its intention of reducing harm. Where lawyers are supported by employers to learn about emotional acknowledgment and interpretation, trauma-informed practice methods can hone, compliment, and enforce these skills. Without greater organizational support and a significant change in legal culture, however, disengagement from emotions will likely inhibit the full effectiveness of trauma-informed methods and heighten the risk of indirect trauma.

As illustrated, the language available to describe emotions and the consequences of suppressing them is continually developing and evolving. This has drastically changed how people

understand human behaviour, brain development, childhood impacts, life challenges, substance usage, mental health, and even physical illness and mortality. Yet, law maintains an anachronistic view of human behaviour and emotions. Rather than maintaining these outdated erroneous views (held, at times, to conform to what is familiar to legal professionals), it is past time to reconsider how human behaviour (including biases) and emotions are perceived in law. Therefore, trauma-informed lawyering and emotional acknowledgement is more than a bid to improve client experiences; it is an opportunity to steer legal culture towards healthier outcomes, healthier lawyers, healthier legal practice, and create a more sustainable legal profession overall. Such a shift requires the effort of all lawyers, their employers, and their law societies, which will be explored in the next chapter.

Chapter 4: Current Endeavours Towards Trauma-Informed Legal Practice in Canada

Law societies have historically contributed significantly to shape the culture of the profession, whether it is advocating for equality in membership, or in earlier years, excluding people of marginalized groups from becoming lawyers.³⁶⁴ Law societies have also promoted access to justice, arranged the provision of pro bono services, and engaged in law reform initiatives towards furthering the legal profession and shifting legal culture.³⁶⁵ Some law societies have rules to oversee firm regulation which means there are mechanisms to hold law firms accountable to their employees learning trauma-informed training and emotional acknowledgment.³⁶⁶ They can partner with other helping professions such as medicine, mental health, and work together to develop trauma-informed skillsets as requirements for lawyers. Given the growing awareness about trauma and its prevalence, law societies now have the opportunity to become leaders in shifting professional culture and measuring the impacts of trauma-informed training to inform other sectors. Trauma cannot resolve without concentrated and considerate community support including from lawyers and law societies. There is plenty of evidence to support that when left unresolved, trauma spreads and compounds. Lawyers need to learn to healthily address clients' traumatic situations and law societies need to support this.

Law societies across Canada are recognizing the importance of acknowledging and understanding trauma as it affects many clients. However, there remains a considerable focus on the trauma in clients rather than focusing on how trauma also arises in lawyers through the practice of law (and perhaps before). In reviewing what is currently available on law society websites across the country, the resources are largely optional, which implies that information about trauma is only needed for some lawyers and not for others. For most of these materials, the focus appears to be trying to convincing the lawyer audience that trauma education is necessary even though they are simultaneously offered on an optional basis. The exception is where trauma is mentioned alongside materials related to survivors of sexual violence, domestic violence, or in

³⁶⁴ *Abel, supra* note 25.

³⁶⁵ *Ibid* at 121.

³⁶⁶ See e.g. The Law Society of Saskatchewan, *Law Society Rules*, Regina: Law Society of Saskatchewan, 2019, Part 9.

relation to Indigenous peoples' experience of colonialism and residential schools. In these three contexts, trauma is often assumed to exist.

While these contexts are vitally important and require ongoing education within the legal profession, attaching trauma exclusively to people who have these experiences is too narrow. Drawing on narrow or clinical definitions of trauma (as discussed earlier in this thesis), implies that trauma occurs only in specific experiences. As detailed in chapter 2, instead of convincing lawyers that trauma may happen or only applies to specific clients, lawyers need to understand that trauma can happen to anyone and at any time. This is especially true as lawyers are at high risk of indirect trauma.³⁶⁷ Understanding the prevalence of trauma and one's own emotions can help lawyers become more self-aware and more aware of any implicit biases or stigmas they may carry. Further, another critique of the existing trauma-informed resources offered by law societies is that many do not specifically address the ways that law and legal practice dissociate from emotions, as covered in the last chapter. This omission is a significant deficit when it comes to trauma-informed practice and education because it focuses most of the attention on a client who may be traumatized. There is not enough attention on lawyers' own stress, emotional awareness, or potential personal traumas, and even less attention on how the legal profession and legal employers exacerbate lawyers' mental health challenges.

This chapter explores the trauma-informed resources available throughout law societies across Canada, compares them, and draws some themes from the language and context in which these are offered. The method of research used included a brief review of resources found on law society websites. I used the terms, "trauma," "adverse childhood," "feeling," and "emotion" and assessed the search results. Although there were no results for the search term, "adverse childhood," it was used to find out whether law societies educate about how a person's individual context connects to greater understanding about clients and one's self.

The limitations to my research method include:

³⁶⁷ Marie-Jeanne Leonard et al, "Traumatic stress in Canadian lawyers: A longitudinal study." (2021) *Psychological Trauma: Theory, Research, Practice, and Policy*, online: <<http://doi.apa.org/getdoi.cfm?doi=10.1037/tra0001177>>.

1) The courses and resources I found on each law society website are only ones that are viewable to the general public. A full empirical study with greater detail into law society resources was not done as this would have been outside the scope of this thesis. Rather, the purpose is to ascertain a general sense of what law societies were offering at the time of review;

2) Some law societies rely on other entities to provide courses for continuing professional development (CPD) credits, such as the Canadian Bar Association (CBA). When this occurred, I followed the links for these courses, however, these were not in-depth searches. A separate section discussing what the CBA offers is included below in chapter 4.2 o);

3) The search results are limited by the quality of the search engine on each law society's website. Some search engines were more effective than others while some had technological glitches when returning results;

4) As trauma-informed practice and emotional acknowledgment are ever evolving topics, there are likely more resources offered than may be listed here. At the time of research, the bulk of these resources were found in February, 2022. Newer resources after this date may not be captured below.

This chapter will begin with a discussion on law societies' responsibility to provide trauma education; require trauma-informed approaches in law, and towards shifting legal culture. Next, I will discuss the results found from law society websites across the country. This will include a review of the recently released Sherbrooke Report, the dire statistics on lawyers' mental health, and their initial suggestions to address psychological distress. I then provide an overall analysis of resources from law society websites including a review of Le Barreau de Québec's Research Report, A Study of the Determinants of Mental Health in the Workplace Among Québec

Lawyers, which includes recommendations.³⁶⁸ Both the Sherbrooke Report and the Barreau Report were authored by the same lead researcher, therefore a review of the Barreau Report’s recommendations will be useful as these may be similar to the recommendations issued in the next phase of the Sherbrooke Report. The chapter concludes that the resources currently available are not enough and need to become part of mandatory training in trauma-informed skills for all lawyers. I argue that law societies have the opportunity to lead the shift in legal culture towards health and sustainability in the profession over the long-term. The time to create this shift is past overdue as people’s health and well-being are at stake.

4.1 Brief Overview of Law Societies’ Responsibilities to the Public Interest

For the most part, law societies across Canada share similar mandates and responsibilities to “govern the legal profession” and to do so in the public interest.³⁶⁹ Broadly speaking, this is done by ensuring that lawyers practice ethically, honourably, and competently. In British Columbia, the Law Society states that they “bring a voice to issues affecting the justice system and the delivery of legal services.”³⁷⁰ In Saskatchewan, the *Legal Profession Act, 1990* identifies the Law Society’s duty as follows:

3.1 (a) to act in the public interest;

(b) to regulate the profession and to govern the members in accordance with this Act and the rules; and

(c) to protect the public by assuring the integrity, knowledge, skill, proficiency and competence of members.

3.2 In any exercise of the society’s powers or discharge of its responsibilities or in any proceeding pursuant to this Act, the protection of the public and ethical and competent practice take priority over the interests of the member.³⁷¹

³⁶⁸ Nathalie Cadieux et al *RESEARCH REPORT, A Study of the Determinants of Mental Health in the Workplace Among Québec Lawyers - PHASE II – 2017-2019*, (Université de Sherbrooke, 2019) online *Le Barreau du Québec*: <https://www.barreau.qc.ca/media/2391/rapport-sante-psychologique-travail-avocats-anglais.pdf> [Barreau Report].

³⁶⁹ *The Legal Profession Act, 1990*, Chapter L-10.1, SS, 2019, c.7, s. 3.1-3.2.

³⁷⁰ “About Us” online: *The Law Society of British Columbia* <<https://www.lawsociety.bc.ca/about-us/>>.

³⁷¹ *Supra* note 369.

Thus law societies in Canada are statutorily required to monitor and regulate lawyers. The above section recognizes that lawyers have access to certain powers and privileges that have a major impact on their clients, and the community generally. As part of their efforts to protect the public, law societies are responsible for the integrity and competency of the profession, among other aspects.

An in-depth discussion about whether law societies in Canada are effectively protecting the public's interest is outside the scope of this paper.³⁷² However, law societies are responsible for balancing the power of self-regulation with accountability to the public. This includes helping lawyers with their own potential traumas and supporting them towards healthier practice and healthier outcomes for clients while mitigating the risks of indirect trauma. Such teachings would be in line with acting in the public's interest as it would reduce harm in legal practice. Where possible, law firms and other employers must also provide trauma-informed working environments for lawyers. More on this point will be explored in chapter 4.3.

Law societies are currently missing the opportunity to educate lawyers on information that can help them build a healthier way to practice. For this reason, failing to require trauma education and emotional acknowledgment is a big fault line in an already fragile profession. Teaching lawyers and students about trauma and emotions before they encounter challenges at work (or school) is practical and sensible. Doing so would help lawyers maintain the integrity, knowledge, skill, proficiency and competency required of them. Committing to building trauma-informed workspaces and trauma-informed lawyering practices would help set lawyers and law students up for success rather than mostly offering services for after the harm has occurred. This can only be in the public's interest. While law schools must also do more to address trauma in law and prepare students for the trauma that arises in legal practice, it is vitally important for the law society to also educate current practicing lawyers on the same topics. For trauma-informed lawyering to truly be successful, everyone must be involved. Law students with trauma-informed training must be supported by the lawyers who hire them, work with them, and even those who

³⁷² See e.g. Alice Woolley & Amy Salyzyn, "Protecting the Public Interest: Law Society Decision-Making After Trinity Western University" (2019) 97:1 The Canadian Bar Review, online: <<https://cbr.cba.org/index.php/cbr/article/view/4508>>; Anita Indira Anand, "Governance gone wrong: examining self-regulation of the legal profession" (2018) 21:2 Legal Ethics 99.

work on files opposite them. Trauma-informed legal services work best as a community effort as it requires knowing that one person's actions will impact others. COVID-19 has certainly highlighted how each person's actions can have a significant impact on those around them. As previously illustrated, the impacts of trauma are spread across communities and generations and will require community effort to address.

4.2 Current Trauma Education Offerings from Canadian Law Societies

The following is an overview and brief analysis of what is offered by law societies across Canada in order to understand how they are approaching trauma-informed education and emotions in law. Cited by many law societies is Myrna McCallum, who has advocated for and educated on the importance of trauma-informed lawyering over the past several years. Partnering with the Canadian Bar Association, she created a podcast called “The Trauma-Informed Lawyer,” which features discussions with Indigenous Elders, survivors, legal professionals, researchers, and medical health professionals discussing trauma and the law. She led the project that produced the Trauma-Informed Toolkit for Legal Professionals, funded by the Law Foundation of BC. This Toolkit is free on the Golden Eagle Rising website.³⁷³ McCallum also teaches several seminars on trauma-informed lawyering. As such, her materials and courses are offered and referred to as leading sources on how to utilize trauma-informed lawyering skills. In addition to McCallum's teachings, a variety of counselling options are also offered. These are excellent starting places to continue the essential conversation on trauma-informed lawyering and emotions. However, the fact that they are still offered as optional courses undermines what is known about trauma and McCallum's message that every lawyer requires trauma-informed education.³⁷⁴

4.2 a) Federation of Law Societies of Canada

The Federation of Law Societies of Canada (the Federation) is “the national coordinating body of the 14 law societies which are mandated by provincial and territorial law to regulate Canada's

³⁷³ *Supra* note 130.

³⁷⁴ *Supra* note 209.

126,400 lawyers, Québec’s 3,800 notaries and Ontario’s 10,000 licensed paralegals in the public interest.”³⁷⁵ Significantly, the Federation supported the Sherbrooke Report through a partnership with the Université de Sherbrooke, the Canadian Bar Association (CBA), law societies of Canada, and the Chambre des notaires du Québec.³⁷⁶ As previously noted, this report shares statistics that illuminate how many legal professionals are experiencing psychological distress, burnout, or symptoms of depression. It presents data that challenges everyone in the legal profession to acknowledge the high stress in legal work. The information shared is likely unsurprising and the results require the legal profession to address these concerns head on. This is possible to do through trauma-informed training and education on emotional acknowledgment and management.

The data collected from the Sherbrooke Report came from surveys voluntarily completed by 7,305 legal professionals across the country and the main highlights as noted by the Federation are: 1) more than half of legal professionals experience psychological distress and burnout, these rates are even higher for those who live with a disability, are articling students, are aged 26-35, have less than 10 years of experience, who identify as LGBTQ2S+, or are women; 2) billable hours as a model has a very negative impact on mental health and the emotional demands of clients is a risk factor with the most significant impact on mental health; 3) work-life conflict is a “critical stressor” that is connected to “a significantly lower level of commitment to the profession and a substantially higher level of intention to leave the profession”; 4) legal professionals who experience a disability and are part of a minority group experience more mental health concerns; 5) alcohol and drug use are at a very high level; and 6) the skills needed for legal professionals to build resilience and shield from stressors include learning how to “psychologically detach from work and to set limits.”³⁷⁷

The report is 380 pages of findings with the “Targeted Recommendations: Towards a Healthy and Sustainable Practice of Law References” set to come out later this year.³⁷⁸ The Sherbrooke

³⁷⁵ “About Us”, online: *Federation of Law Societies of Canada* <<https://flsc.ca/about-us/>> (the 14th law society is the Chambre des notaires du Québec).

³⁷⁶ *Supra* note 1 at 1.

³⁷⁷ “The first comprehensive national study on wellness in the legal profession is published” (27 October 2022), online: *Federation of Law Societies of Canada* <<https://flsc.ca/news/#article-9033>>.

³⁷⁸ *Supra* note 1 at 348.

Report shows a clear and current picture of the serious state of intense stress and poor mental health for legal professionals. It also illustrates, through personal testimonies, the thoughts of legal professionals who have either sought mental health services and stopped, or those who have chosen not to seek help at all. One legal professional stated that they did not want to use the available mental health assistance services because they believed the intentions of these services were to increase productivity rather than to help them “feel human.”³⁷⁹ Other legal professionals said seeking a therapist feels daunting and is expensive, one shared that the assistance programs are not helpful as the employees are rushed and have inadequate training. Roughly 40% of surveyed legal professionals were concerned about the law society assistance service disclosing what they share to a law society or the legal profession regulator (fearing that seeking help will negatively impact their career).³⁸⁰

Recommendations with practical and actionable solutions are sorely needed as the data in the Sherbrooke Report, echoes what law societies, legal scholars, and mental health scholars have shared for decades about the legal profession. Where previous efforts have seemingly failed is in implementing actions that adequately address the concerns raised by these reports and research articles, including ongoing re-evaluation of such measures for impact and effectiveness amongst lawyers and clients. At present, the Sherbrooke Report notes some preliminary solutions, such as ones utilized by legal professionals who were or had previously been on medical leave. For example, to address stigma towards legal professionals who are or were on medical leave, more education to raise awareness and normalize the difficulties that come with the high standards set for legal professionals may be helpful.³⁸¹ Other possible solutions from the report include increasing peer support amongst those who hesitate to seek help, to implement organizational measures such as a discrimination prevention policy, training managers, and developing more inclusive organizational culture. This section of the report also notes protective factors such as seeking support from colleagues by pairing a legal professional returning to work from medical leave with a caring colleague to guide them through transition, increasing the use of employee

³⁷⁹ *Ibid* at 59.

³⁸⁰ *Ibid* at 57.

³⁸¹ *Ibid* at 347.

assistance programs by informing of and encouraging their use, and normalizing the difficulties that arise with such a transition.³⁸²

These proposed solutions could work to address the greater challenges related to lawyers' mental health and as initial steps. However, in addition to these steps, law societies would need to concurrently consider how to implement these in practice so that they can have actual impact. For example, increased peer support or a colleague to support a legal professional returning to work after medical leave requires support persons to be trauma-informed, even if the returning colleague is not dealing with trauma. This is because trauma-informed skills can teach a lawyer how to be present with their colleague including witnessing their potential struggles in transitioning back to work. Otherwise, lawyers may unconsciously cause more harm to their colleague at a vulnerable time. Further, for lawyers to have the time, energy, and capacity to support a colleague returning to work, their employer would have to consider these factors (such as adjusting expectations for this lawyer's workload) so the support lawyer can be truly effective for their colleague. As the Sherbrooke Report states, organizational changes are required. Organizations must go a step further and be directly involved in supporting legal professional employees' overall well-being. Organizations should also consider how invested they are in helping someone return to work from medical leave. How interested would the organization be to support that person achieving success and would that person's definition of success align with the organization's definition of success? If the organization is not interested in helping an employee return to work, what sort of message would this implicitly send to the rest of their workforce including those who may be unsure about seeking mental health services or medical leave for themselves? Employers must consider how such changes can have actual impact and law societies must support changes that increase healthy work practices for lawyers, including trauma-informed education and emotional acknowledgment.

With respect to increasing awareness on medical leave and mental health related topics for legal professionals, many related materials are already available on law society websites but how often are they utilized? What impacts do these materials actually have on lawyers? While answering these questions is outside the scope of this thesis, they are important to consider. Solutions to the

³⁸² *Ibid.*

challenges that plague legal professionals will likely be nuanced and differ from person to person, organization to organization. Caution must be taken with placing the impetus to improve well-being solely on individual legal professionals without considering what is workable with their typically high caseloads and high stress levels. This may ultimately require a re-evaluation and adjustment of career demands and expectations placed on lawyers. The Sherbrooke Report's media release on the Federation's News section suggests that key skills to help legal professionals guard against stressors include psychologically detaching from work and setting limits.³⁸³ Psychological detachment is defined "as the ability to mentally disengage from work outside office hours."³⁸⁴ At first, this may seem at odds with what this thesis argues about empathy, trauma-informed skills, and emotional acknowledgment. However, learning trauma-informed lawyering skills, acknowledging one's emotions, and raising self-awareness will pave the way towards lawyers learning to set healthy limits with their work (and maybe employers), to safeguard their overall well-being, and minimize trauma. Otherwise, continuing legal practice without significant changes in the profession will most likely impair the profession's integrity, harm lawyers, and harm clients.

In other parts of the Federation's website, several posts discuss the development of trauma-informed courses for legal practice. In 2014, an "Inventory of Access to Legal Services Initiatives of the Law Societies of Canada," was being developed in Ontario as a kit for lawyers and paralegals with the Mental Health Commission of Canada. This kit included trauma-informed representation of clients with mental health issues.³⁸⁵ In the same document, the Nova Scotia Barristers' Society reports that it developed training programs to "sensitize lawyers to barriers their clients may face in accessing justice."³⁸⁶ Through collaboration with sexual assault community resource organizations, the Barristers' Society also plans to develop a trauma-informed training session for lawyers. Other resources that mention trauma include a 2019 statutory review of the Criminal Code and the vulnerability of members who cannot access legal

³⁸³ *Supra* note 377.

³⁸⁴ *Supra* note 1 at 180 [citation omitted].

³⁸⁵ "Inventory of Access to Legal Services Initiatives of the Law Societies of Canada", (2014), online: *Federation of Law Societies of Canada* <<https://flsc.ca/wp-content/uploads/2014/10/ACCESSInventoryOct2014.pdf>> at 24.

³⁸⁶ *Ibid.*

support.³⁸⁷ A 2019 report from an annual conference noted a discussion on indirect trauma experienced by lawyers as well as the growing incivility in the profession, which contributes to psychological harm and burnout.³⁸⁸ The Law Society staff noted they want better tools so they can better help members in crisis and avoid taking on indirect trauma and negative impacts on their mental well-being.³⁸⁹ The report also noted: “Presenters observed that legal practitioners sometimes experience a sense of disconnect between their personal values and their work, which can lead to well-being challenges. This can be more pronounced for those who are members of equity-seeking groups.”³⁹⁰ As such, from the Federation’s most recent endeavour to address well-being, it is clear this is a vitally important issue for every lawyer in the country and for the future of the profession.

4.2 b) Law Society of Alberta

The Law Society of Alberta had a variety of resources related to diversity and trauma in the workplace. One of the first results for the term “trauma” was a blogpost titled, “A Letter from the Law Society: The well-being Matrix: Why Equity, Diversity, and Inclusion are Essential to a Healthy Legal Profession.”³⁹¹ The post, dated June 29, 2021, discussed systemic racism, sexual prejudice, microaggressions, and mental health and how those impacted by these factors were impacted by the pandemic. As such lawyers were, along with everyone else, required to working from home during the pandemic, it allowed them to avoid these “forms of trauma” in the office workplace.³⁹² The post highlighted the importance of workplace inclusivity rather than expecting everyone to assimilate into the existing work culture. However, this was a blog post and not a CPD course. In an online event, the topic was on creating a practice that allows the lawyer to take care of themselves, their workplace, and the profession.³⁹³ Another resource that mentions

³⁸⁷ “Committee Submissions Bill C-75”, (April 2019), online: *Federation of Law Societies of Canada* <<https://flsc.ca/wp-content/uploads/2019/09/Committee-submissions-Bill-C-75-29-April-2019.pdf>>.

³⁸⁸ “2019 Federation of Law Societies of Canada Annual Conference”, (April 2019), online: *Federation of Law Societies of Canada* <<https://flsc.ca/wp-content/uploads/2021/05/2019ConferenceREPORTEFin.pdf>>.

³⁸⁹ *Ibid* at 2-4.

³⁹⁰ *Ibid*.

³⁹¹ *Alleyne*, *supra* note 282.

³⁹² *Ibid*.

³⁹³ “Well-Being in Practice: A summit on taking care of yourself, your workplace and our profession”, (October 2022), online: *Law Society of Alberta* <<https://www.lawsociety.ab.ca/event/well-being-in-practice-a-summit-on-taking-care-of-yourself-your-workplace-and-our-profession/>>.

the word “trauma” was a link within the Indigenous Cultural Competency Resources. In Alberta, all lawyers are required to complete a course on Indigenous Cultural Competency.³⁹⁴ As such, it is possible that lawyers will also learn about trauma-informed lawyering. Under the heading of Indigenous Cultural Competency Resources, there are two links: one to a journal article titled, “The Pedagogy of Trauma-Informed Lawyering” by Sarah Katz and Deeya Haldar and another was a link to Myrna McCallum’s podcast, “The Trauma-Informed Lawyer Podcast.”³⁹⁵

The Alberta Lawyer’s Assistance Society states that it includes peer support for issues related to trauma.³⁹⁶ This information was directed at the individual lawyer’s experience and responsibility to seek help. There is a caveat on the homepage about what information may remain confidential between the lawyer seeking help and their peer counsellor. While such a warning is understandable on the part of the Lawyer’s Assistance Society, it may also be a bar to lawyers who need support but worry they will breach the confidentiality of their clients if they seek it. To address this with more transparency, law societies might consider providing examples of when a counsellor or peer support person would be required to report, as well as examples of when they are not required to. This could address some of the hesitancy on the part of lawyer to seek such help. Overall, however, the description of the peer support program is very thorough and transparent, thereby allowing any interested lawyers to make an informed choice before seeking a peer support match with another lawyer.

A Law Society of Alberta blog post discussed burnout, emotions, and how the legal profession does not talk about this. It is dated May 2022, and authored by Cori Ghitter, Deputy Executive Director and Director of Policy and Education at the Law Society of Alberta.³⁹⁷ Another blog resource that considers emotions is: “Psychological First Aid: Stress and Burnout,” which

³⁹⁴ “Indigenous Cultural Competency Resources”, online: *Law Society of Alberta* <<https://www.lawsociety.ab.ca/about-us/key-initiatives/indigenous-initiatives/indigenous-cultural-competency-resources/>>; but see Arno K Kumagai & Monica L Lypson, “Beyond cultural competence: critical consciousness, social justice, and multicultural education” (2009) 84:6 *Academic medicine* 782 (debate over “cultural competence” as an acceptable term can be found in is not enough and multicultural education must involve the fostering of a “critical consciousness of the self, others, and the world”).

³⁹⁵ *Ibid.*

³⁹⁶ “Alberta Lawyers’ Assistance Society Peer Support”, online: *Alberta Lawyers’ Assistance Society* <<https://lawyersassist.ca/programs/peer-support/>>.

³⁹⁷ Cori Ghitter, “We Don’t Talk About Burnout – No No No!” (May 2022), online: *Law Society of Alberta* <<https://www.lawsociety.ab.ca/resource-centre/key-resources/wellness/we-dont-talk-about-burnout-no-no-no/>>.

discusses symptoms of burnout and solutions such as reframing how one views work, exercise, setting boundaries, accessing counselling services, or peer support.³⁹⁸

4.2 c) Law Society of British Columbia

The Law Society of British Columbia website had trauma-informed lawyering resources in several different forms. One strong example of a trauma-informed resource was a disciplinary advisory post for lawyers in high conflict litigation. It noted that a trauma-informed approach in these cases can help lawyers better understand their clients and self-represented opposing parties.³⁹⁹ Significantly, it includes the *Code of Professional Conduct for British Columbia* requirement that “lawyers treat all people they interact with... with courtesy and good-faith,” thereby, reminding lawyers of their professional duties. To maintain courtesy and good faith, it urges lawyers to remember that a self-represented litigant is a human dealing with personal issues. Remembering this can help the lawyer avoid joining in the animosity between the parties and acting in unethical ways.⁴⁰⁰ The advisory specifically notes that lawyers should:

...not take remarks or actions personally. Take a step back and remind yourself that decisions being made impact [the self-litigant] directly, whether it is how often they can see their children or how their finances will be impacted by the litigation. While it does not necessarily change the outcome you are seeking for your clients, it may affect how you approach advocating for the outcome.⁴⁰¹

The tone of the advisory is informational and supportive, rather than judgmental. It notes that it can be challenging to work with a self-represented litigant and offers achievable solutions to help lawyers mitigate their experience if a complaint is made. Further, it connects this back to trauma-informed practice and how important it is to think of a challenging self-litigant as a person with their own unique and difficult experiences that an opposing lawyer may not be privy to. Most importantly, it notes that while a trauma-informed approach may not change the outcome, it

³⁹⁸ Brian Forbes, PhD, RPsych, “Psychological First Aid: Stress and Burnout” (May 2022), online: *Law Society of Alberta* <<https://www.lawsociety.ab.ca/resource-centre/key-resources/wellness/psychological-first-aid-stress-and-burnout/>>; see also Brian Forbes, PhD, RPsych, “Psychological First-Aid: Stepping up to the Plate”, (25 June 2021), online: *Law Society of Alberta* <<https://www.lawsociety.ab.ca/stepping-up-to-the-plate-psychological-first-aid/>>.

³⁹⁹ “Self-Represented/Unrepresented Litigants”, (29 June 2021), online: *Law Society of British Columbia* <<https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/discipline-advisories/june-29,-2021/>>.

⁴⁰⁰ *Ibid.*

⁴⁰¹ *Ibid.*

ultimately helps the lawyer to approach advocacy in a way that allows them to maintain their good-faith and mitigate matters if a complaint happens.⁴⁰²

This is a strong example of trauma-informed lawyering because it emphasizes what is realistically within the individual lawyer's control: the lawyer's *perspective* of the self-represented litigant's actions, and how the lawyer can avoid joining in the animosity. It also notes that taking a trauma-informed approach is not going to necessarily create a miracle outcome, that is not the point. Rather, it will allow the lawyer to maintain their good faith and more directly mitigate matters without taking them personally, especially if a law society complaint arises. In this context, the point of trauma-informed lawyering is for the lawyer to maintain their ethical behaviour, regulate their own emotions, and cultivate a sense of calm when interacting with someone who initiates conflict. This presents a more balanced way of practicing law that focuses on what is realistic rather than solely focusing on the adversarial nature of legal processes. Unfortunately, this advisory is an optional read for members. On the other hand, it is also an accessible and free resource.

The Law Society of BC website also linked to several free courses on trauma. One link is to The Continuing Legal Education Society of British Columbia (CLEBC), an independent non-profit that provides legal education for BC lawyers and support staff. The CLEBC course titled, "Dealing with Vicarious Trauma in Your Practice 2020." It is recommended for all lawyers and the description reads: "Many lawyers are exposed to cases involving cruel and inhumane acts or negligence perpetrated by and toward people. Exposure to such cases can cause depression, burnout, compassion fatigue, and the erosion of optimism, which can undermine your practice. This one-hour neuroscience-informed workshop will help you to develop your resilience capacities..."⁴⁰³ This is a great way to introduce such concepts and to normalize the occurrence of indirect trauma. Normalizing the occurrence and impacts of trauma helps create a safe space for lawyers to discuss the challenges of legal practice, while learning empowering skills towards navigating tough and isolating situations.

⁴⁰² *Ibid.*

⁴⁰³ Susan P Burak, "Dealing with Vicarious Trauma in Your Practice" (2020), online: *CLE BC Online Store* <<https://store.cle.bc.ca/productdetails.aspx?title=CLE-TV-Dealing-with-Vicarious-Trauma-in-Your-Practice-2020&cid=1730>>.

In other types of resources that mention “trauma,” as part of a June 2021 E-Brief, the Law Society issued a public acknowledgement of the Kamloops Indian Residential School discovery. It expressed their condolences for the children who did not make it home and the trauma carried by residential school survivors and their families.⁴⁰⁴ In the Diversity Action Plan, prepared by the Equity Diversity and Inclusion Advisory Committee in 2020, trauma is mentioned in a footnote as one of several legal education options towards furthering intercultural competence education amongst lawyers.⁴⁰⁵ Another resource is a podcast episode on the topic of prosecutors’ role in criminal justice, including a discussion on the complainant’s experience of trauma in a trial: “...whether it’s in the public interest to proceed... Sometimes it could even be a serious offense but the trauma to the victim, ...sometimes sexual offenses, would be so great you have to ask yourself can we, should we proceed with this in this manner?”⁴⁰⁶ As stated before, considering the impact of legal systems on complainants or clients, anticipating how the experience will impact or further harm them, is trauma-informed lawyering.

In an E-Brief from November 24, 2017, a summary of the “Truth and Reconciliation Symposium: truth-telling and sparking change,” notes the traumatic experiences of many Indigenous people in Canada. It includes the previously shared quote from Judge Point, who requested that each attendee look inward and heal in order to radiate change outwards.⁴⁰⁷ This request challenges the way many legal practitioners are trained to work on files. Legal training and legal culture emphasize how a lawyer ought to focus energy towards helping their client, rather than focusing energy on their own issues or emotions. As stated by Judge Point, it is those actions of self-reflection and holding one’s self accountable that create change. This will assist the lawyer to become more trauma-informed and more able to acknowledge and manage their

⁴⁰⁴ “E-Brief” (June 2021), online: *Law Society of British Columbia* <<https://www.lawsociety.bc.ca/about-us/news-and-publications/e-brief/e-brief-june-2021/>>.

⁴⁰⁵ “Diversity Action Plan - Equity Diversity and Inclusion Advisory Committee” (28 August 2020), online: *Law Society of British Columbia* <<https://www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/2020DiversityActionPlan.pdf>> at 1.

⁴⁰⁶ “The role of prosecutors in criminal justice and the rule of law transcript”, online: *Law Society of British Columbia* <<https://www.lawsociety.bc.ca/our-initiatives/rule-of-law-and-lawyer-independence/rule-of-law-matters-podcast/the-role-of-prosecutors-in-criminal-justice-and-th/>>.

⁴⁰⁷ *Supra* note 293.

own emotions. As discussed in detail in the previous chapter, looking inwards at one's own self is a *primary* step towards significant change and transformation.⁴⁰⁸

On wellness and mental health, a 2004 Benchers' Bulletin from the Interlock Member Assistance Program, the counseling service offered by the law society, focused on grief, trauma, and the lawyers' response. Three examples of loss or trauma in the workplace used were: 1) the death of a senior partner from a heart attack at a staff meeting, 2) the office manager who dies from terminal cancer after months of leave, and 3) the former client who verbally or physically threatens staff. The author, Nancy Payeur, a counsellor for lawyers, shared observations and noted that lawyers' training can work against their own best interests.⁴⁰⁹ Trying to problem solve a tragedy or trauma after the event using logic and analysis can be "counter-productive to effective coping."⁴¹⁰ In her view, lawyers often have unrealistic expectations on being in "perfect control," particularly when their lawyerly skills are on display. When experiencing tragedy or trauma (uncontrollable events), lawyers can be "extremely hard on themselves when they experience" normal emotions such as anger, fear, or sadness.⁴¹¹ Although the article was published in 2004, the messages remain applicable to legal culture and the legal profession today and underscore how trauma and one's reaction to it is outside of a person's control. Payeur emphasized the importance of acknowledging and normalizing emotional reactions to help process the trauma.

On a page titled "Improving Mental Health for the Legal Profession," the website details the organization's current efforts to address mental wellness and substance use.⁴¹² For example, they have started an Alternative Discipline Process pilot project, which seeks to address situations where conduct complained of is connected to the lawyer's health. This pilot will run for three years and will hopefully reduce the focus on penalising lawyer misconduct when it is related to health challenges.⁴¹³ The page also includes an update on the previously discussed Sherbrooke

⁴⁰⁸ See *supra* note 275.

⁴⁰⁹ Nancy Payeur, "Grief, trauma and lawyer response - Benchers' Bulletin" (The Law Society British Columbia, 2004) online: <https://www.lawsociety.bc.ca/Website/media/Shared/docs/bulletin/BB_04-06.pdf> at 20.

⁴¹⁰ *Ibid.*

⁴¹¹ *Ibid.*

⁴¹² "Improving Mental Health", (2022), online: *The Law Society of British Columbia* <<https://www.lawsociety.bc.ca/our-initiatives/improving-mental-health/>>.

⁴¹³ *Ibid.*

Report as well as numbers to 24-hour crisis lines. Another resource is the link to the Mental Health Forum for Legal Professionals 2021, which was cohosted by the Law Society of BC and CLEBC. The Mental Health Forum included a session on employers who are trying initiatives to address mental health challenges at work. All the sessions are recorded and available free of charge.⁴¹⁴ Another resource, a blog post authored by the Law Society of BC President, Lisa Hamilton, KC, provides her frank account of her own struggles with depression and the law in the context of Mental Health Week and exercising empathy.⁴¹⁵ As well, the Law Society funds LifeWorks Canada, a counselling and referral service that is confidential and free to BC lawyers, articling students, and their families.⁴¹⁶ It is evident that the Law Society of BC has put a great deal of thought into providing optional courses to lawyers about emotional acknowledgment, emotional awareness, and appears to have a stronger focus on emotions related education than trauma-informed lawyering education.

Also available were emotional intelligence training resources, mental health services, and blog posts including one on depression and law. The “Search Inside Yourself - 2 Day Program,” designed for teachers and developed at Google is a mindfulness-based emotional intelligence training program. However, because this search result was a document created by a third-party company, it is not clear whether it is eligible for CPD credits.⁴¹⁷ Another course offered for BC lawyers is the “Next Level Emotional Intelligence: Developing for the Future” course. It is two hours long and the description reads that it will help build knowledge and skills around emotional intelligence and one’s inner world versus their external world. This is offered by a third party legal education site called Learn Formula.⁴¹⁸ One resource titled, “Managing Anxiety in a Time of Uncertainty” was free on the date of presentation and is now available as a recording.⁴¹⁹ It provides education on neuroscience, coping mechanisms, practicing empathy and mindfulness, and teaches emotional acknowledgment as well as indicators for when trauma

⁴¹⁴ “Mental Health Forum for Legal Professionals”, (2021), online: *The Continuing Legal Education Society of British Columbia* <<https://www.cle.bc.ca/mental-health-forum-2021/>>.

⁴¹⁵ Lisa Hamilton, QC, “Reflections on mental health”, (5 May 2022), online: *Law Society of British Columbia* <<https://www.lawsociety.bc.ca/about-us/news-and-publications/news/2022/reflections-on-mental-health/>>.

⁴¹⁶ *Ibid.*

⁴¹⁷ *Search Inside Yourself - 2 Day Program* (Search Inside Yourself Canada), online: *Law Society of BC* <https://www.lawsociety.bc.ca/labc/apps/cpd/dsp-file.cfm?file_blob_id=25541&credit_type=CO>.

⁴¹⁸ “Legal Courses”, online: <https://www.lawsociety.bc.ca/labc/apps/cpd/detail-course.cfm?course_id=124014>.

⁴¹⁹ “Managing Anxiety in a Time of Uncertainty” (17 April 2020), online: *CLE BC Online Store* <<https://store.cle.bc.ca/productdetails.aspx?title=Managing-Anxiety-in-a-Time-of-Uncertainty&cid=1758>>.

arises. This presentation had roughly 220 participants in its initial broadcast (April 17, 2020), underscoring the demand for mental well-being in legal practice, particularly during the uncertainty of a pandemic.⁴²⁰ “Coping with Change and Unexpected Losses During COVID-19,” also a free course, focuses on changes lawyers face with work, daily life, personal relationships, and visions of future.⁴²¹ It acknowledges emotional instability in a stressful time, and the importance of learning how to process these emotions.

4.2 d) Law Society of Manitoba

Trauma-informed resources appeared to be limited on the Law Society of Manitoba website. The term “trauma” did not return any results. Through links from the front page, I found some resources regarding trauma or acknowledgment of emotions. Trauma was mentioned in the context of the children’s graves discovered at Indian Residential Schools in 2021. The Health and Wellness Program listed links for more information if users require support as a result of discovering the gravesites.⁴²² A support call line, Connect Now, is offered as a peer support group for anyone requiring support with stress or mental health.⁴²³ In a list of past courses offered as part of CPD credits, one trauma-informed lawyering course was offered in the past year.⁴²⁴

Another trauma related resource on the website was the “Mindfulness handbook for lawyers” written by Jon Krop, a lawyer from Rockville, Maryland in the United States.⁴²⁵ It is short and provides pointers on how to meditate. It lists the wellness benefits of mindfulness to help readers with their legal practice and make effective use of time. It also highlights the importance of accepting emotions rather than avoiding them as the latter intensifies the emotions one wants to

⁴²⁰ *Ibid* at 00:00:21.

⁴²¹ “Coping with Change and Unexpected Losses During COVID-19” (28 April 2020), online: *CLE BC Online Store* <<https://store.cle.bc.ca/productdetails.aspx?title=Coping-with-Change-and-Unexpected-Losses-During-COVID-19&cid=1765>>.

⁴²² “Health & Wellness”, online: *The Law Society of Manitoba* <<https://lawsociety.mb.ca/for-lawyers/supports-for-lawyers/health-wellness/>>.

⁴²³ *Ibid*.

⁴²⁴ “Past CPD Programs”, online: *The Law Society of Manitoba Education Centre* <<https://educationcentre.lawsociety.mb.ca/past-cpd-programs/>>.

⁴²⁵ *Krop, supra* note 361.

avoid.⁴²⁶ Aside from this, a blog post by Lisa Schaefer, titled, “We Are All Part of the Problem and the Solution,” discusses the aftermath following the actions of Derek Chauvin, who murdered George Floyd while on duty as a police officer in the United States.⁴²⁷ Specifically, Schaefer says Canadian lawyers have a responsibility to take concrete action to understand and educate themselves about what life is like for Black and Indigenous people seeking equality.⁴²⁸ This blog post is important because it discusses the importance of lawyers acknowledging they are both part of the problem and part of the solution to inequality and racism (both are connected to reducing harm). This approach is similar to trauma-informed lawyering teachings which emphasize the lawyer’s own human experiences, and the individual lawyer’s ability to sit with discomfort.⁴²⁹ However, aside from these resources, no other trauma related materials were found.

With respect to emotion related resources, section 44 of *The Legal Profession Act* states that benchers may establish programs to assist lawyers with handling or avoiding personal, emotional, medical or substance abuse problems and establish programs to assist lawyers with issues that arise from the practice of law.⁴³⁰ This part of the act has been in the statute since at least 2002 and suggests that emotions have long been a consideration for the Law Society of Manitoba.⁴³¹ Besides this act, I was unable to find other relevant results.

4.2 e) Law Society of New Brunswick

The Law Society of New Brunswick website did not appear to have any results for the terms “trauma” or “emotions.” New Brunswick is the only law society that requires their licensed practitioners to purchase a membership with the Canadian Bar Association (“CBA”), which may explain why there were no trauma resources listed on the website.⁴³² For New Brunswick bar

⁴²⁶ *Ibid* at 15.

⁴²⁷ Alissa Schacter, “We Are All Part of the Problem and the Solution”, *Communiqué* (June 2020) 12.

⁴²⁸ *Ibid*.

⁴²⁹ *Ibid* at 13.

⁴³⁰ *The Legal Profession Act*, CCSM c L 107, s.44.

⁴³¹ *The Legal Profession Act*, CCSM c L107 2002, s. 44, 2002 version.

⁴³² “Canadian Bar Association - Who We Are” online: <<https://www.cba.org/Who-We-Are>>.

members, CBA courses (which are discussed in chapter 4.2 o)) are accepted as accredited CPD courses.⁴³³

An online CPD course included a section on “difficult clients.” The contents were not trauma-informed as they relied on stereotypes and broad assumptions about clients rather than taking time to consider one’s own emotions, biases, and to listen to the client in order to meet them where they are at. It promoted dismissal of clients based on snap judgments. These materials, published in 2018 and available to the general public, include a list of types of “difficult” clients. The resource states broadly that, “[clients who] were angry before they retained you [...] likely will stay angry,” “a difficult client may also be a fraud artist,” and “people with depression may not be able to perform normal tasks.”⁴³⁴ Such narrow and stereotypical views directed by a law society is problematic in a number of ways. To be trauma-informed requires a lawyer to practice empathy and consideration for themselves and to do the same for clients and anyone else they may interact with. Claiming that an angry client will stay angry diminishes a person down to what they are feeling in a particular moment. This narrow perspective is not in the public or lawyer’s interests as it encourages lawyers to make rigid snap judgments based on a potential client’s varying emotions or mental health state.

While there are some valid and necessary points made within this course, creating the expectation that lawyers ought to only work with clients they feel comfortable with and who take direction easily is an unrealistic expectation of human behaviour. The legal profession is a helping profession for a broad range of humans and their varied experiences.⁴³⁵ Yet, the course states that a lawyer should avoid “difficult” clients as another lawyer can take the file.

Aside from this course, I found a pre-approved seminar by the Law Society of New Brunswick on the topic of a trauma-informed approach to managing alternative dispute resolution.⁴³⁶ The

⁴³³ “Eligible Activities”, online: *Law Society of New Brunswick* <<https://lawsociety-barreau.nb.ca/en/for-lawyers/continuing-professional-development/eligible-activities/>>.

⁴³⁴ “Some Types of Difficult Clients and How to Deal With Them”, online: *Law Society Online Learning Center - Law Society of New Brunswick* <<https://lsnb-educ-bnb.ca/node/1016>>.

⁴³⁵ See Dennis P Stolle, David B Wexler & Bruce J Winick, *Practicing therapeutic jurisprudence : law as a helping profession* (Durham, N.C.: Durham, N.C. : Carolina Academic Press, 2000).

⁴³⁶ “Trauma-Informed ADR: How to Support Clients”, (17 January 2021), online: *ADR Institute of Canada* <<https://adric.ca/fr/my-calendar/trauma-informed-adr-how-to-support-clients/>>.

description of the course states: “[a]wareness of how working with clients impacted by trauma can also affect us allows us to implement strategies for our own well-being.”⁴³⁷ This is a very different approach from the one taken by the course about “difficult clients.” Whereas this course hopes to teach the individual lawyer about their own accountability when faced with others’ trauma, the “Difficult Clients” course requires no self-awareness from the lawyer and reduces clients to their emotional or mental health state, encouraging biases; a significant disparity in approaches to clients. With respect to mental health services, the New Brunswick Lawyers’ Assistance Program is confidential and available for coaching, counselling, and support. These are available to New Brunswick lawyers, employees, judges, articling students, law students, and their families 24 hours a day, 7 days a week.⁴³⁸

4.2 f) The Law Society of Newfoundland and Labrador

The Law Society of Newfoundland and Labrador website had a number of resources and courses that support trauma-informed lawyering. One webinar, featuring Myrna McCallum, titled “An Intersectional Introduction to Trauma-Informed Lawyering,” is a two day course, 3.5 hours each day.⁴³⁹ It defines trauma, trauma-informed lawyering, and teaches skills so that lawyers can identify their beliefs and biases, cultural trauma within the Indigenous context, indirect trauma, resilience, and mental health. Another trauma focused webinar, “Healing Trauma: Gender, Trauma and Paths Healing in Family Law Disputes” seeks to teach lawyers how to support survivors of family violence in family law.⁴⁴⁰ In a “Lawyer Information Session,” a free course, “Introduction to Trauma-Informed Practice for Lawyers,” teaches lawyers about trauma and is mandatory for lawyers in the Sexual Violence Legal Support Service.⁴⁴¹

⁴³⁷ *Ibid.*

⁴³⁸ “New Brunswick Lawyers’ Assistance Program”, online: *Law Society of New Brunswick* <<https://lawsociety-barreau.nb.ca/en/for-lawyers/insurance>>.

⁴³⁹ “Webinar - Trauma-Informed Lawyering”, (4 October 2021), online: *The Law Society of Newfoundland and Labrador* <<https://lsnl.ca/webinar-trauma-informed-lawyering/>>.

⁴⁴⁰ “Webinar - Healing Trauma: Gender, Trauma and Paths Healing in Family Law Disputes” (31 March 2021), online: *The Law Society of Newfoundland and Labrador* <<https://lsnl.ca/webinar-healing-trauma-gender-trauma-and-paths-healing-in-family-law-disputes/>>.

⁴⁴¹ “The Journey Project - Introduction to Trauma Informed Practice for Lawyers”, (24 September 2019), online: *Law Society of Newfoundland and Labrador* <<https://lsnl.ca/wp-content/uploads/2019/09/Lawyer-Info-Session-SJ-2019.pdf>>; “Lawyer Information Session - The Journey Project”, (6 September 2019), online: *The Law Society of Newfoundland and Labrador* <<https://lsnl.ca/lawyer-information-session-the-journey-project/>>.

Another course offered by the Law Society is “The National Inquiry into Missing and Murdered Indigenous Women and Girls: A Brief History and Groundwork for Implementing the Calls for Justice.” This seminar reviews the history of the National Inquiry’s work, and how this “work was trauma-informed and incorporated culture and ceremony into its hearings.”⁴⁴² In a different set of courses offered by the Federal Department of Justice addressing amendments to federal family laws, trauma is mentioned in a course teaching lawyers how to work with clients experiencing family violence, as well as information about the impacts of trauma on adults and children.⁴⁴³

Besides these CPD courses, other resources include blog posts, statements to the public, and resources for individual lawyers regarding wellness and mental health. Three statements mentioned trauma; they addressed the findings of graves at Indian Residential Schools including the Kuper Island Residential School, the Marieval and St. Eugene Residential Schools, and the Kamloops Residential School. Each stated that the Law Society’s thoughts are with those who continue to live with the trauma inflicted by the residential school system.⁴⁴⁴ In each of the statements, the Law Society of Newfoundland and Labrador shared their commitment to continue implementing The Truth and Reconciliation Commission of Canada: Calls to Action.⁴⁴⁵ Other links on wellness and mental health detail the Law Society’s Professional Assistance Program: “The Lawyers’ Insurance Programme funds the Professionals’ Assistance Program as part of risk management and because we understand the value of the services you provide and we are committed to ensuring that you have the support you need to serve the public properly.”⁴⁴⁶ A

⁴⁴² “Reminder - CLE - The National Inquiry into Missing and Murdered Indigenous Women” (11 September 2020), online: *The Law Society of Newfoundland and Labrador* <<https://lsnl.ca/reminder-cle-the-national-inquiry-into-missing-and-murdered-indigenous-women/>>.

⁴⁴³ “Message from Justice Canada”, (13 January 2021), online: *The Law Society of Newfoundland and Labrador* <<https://lsnl.ca/messages-from-justice-canada-family-law-group/>>.

⁴⁴⁴ “Statement on the Kuper Island Residential School”, (16 July 2021), online: *The Law Society of Newfoundland and Labrador* <<https://lsnl.ca/statement-on-the-kuper-island-residential-school/>>; “Statement on the Marieval and St. Eugene Residential Schools”, (30 June 2021), online: *The Law Society of Newfoundland and Labrador* <<https://lsnl.ca/statement-on-the-marieval-residential-school/>>; “Statement on the Kamloops Residential School”, (2 June 2021), online: *The Law Society of Newfoundland and Labrador* <<https://lsnl.ca/statement-on-the-kamloops-residential-school/>>.

⁴⁴⁵ *Ibid.*

⁴⁴⁶ “Law Society’s Professional Assistance Program” (20 January 2016), online: *The Law Society of Newfoundland and Labrador* <<https://lsnl.ca/law-societys-professional-assistance-program/>>.

link within the Wellness section of the website links to Homewood Health, the provider for wellness-related services. It has articles on wellness and addictions generally.⁴⁴⁷ Notably, it is not clear what sort of assistance the Professional Assistance Program provides or whether Homewood Health services are offered under the Professional Assistance Program.

With respect to resources on emotions, a Homewood Health webinar and a Continuing Legal Education (CLE) seminar were offered. The topic for the Homewood Health webinar was “COVID-19: What is Languishing and Why is it Important?,” which seeks to address the state of stagnation with feelings of emptiness while navigating daily life in the global pandemic, including feelings of indifference or numbness.⁴⁴⁸ They call this state “languishing” and associate it with poor mental health. The topic of the CLE seminar was “How to Achieve Great Career Success in the Legal Profession,” a 2.5 hour online course to help lawyers define success for one’s self and determine a subjective measure of success in one’s legal career. This strategy is billed to counteract feelings of emptiness, burnout, and a sense of unfulfillment as these “negative emotions too often do great damage to a person’s career and general well-being.”⁴⁴⁹ Both of these can act as a starting point for how a lawyer can change their perspective, acknowledge their emotions, and learn how to manage emotions.

4.2 g) Nova Scotia Barristers’ Society

On the Nova Scotia Barristers’ Society website, there is a heading, “Equity and Access Resources” that, at the time of research, listed two trauma-related links. One was Myrna McCallum’s podcast and the other was a video on “Best practices for trauma-informed lawyering” from the perspective of a sexual assault victim.⁴⁵⁰ At the outset of the video, the

⁴⁴⁷ “Resources - The Health Library” online: *The Law Society of Newfoundland and Labrador* <<https://lsnl.ca/lawyers-students/wellness-program/resources/>>.

⁴⁴⁸ “Homewood Health Webinar - COVID-19: What is Languishing and Why is it Important?” (17 June 2021), online: *The Law Society of Newfoundland and Labrador* <<https://lsnl.ca/homewood-health-webinar-covid-19-what-is-languishing-and-why-is-it-important/>>.

⁴⁴⁹ “CLE Seminar - How to Achieve Great Career Success in the Legal Profession” (22 March 2021), online: *The Law Society of Newfoundland and Labrador* <<https://lsnl.ca/cle-seminar-how-to-achieve-great-career-success-in-the-legal-profession/>>.

⁴⁵⁰ “Equity & Access Resources” online: *Nova Scotia Barristers’ Society* <<https://nsbs.org/legal-profession/your-practice/practice-support-resources/equity-access-resources/>>.

speakers emphasize that trauma-informed skills are applicable in more than sexual violence contexts.⁴⁵¹ They go on to explain the perspective of a victim of sexual assault navigating the legal system. Further down on the “Equity and Access Resources” page, there was a link to “Cultural Competence Information and Training,” which seeks to “ensure that Nova Scotia’s lawyers are culturally competent, trauma-informed, and broadly reflective of Nova Scotia’s diverse populations.”⁴⁵² For CPD courses, two are trauma-related. “Trauma Informed Lawyering: The Duty to Do Better in the Era of Truth and Reconciliation” teaches a “do-no-further-harm relational approach to the practice of law” that benefits the lawyer, the lawyer’s clients, their colleagues, and the legal profession generally.⁴⁵³ The other course is on trauma-informed lawyering. Both are led by McCallum.⁴⁵⁴

Aside from courses, other resources with the term “trauma” include newsletters, information on seeking assistance from Homewood Health, and summaries of meetings. The Nova Scotia Lawyers Assistance Program (“NSLAP”) page had a statement regarding the “realities of Canada’s history with Indigenous People” and how these were “reinforced with the discovery of another unmarked gravesite in Saskatchewan.”⁴⁵⁵ It then links to a Homewood Health newsletter: “Experiencing a Traumatic Event: Recovery and Coping Strategies.”⁴⁵⁶ The newsletter discusses how trauma responses to abnormally distressing events are normal human responses. They emphasize this happens no matter the sort of training an individual has and the importance of acknowledging what arises rather than avoiding or ignoring it.⁴⁵⁷

⁴⁵¹ Andrea Hancock & Mary Brown, *Best practices for trauma-informed lawyering* (Nova Scotia Barristers Society, 2015), online: *YouTube* <https://www.youtube.com/watch?v=Jj3_ybLWqiY> at 00:00:44 seconds.

⁴⁵² *Supra* note 450.

⁴⁵³ Myrna McCallum, “Trauma-Informed Lawyering: The Duty to Do Better in the Era of Truth & Reconciliation”, (29 September 2021), online: *Nova Scotia Barristers’ Society* <<https://nsbs.org/events/trauma-informed-lawyering-myrna-mccallum/>>.

⁴⁵⁴ “TRC Education Session: Trauma-Informed Lawyering with Myrna McCallum”, (26 May 2021), online: *Nova Scotia Barristers’ Society - April InForum* <<https://nsbs.org/society-news/april-inforum-2/>>.

⁴⁵⁵ “NSLAP WELLNESS: Experiencing a Traumatic Event - Canada’s Residential Schools”, online: *Lawyers’ Insurance Association of Nova Scotia* <<https://www.lians.ca/news/2021/07/23/nslap-wellness-experiencing-traumatic-event-canadas-residential-schools>>.

⁴⁵⁶ *Ibid.*

⁴⁵⁷ “Experiencing a Traumatic Event: Recovery and Coping Strategies - Homewood Health” (2021), online: *Lawyers’ Insurance Association of Nova Scotia* <<https://www.lians.ca/sites/default/files/documents/00166173.pdf>>.

In another newsletter, NSLAP notifies their membership of two new services, one for depression and the other for trauma, which act as a supplement to current assistance services. The Depression Care service provides mid- to longer-term care for individuals with moderate to severe anxiety and/or depressive symptoms. The services' intention is to help the individual reduce symptoms and develop resiliency to stay at work and get back to life.⁴⁵⁸ The Trauma Care service provides treatment for individuals struggling with acute or long-term trauma symptoms, it offers treatment and resiliency training for PTSD, mood, and anxiety disorders. In a separate post, a summary of a council meeting included suggestions for the provision of more education on trauma, mental illness, and creating safety to "increase inclusion" in legal practice.⁴⁵⁹ They suggest this could be done by partnering with community agencies that work with clients who often need legal resources.

Emotions related resources included a presentation, a seminar, and two sections of the *Code of Professional Conduct*.⁴⁶⁰ The topic of the Criminal Justice Section presentation was "The Emotional Lawyer" offered online by the CBA which "provides strategies and resources to increase mindfulness and resiliency for criminal lawyers."⁴⁶¹ The seminar topic was "Unlock and Create Space for Joy: Bonus Solo-Small Firm Conference Wellness Session" offered for free.⁴⁶² The description advises this seminar will help lawyers explore what influences their thinking and responses to change, including struggles with balancing lives as well as solutions. It notes that such challenges are more important to explore in the context of the holiday season during the pandemic and draws on psychological science and positive psychology studies on joy. Another search result, section 3.1 from the *Code of Professional Conduct* defines competence, sets out a lawyer's duty to recognize their own limitations in their ability to handle a matter, and in the commentary section, notes that to act otherwise is to be dishonest with the client, which may

⁴⁵⁸ "Depression & Trauma Care Added to NSLAP" (27 July 2020), online: *Nova Scotia Barristers' Society* <<https://nsbs.org/society-news/inforum-newsletter/july-inforum/>>.

⁴⁵⁹ "Recap: Council in the Community with reachAbility", (27 November 2019), online: *Nova Scotia Barristers' Society Blog* <<https://nsbs.org/nsbs-blog/recap-council-in-the-community-with-reachability/>>.

⁴⁶⁰ Nova Scotia Barristers' Society, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2020, ss. 3.1, 7.1, 7.2.

⁴⁶¹ Christopher Leafloor, "Criminal Justice Section Meeting - The Emotional Lawyer" (28 October 2022), online: *Nova Scotia Barristers' Society* <<https://nsbs.org/events/criminal-justice-section-meeting-the-emotional-lawyer/>>.

⁴⁶² "Unlock and Create Space for Joy: Bonus Solo/Small Firm Conference Wellness Session" (7 December 2021), online: *Nova Scotia Barristers' Society* <<https://nsbs.org/events/unlock-and-create-space-for-joy-bonus-solo-small-firm-conference-wellness-session/>>.

amount to negligence.⁴⁶³ Section 7.1-3 sets out the Duty to Report and in the commentary, advises that lawyers should encourage other lawyers facing challenges (such as “emotional conditions”) to seek assistance as soon as possible, though this is not a duty.⁴⁶⁴ Section 7.2-1 sets out the duty to act in good faith and civilly. It includes commentary about how any animosity between clients should never influence how lawyers conduct themselves towards each other or other parties, including the clouding of judgment due to emotional factors.⁴⁶⁵ These sections are promising as they hold lawyers accountable for managing their own capacity to work, pay attention to their own emotions, and encourage each other to seek help where needed.

4.2 h) Law Society of Ontario

Given the size of the profession in this province, there were only three resources related to trauma available on the Law Society of Ontario website. One 8+ hour course focused on how to recognize trauma and indirect trauma while managing files involving family violence.⁴⁶⁶ The second course, 4 hours long, focused on how lawyers can conduct trauma-informed workplace investigations.⁴⁶⁷ The last was a Mental Health for Legal Professionals Summit which took place over two days.⁴⁶⁸ Aside from these, a 2018 Law Society of Ontario post recommended improving regulatory and hearing processes by ensuring they are more culturally competent and culturally safe for Indigenous People.⁴⁶⁹

On emotions and feelings, the Law Society provided a session on “Managing Your Practice And Avoiding Emotional Burn-Out,” the description states that while “it can be helpful to leave your

⁴⁶³ *Ibid.*

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *Ibid.*

⁴⁶⁶ “A Primer on Managing the Family Violence File” (18 November 2021), online: *Law Society of Ontario Store* <<https://store.lso.ca/a-primer-on-managing-the-family-violence-file>>.

⁴⁶⁷ “Workplace Investigations: A Comprehensive Look at Emerging Issues and Practical Solutions” (23 September 2019), online: *The Law Society of Ontario Store* <<https://store.lso.ca/workplace-investigations-2019>>.

⁴⁶⁸ “Mental Health for Legal Professionals Summit” (19 May 2021), online: *The Law Society of Ontario Store* <<https://store.lso.ca/mental-health-for-legal-professionals-summit>>.

⁴⁶⁹ “Law Society approves recommendations to improve its regulatory and hearing processes affecting Indigenous Peoples | Law Society of Ontario” (23 May 2018), online: *Law Society of Ontario* <https://lso.ca/news-events/news/2018/law-society-approves-recommendations-to-improve-it>; see also “CPD Equality, Diversity and Inclusion Requirement”, online: <<https://lso.ca/about-lso/initiatives/edi/cpd-equality,-diversity-and-inclusion-requirement>>.

emotions at the door[...], now more than ever, it's important to recognize how your emotional well-being affects your practice.”⁴⁷⁰ This free course is eligible for 20 minutes towards CPD credits.

4.2 i) The Law Society of Prince Edward Island

The Law Society of Prince Edward Island's website had one resource on trauma at the time of review. It was a documentary shown during a Mid-Winter Meeting and Cultural Competency Training from February 3, 2017. The documentary discussed historic trauma in connection to colonization.⁴⁷¹ With respect to resources related to emotion, several sections of the *Professional Code of Conduct* were relevant. These were the same two sections previously discussed from the Nova Scotia Barrister's Society. This included section 7.1-3, a duty to report with commentary about how lawyers should encourage other lawyers facing “emotional conditions” but this encouragement is not a duty required of lawyers. Section 7.2-1 requires that lawyers are not to allow “emotional factors” to influence how they conduct themselves with others.⁴⁷² Finally, another resource was the “Tapped Out to Thriving” 3 hour interactive workshop focused on burnout and self-doubt.⁴⁷³ It notes that determination is not the way out of self-doubt or burnout and instead, lawyers ought to learn how to have clarity about what they want and how to achieve that without sacrificing productivity.

4.2 j) Le Barreau du Québec

The le Barreau du Québec website, at the time of review, linked to an academic paper and a Bar Review journal for resources regarding “trauma.” The academic paper out of the Université de Sherbrooke notes that lawyers' exposure to traumatized clients is correlated to psychological

⁴⁷⁰ “Managing Your Practice and Avoiding Emotional Burn-Out” online: *The Law Society of Ontario Store* <<https://store.lso.ca/managing-your-practice-and-avoiding-emotional-burn-out>>.

⁴⁷¹ “Law Society of PEI & CBA PEI Branch - Mid-Winter Meetings & Cultural Competency Training” (3 February 2017), online: *Law Society of Prince Edward Island* <https://lawsocietypei.ca/media/upcoming_events/upcoming_events15.pdf>.

⁴⁷² Law Society of Prince Edward Island, *Code of Professional Conduct*, Charlottetown: Law Society of Prince Edward Island, 2020, ss. 7.1-7.2.

⁴⁷³ “Tapped Out to Thriving: Leadership Practices That Help Us Shift CLE” (18 November 2021), online: <<http://www.lawsocietypei.ca/upcoming-events/96/register>>.

distress.⁴⁷⁴ In the Spring 2019 Bar Review journal, one section discusses sexual violence, family violence, the effect on the children who witness this, and the effect on lawyers who practice in these areas.⁴⁷⁵

A significant resource on emotional acknowledgment and stress in legal practice is the Université de Sherbrooke report on Québec lawyers [Barreau Report]. Phase II of this report includes data, analysis, and suggestions to mitigate the harms of psychological distress, burnout, and decreased well-being in Québec lawyers. It is relevant to review some key points arising from it, especially their recommendations, as it was the foundation and impetus behind the larger Sherbrooke Report.

In the Barreau Report, factors that significantly increase well-being include harmonious relations with colleagues, self-esteem, and consistency between personal and organizational values.⁴⁷⁶ Factors that significantly increase burnout include emotional demands in connection to litigation files such as criminal or family law.⁴⁷⁷ The researchers suggest that training lawyers to manage emotional demands, such as self-knowledge and emotional intelligence can counter high levels of distress and burnout. Data also indicates there are certain lawyers more susceptible to mental health challenges, such as younger lawyers, those who work by the billable hour system, or those in private practice.⁴⁷⁸

For “individual skills that could significantly reduce psychological distress” the Barreau Report suggests 1) coping strategies to deal with stress, 2) the ability to set limits and self-assert boundaries, and 3) being able to self-lead, self-manage, and psychologically detach from work when not at work.⁴⁷⁹ One discussed coping strategy is problem-oriented, which seeks to manage external factors that may contribute to higher stress (this is most commonly used). Another coping strategy is emotion-oriented which seeks to use introspective tools to mitigate the

⁴⁷⁴ *Gingues, supra* note 309 at 50-51 and 101.

⁴⁷⁵ Nathalie Cadieux et al, “Research Report - A Study of the Determinants of Mental Health in the Workplace Among Québec Lawyers - Phase II - 2017-2019” (2020) Université de Sherbrooke, Business School 1.

⁴⁷⁶ *Ibid* at 64.

⁴⁷⁷ *Ibid* at 63.

⁴⁷⁸ *Ibid* at 133

⁴⁷⁹ *Ibid* at 111.

emotional impact of stressors on the individual. The three individual skill suggestions are generally in line with the themes of this thesis: that self-reflection and acknowledgement of one's own emotions can mitigate the stress and trauma encountered in law. Questions arise around how realistic it is to expect lawyers to psychologically detach from work where all things in the workplace remain the same (such as billable hour targets, competitive coworkers, or employers who expect quick responses from young lawyers outside of office hours). Trauma is not discussed in the report.

From an organizational standpoint, the Barreau Report's five suggested courses of action have potential to be helpful but they lack clarity on who must take responsibility for enacting them. This lack of clarity may compromise the positive potential for these suggestions to better lawyers' well-being. These are: "1) raising awareness of mental health in workplaces, adoption of healthy lifestyle habits among lawyers; 2) developing training content and interventions for risk groups; 3) implementing a centralized mentoring program for young lawyers; 4) enhancing the image of the profession in the public eye; and 5) implementing workplace-friendly means to promote health."⁴⁸⁰ While the first course of action notes an important action (raising awareness), it does not clarify who (individual lawyers, employers, or the law society) ought to implement this. There are many individual lawyers who are engaging in honest conversations about the mental health challenges they face. A group effort on the part of individual lawyers, employers, and law societies is most ideal to create trust and safety with lawyers who may struggle to admit (including to themselves) they need support. Suggestions directed specifically at organizations (employers) include promoting a healthy practice such as introducing physical activity, meditation, support sessions for colleagues, and other practices that would encourage work-life balance. However, these activities do not address the way many organizations still use the billable hour system or other practices that place added stress on lawyers. As noted by the Barreau Report, billable hours both decrease a lawyers' consistency of values and increases their psychological distress. This is further compounded as a decrease in a lawyers' consistency of values also increases their psychological distress.⁴⁸¹ Further, the above suggested activities on their own are likely not enough to impact the root causes of distress. Care must be taken for

⁴⁸⁰ *Ibid* at 130-140.

⁴⁸¹ *Ibid* at 32.

employers to try multiple strategies towards healthier legal practice while seeking feedback from lawyers and clients (more on this below).

The second course of action, which suggests training for risk groups, may encourage “difference blindness.”⁴⁸² Difference blindness describes how “all lawyers [are] accountable to seemingly neutral standards, [which] disproportionately disadvantages diverse populations and normalizes the dominance of certain actors—here, white men—by creating the illusion that success or failure depends upon individual rather than *structural* constraints.”⁴⁸³ By requiring training for the lawyers who are more likely to experience psychological distress or burnout, this addresses only lawyers in disproportionately disadvantaged populations and none of the lawyers who may form or contribute to the structural constraints and who reinforce the dominant standards.

The Barreau Report touches on the above briefly: “this training [for risk groups] is not to make individuals responsible for their situation.... In order to be effective, training should be accompanied by... the transformation of practices in certain organizational settings, a gradual change in the professional culture....”⁴⁸⁴ After all, “mental health in the workplace is built on a daily basis and is everyone’s responsibility.”⁴⁸⁵ As such, the success of implementing these suggestions will depend on the amount of active participation from organizational structures and in particular, the employers, towards changing the structurally imposed constraints that can form difference blindness and reinforce harm on lawyers’ well-being. Law firm regulation on the part of law societies could address this, which will be discussed further in chapter 4.3 below.

4.2 k) The Law Society of Saskatchewan

⁴⁸² *Pearce*, *supra* note 238.

⁴⁸³ *Ibid* at 2407 [emphasis added]; see Stephanie Nemeth, “Addressing the Elephant in the Legal Profession: The Lawyer’s Struggle with Mental Health” (2019) CanLIIDocs 4037 (“Turning a blind eye and placing blame on individuals increases the isolation and stigmatization of lawyers who suffer in silence. Each person within the legal profession has a responsibility to it to work to address these issues. Doing so will improve the profession as a whole and enhance the lives of many who feel that they cannot seek help because of the implications it may have on their livelihood.”).

⁴⁸⁴ *Supra* note 475 at 134.

⁴⁸⁵ *Ibid* at 136-137.

The Law Society of Saskatchewan website had more links to CPD courses on trauma than most other law society websites across the country. The links connected to courses from different provinces including one hosted by the Indiana State Bar. The CPD courses range from introducing trauma-informed law concepts to a 6+ hour course on trauma-informed lawyering as an essential ethical competency on how to spot indirect trauma, safeguard harm, and minimize risks.⁴⁸⁶ Several courses focused on trauma in the context of sexual violence or domestic violence. One discussed the impacts of trauma on a person’s brain and memory and the impact of childhood trauma and adulthood trauma.⁴⁸⁷ Several focused on working with sexual trauma survivors as part of testifying in trial or in other similar contexts.⁴⁸⁸ Others were focused on sexual offence litigation cases and sexual trauma or working with sexual trauma survivors (though the course on sexual offence litigation cases is named “Just a Tease” which is highly problematic for the connotations this title has with allegations of sexual assault).⁴⁸⁹ One course offered training to help lawyers understand domestic violence within family law through the Provincial Association of Transition Houses and Services of Saskatchewan (PATHS).⁴⁹⁰ PATHS also provided a 13 hour training on family violence in early 2020, which covered intimate partner violence, a trauma-and-violence informed approach to working with survivors, and other related topics.⁴⁹¹ The Law Society of Saskatchewan also hosts the Public Legal Education

⁴⁸⁶ “Trauma-Informed Legal Practice Webinar”, online: *The Law Society of Saskatchewan* <<https://www.lawsociety.sk.ca/uncategorized/trauma-informed-legal-practice-webinar/>>; “Trauma-Informed Lawyering: A Critical Competency 2020”, (4 August 2020), online: <<https://www.lawsociety.sk.ca/uncategorized/trauma-informed-lawyering-a-critical-competency-2020/>>.

⁴⁸⁷ “CPD 291.1 – Working with Survivors of Sexual Violence: A Trauma-Informed Approach (Episode 1, Working with Sexual Trauma Survivors Series)” (25 November 2020), online: <<https://www.lawsociety.sk.ca/courses/cpd-291-1/>>.

⁴⁸⁸ “CPD 291.4 – Testimonial Aids (Episode 4, Working with Sexual Trauma Survivors Series)” (25 November 2020), online: <<https://www.lawsociety.sk.ca/courses/cpd-291-4-testimonial-aids-episode-4-working-with-sexual-trauma-survivors-series/>>; “CPD 291.3 – Bill C-51: Counsel for Complainants and the Role of Court Services (E3 – Working with Sexual Trauma Survivors Series)” online: *The Law Society of Saskatchewan* <<https://www.lawsociety.sk.ca/product/cpd-291-3-bill-c-51-counsel-for-complainants-and-the-role-of-court-services/>>.

⁴⁸⁹ “CPD 291 – Working with Sexual Trauma Survivors Series” online: *The Law Society of Saskatchewan* <<https://www.lawsociety.sk.ca/product/cpd-291-working-with-sexual-trauma-survivors-series/>>; “CPD 205 – Working with Victims of Sexual Violence” (July 2018), online: *The Law Society of Saskatchewan* <<https://www.lawsociety.sk.ca/courses/cpd-205/>>.

⁴⁹⁰ “Understanding the Dynamics of Domestic Violence for Family Law Practitioners” (28 September 2020), online: *The Law Society of Saskatchewan* <<https://www.lawsociety.sk.ca/event/understanding-the-dynamics-of-domestic-violence-for-family-law-practitioners/>>.

⁴⁹¹ “Family Violence Training for Lawyers and Mediators in February” (14 January 2020), online: *The Law Society of Saskatchewan* <<https://www.lawsociety.sk.ca/uncategorized/family-violence-training-for-lawyers-and-mediators-in-february/>>.

Association of Saskatchewan (PLEA) Listen project, which seeks to help survivors of sexual violence find their voice and speak to their experiences.⁴⁹² Lawyers who sign up to give legal advice to survivors are required to complete a one-day training course on traumatized clients and legal responses to sexual violence in different contexts.

For the Indiana State Bar webinar, the focus was bias, systemic racism, and the hard work lawyers need to do as actors within the legal system.⁴⁹³ This included indirect trauma and what happens when failure (inevitably) occurs, and how to develop resilience and well-being. Other resources and links that mention “trauma” included statements to the public, resources on health and wellness, and articles about various issues. As with many of the other law societies, the Law Society of Saskatchewan issued a statement in response to the discovery of children’s graves at the Kamloops Indian Residential School; they also noted survivors’ ongoing intergenerational trauma.⁴⁹⁴ On the topics of health, wellness, and mental health, links were posted to Myrna McCallum’s Trauma-Informed Lawyer podcast and Homewood Health, a service that manages Lawyers Concerned for Lawyers (LCL), the free assistance program for Law Society members, available 24 hours a day, 7 days a week.⁴⁹⁵ Additional resources for dealing with mental health in the time of COVID-19 included a link to a CBA course on lawyers’ mental health and addictions. Links for families included how to parent during the pandemic.⁴⁹⁶

Resources related to emotions included blog posts, CBA well-being links, modules, and journal articles. From a May 2, 2017 post, Melanie Hodges Neufeld discusses Mental Health Week and raising awareness about her personal challenges including emotional, health, and wellness

⁴⁹²Joel Janow, “The Listen Project – Helping Survivors of Sexual Violence Find their Voice” (27 April 2018), online: *The Law Society of Saskatchewan* <<https://www.lawsociety.sk.ca/access-to-justice/the-listen-project-helping-survivors-of-sexual-violence-find-their-voice/>>.

⁴⁹³ “Just Mercy and Access to Justice: Illuminating Bias, Confronting Systemic Racism, and Doing the Hard Work that Needs to be Done” (19 June 2020), online: *The Law Society of Saskatchewan* <<https://www.lawsociety.sk.ca/uncategorized/just-mercy-and-access-to-justice-illuminating-bias-confronting-systemic-racism-and-doing-the-hard-work-that-needs-to-be-done/>>.

⁴⁹⁴ “Statement Regarding the Kamloops Residential School”, (4 June 2021), online: *The Law Society of Saskatchewan* <<https://www.lawsociety.sk.ca/law-society-of-saskatchewan/statement-regarding-the-kamloops-residential-school/>>.

⁴⁹⁵ “Health and Wellness”, online: *The Law Society of Saskatchewan* <<https://www.lawsociety.sk.ca/health-and-wellness/>>.

⁴⁹⁶ *Ibid.*

challenges for lawyers.⁴⁹⁷ Links to the CBA Wellness site are referenced, which offer programs such as the “Mindful Lawyer Series.” This series directs lawyers towards self-awareness through topics such as: how to reset one’s priorities, find and provide support, manage stress to thrive, avoiding burnout and increasing resilience.⁴⁹⁸ The law society also links to an article in the Saskatchewan Law Review titled “Addressing the Elephant in the Legal Profession: The Lawyer’s Struggle with Mental Health.” The author, Stephanie Nemeth, concludes that placing blame on individual lawyers suffering from mental health challenges increases isolation and stigmatization; it is every legal professional’s responsibility to address such issues.⁴⁹⁹ Another article on using emotional intelligence to manage anxiety links the ability to recognize, understand, and manage one’s own emotions to better health and well-being in organizations.⁵⁰⁰ These resources appear to be very useful but are not easily accessible as they were found only after clicking through several links and different tabs.

4.2 1) The Law Society of The Northwest Territories

While there were no resources directly referencing any of the search terms, the Law Society of The Northwest Territories website had a link to a Lawyer and Family Assistance Program (LFAP). Homewood Health is also the external provider for confidential support, 24 hours a day, 7 days a week.⁵⁰¹ In 2020, the Law Society created a YouTube channel to host previously recorded CPD sessions.⁵⁰² Some of these are related to Truth and Reconciliation. However, trauma is not explicitly discussed in any of the recorded sessions, though two sessions discuss lawyer wellness, mental health, and addictions. The Northwest Territories Bar requires its members to take a cultural competency course regarding either “the history of Indigenous peoples and their relationship with European settlers” or “awareness about colonization,

⁴⁹⁷ Melanie Hodges Neufeld, “Mental Health Week #2” (2 May 2017), online: *The Law Society of Saskatchewan* <<https://www.lawsociety.sk.ca/lss-events/mental-health-week-2/>>.

⁴⁹⁸ “Canadian Bar Association - Wellness” online: *The Canadian Bar Association* <<https://www.cba.org/COVID-19/Professional-Development/Wellness>>.

⁴⁹⁹ *Nemeth, supra* note 483.

⁵⁰⁰ Alan Kilpatrick, “COVID-19 Legal News Roundup: July 23rd Edition” (23 July 2020), online: *The Law Society of Saskatchewan* <<https://www.lawsociety.sk.ca/uncategorized/covid-19-legal-news-roundup-july-23rd-edition/>>.

⁵⁰¹ *Supra* note 495.

⁵⁰² “Continued Professional Development (CPD)” online: *The Law Society of the Northwest Territories* <<https://lawsociety.nt.ca/for-lawyers/continued-professional-development-cpd/>>; “Law Society of the NWT” online: *YouTube* <https://www.youtube.com/channel/UCi_k3VeWwMbTTCdS400UDag/videos>.

residential schools” towards “developing cultural sensitivity and the practice of reconciliation.”⁵⁰³

4.2 m) Law Society of Nunavut

The Law Society of Nunavut works in partnership with The Advocates’ Society (TAS) to provide CPD credits.⁵⁰⁴ Reviewing the TAS online offerings and upcoming events, trauma is not specifically mentioned in the available courses.⁵⁰⁵ It is not mentioned in the 128 available videos in the archived list.⁵⁰⁶ The Nunavut Lawyer Assistance Program (NuLAP) advises that NuLAP’s counselling and other support services are available to Nunavut resident lawyers, articling students, law students, judges and their families who have personal problems.⁵⁰⁷ Through Alberta Lawyers’ Assistance Society, Nunavut also offers a free counselling telephone number. As well, there is a link to an article in which a lawyer, John MacLean, discusses pressures from the legal profession and his hopes to collaborate with mental health workers to discuss indirect trauma.⁵⁰⁸ Under the “For the Public” tab on the main page, in “Access to Justice,” and “Family Violence Prevention – Recommendations,” trauma-informed or directed training is recommended for community service providers by the Pauktuutit Inuit Women of Canada and the Law Society of Nunavut.⁵⁰⁹ Under service providers, they include social services and mental health workers, counsellors, and RCMP as those that require such training. Lawyers are not included in this list. No emotions focused courses were found.

⁵⁰³ “Mandatory Cultural Competency Course” online: *The Law Society of the Northwest Territories* <<https://lawsociety.nt.ca/for-lawyers/mandatory-cultural-competency-course/>>.

⁵⁰⁴ “FINAL REMINDER - CPD Online Programs - The Advocates’ Society” (2 May 2022), online: *Law Society of Nunavut* <https://www.lawsociety.nu.ca/en/news/final-reminder-cpd-online-programs-advocates-society?language_content_entity=en>.

⁵⁰⁵ “Online Programs and Archives” online: *The Advocates’ Society* <https://www.advocates.ca/TAS/Professional_Development/Webcasts/TAS/Professional_Development/Webcasts.aspx?hkey=a5ecdaf9-9043-403b-8fe4-84eacdea1694>.

⁵⁰⁶ *The Advocates’ Society On Demand Webcasts Archive* (2022), online: *Vimeo* <<https://vimeo.com/ondemand/tasarchives>>.

⁵⁰⁷ “Nunavut Lawyer Assistance Program (NuLAP)”, online: *Law Society of Nunavut* <<https://www.lawsociety.nu.ca/en/lawyers/nunavut-lawyer-assistance-program-nulap>>.

⁵⁰⁸ *Ibid*; Carolyn Curtis, “NuLAP a Vital Service for Nunavut Lawyers” *The Polar Barristers* (Winter 2017) 1 online: *Law Society of Nunavut* <<https://www.lawsociety.nu.ca/sites/default/files/website-general/2017-Polar-Barristers-Newsletter-Final-E.pdf>>.

⁵⁰⁹ “Recommendations” online: *Law Society of Nunavut* <https://www.lawsociety.nu.ca/en/recommendations?language_content_entity=en>.

4.2 n) Law Society of Yukon

No resources were available for any courses or resources related to the search terms. After looking through the website, only the tab titled, “CPD Events” was relevant for review. Out of the listed upcoming CPD events and the previously held events, only one course description includes the word “trauma” as the counsellor who was presenting specialized in trauma regarding children and family matters.⁵¹⁰ The course itself was not about trauma. In another course, trauma is not mentioned, however it discusses the well-being of lawyers who are struggling with the realities of practicing during a pandemic.⁵¹¹

4.2 o) The Canadian Bar Association

The CBA is not a statutorily created organization but a professional organization with voluntary participation from lawyers, excepting New Brunswick lawyers (due to their agreement with the Law Society of NB). CBA Branches located in each province and territory are a significant provider of legal education opportunities for lawyers across the country.⁵¹² It is their mission “[t]o improve and promote the knowledge, skills, ethical standards and well-being of members of the legal profession.”⁵¹³ Therefore, the CBA shares the responsibility of educating lawyers on trauma-informed practice alongside law societies.

The CBA website contains links to several topics that are tangentially related to trauma. For example, one tab linked to unconscious bias resources. As previously noted in chapter 3.3 c), unconscious bias, also known as implicit bias is related to trauma-informed practices.⁵¹⁴ The

⁵¹⁰ Justice Karen Wenckebach, Shayne Fairman & Dr Zoe Armstrong, “Children and Family Law” online: *Law Society of Yukon* <<https://lawsocietyyukon.com/for-the-lawyer/continuing-professional-development/cpd-events/>>.

⁵¹¹ Derek LaCroix, “Getting Back to Work: Developing Well-Being to Deal with the Changing Times” (13 July 2021), online: *Law Society of Yukon* <https://lawsocietyyukon.com/cpd_event/getting-back-to-work-developing-well-being-to-deal-with-the-changing-times/>.

⁵¹² *Supra* note 432.

⁵¹³ “Canadian Bar Association - Mission & Vision” online: *Canadian Bar Association* <<https://www.cba.org/Who-We-Are/About-us/Mission-and-Vision>>.

⁵¹⁴ “Unconscious Bias Resources”, online: *Canadian Bar Association* <<https://www.cba.org/Sections/Women-Lawyers/Resources/Resources/2020/Unconscious-Bias-Resources>>; Dr Pragya Agarwal, “Unconscious Bias: How It Affects Us More Than We Know” *Forbes* (3 December 2018), online: <<https://www.forbes.com/sites/pragyaagarwaleurope/2018/12/03/unconscious-bias-how-it-affects-us-more-than-we>>.

links include a CBA webinar on “uncovering unconscious biases and leading inclusively,” the Harvard implicit bias test, TED talks, and Law Society workshops (including one from Ontario).⁵¹⁵ Within the links relating to the Truth and Reconciliation Calls to Action, there is a section reserved for trauma-informed lawyering links.⁵¹⁶ These include journal articles, a trauma toolkit developed for service providers, a book on how to guide sexual assault victims through the legal system, and the previously mentioned Nova Scotia Barristers’ video on best practices for trauma-informed legal practice.

With respect to seminars directly related to trauma-informed practice, one seminar directed at judges and led by the Honourable Sheilah L. Martin of the Supreme Court of Canada and Myrna McCallum focused on how to reduce harm in legal practice.⁵¹⁷ Other resources include transcripts from CBA podcasts such as one in which the speakers discuss multigenerational (another name for intergenerational) trauma and residential schools.⁵¹⁸ In a podcast regarding the Calls to Action 34-40 (which address the issue of overrepresentation of Indigenous people in the justice system), the host, CBA President Brad Regehr, speaks with Harold Johnson about how trauma can spread within a community. Johnson states:

As a Crown Prosecutor, I handled 1,500 files a year in Northern Saskatchewan. Just assume 1,000 of those files documented a trauma – multiple traumas, because it isn’t just the victim; we know that the offender is traumatised by the atrocities that they commit as well. So you’ve got an offender, a victim, and the five kids who watched in each of those files. Now take my 1,000 files and multiply it by 11 Prosecutors for Northern Saskatchewan, and we’ve got 11,000 files a year, each documenting multiple traumas. And there’s only 37,000 people in Northern Saskatchewan – it doesn’t take very many years until that population is traumatised multiple times.

know/?sh=6c4c0cc66e13>; Anton Dijkster, “Consciousness: a neural capacity for objectivity, especially pronounced in humans” (2014) 5 *Frontiers in Psychology* 1 at 11-12.

⁵¹⁵ *Supra* note 514.

⁵¹⁶ “Truth and Reconciliation Toolkit for Firms” online: *Canadian Bar Association* <<https://www.cba.org/Truth-and-Reconciliation/Resources/Take-Action>>.

⁵¹⁷ “The Canadian Bar Association : Trauma-Informed Judging (On-Demand)” (27 May 2021), online: *Canadian Bar Association* <https://www.cbapd.org/details_en.aspx?id=NA_NA21jud02a&_ga=2.94481311.206384393.1636313150-596345502.1635463131>.

⁵¹⁸ Brad Regehr, *The Every Lawyer - Conversations with the President - Presented by The Canadian Bar Association* (2018 – 2021) online: *Canadian Bar Association* <<https://www.cba.org/Podcast/Transcripts/Beyond-the-CTAs>>.

Now you've got a highly traumatised civilian population, and a traumatised police force; I don't know how many members I know right now who are on PTSD leave – they've just seen too much. All of those files that I looked at, with all of those pictures of crime scenes and autopsies, the ones that filled me with vicarious trauma. Well, those police officers were there, and they weren't looking at pictures of blood – they could smell the blood. *So we've got a traumatised population and a traumatised police force interacting, and the public expects good things to come from that, and it isn't working.*⁵¹⁹

This broader view of the impacts of trauma from Johnson's personal experience working as a prosecutor echoes the findings about trauma in neuroscience and psychology, especially its impact on lawyers. When looking into the detailed ways that interacting with trauma affects a person, it is easy to see how, when unaddressed, it can spread through a community. As stated in a CBA National article on indirect trauma, it is like second-hand smoke.⁵²⁰

In other CBA resources that reference trauma, a letter to the Immigration and Refugee Board (“IRB”) Chairperson regarding gender-based persecution recommends that a trauma-informed approach be used when addressing claimants including mindfulness of body language, facial expression, and matching their vocabulary. Further, the letter emphasizes that not everyone who is impacted by trauma is aware of this or aware of how the trauma has affected their memory or self-expression.⁵²¹ The letter was written by Mark Holthe, chair of the CBA Immigration Law Section. His recommendations present clear examples of how one can meet a person where they are at in trauma-informed and considerate ways. As for emotion related resources, I found two: the first was an advice column named “Dear Advy” which answered anonymous letters from lawyers, and the second was a link to the CBA Well-Being page, as previously discussed in chapter 4.3 k).

⁵¹⁹ Brad Regehr, *Conversations on Calls to action 34-40 - Indigenous people in the justice system – transcript* (2021) online: *Canadian Bar Association* <<https://theeverylawyer.simplecast.com/episodes/cta-34-40-indigenous-people-in-the-justice-system/transcript>> at 00:09:35 [emphasis added].

⁵²⁰Carolynne Burkholder-James, “Vicarious trauma in the legal profession” (21 March 2019) online: <https://www.nationalmagazine.ca/en-ca/articles/the-practice/workplace/2019/vicarious-trauma-in-the-legal-profession?_ga=2.230045402.759028833.1642913518-920737129.1642913518>.

⁵²¹ Mark Holthe, *Guideline on Gender Considerations in Proceedings before the IRB* (2021) online: *Canadian Bar Association* <<https://www.cba.org/CMSPages/GetFile.aspx?guid=aa5e51ee-08d8-4185-a198-cf5a19fba1cf>>.

4.3 Commentary and Analysis

4.3 a) Trauma-Informed Lawyering and Emotional Acknowledgment are Core Competency Skills

The best interests of the client does not necessarily mean what the lawyer *perceives* would be best. Rather, it requires the lawyer to set aside their own biases and personal experiences with trauma in order to truly connect with and work together with a client; all while reducing harm (as best as the lawyer can) for the client. To do so successfully, lawyers need to be supported in prioritizing their well-being, emotional acknowledgment, and trauma-informed lawyering skills; they need the support of law societies and employers to have the time, safety, and freedom to explore these concepts. As such, this thesis calls for mandatory training on the nature, science, and subjective experience of trauma (including emotional acknowledgment and management) for all lawyers as well as mandatory implementation of trauma-informed principles, including in the workplace (discussed below in chapter 4.3 b)).

For most Law Societies across Canada, the Federation of Law Societies, and the Canadian Bar Association, it is clear that trauma-informed lawyering has been considered, discussed, and taught for roughly the past decade. However, the extent of these is not yet adequate to successfully practice trauma-informed lawyering. Despite these resources, the acceptance of neuroscience and psychology findings on trauma by other fields, and despite the experiences of many lawyers like Johnson or McCallum, much of the current trauma-informed resources offered by law societies are lacking.

First, the resources are largely optional despite the fact that trauma is so prevalent. The few courses required by some law societies, such as the Law Society of Alberta, are about Indigenous history, the Truth and Reconciliation Calls to Action, or for lawyers working with sexual assault victims/survivors. While these courses are necessary, general courses on trauma and trauma-informed practice are also necessary for all lawyers, no matter the field of practice. Second, many of the resources are too focused on narrow conceptions of trauma. There is limited discussion about the subjective nature of trauma and how this differs from law's usual

“objective” view. There is too much emphasis on what the client’s context may be and not enough on the lawyer’s own context, biases, etc. or how these may impact their provision of legal services. Further, there is still not enough education about lawyers’ own emotions. As this thesis has established, this is a significant omission because emotions can inform how one thinks, forms biases, and creates expectations. Without acknowledgment or awareness of emotions in one’s self, lawyers will be less likely to practice empathy with themselves and their clients, to consider their own needs, and to minimize the harms previously discussed in chapter 3. Third, many resources do not include practical advice for organizations on how to build space towards achieving trauma-informed practice. Useful pragmatic advice could include how to transition to trauma-informed practice, especially considering such transitions will be at different paces for each lawyer. Fourth, in the Sherbrooke Report, one lawyer shared that they avoided law society mental health services because the services seem more focused on one’s value as a productive lawyer instead of one’s value as a human being.⁵²² Focusing on one’s productivity would not be trauma-informed as it fails to empathize with the individual and instead, sees them as a lawyer first. More research on the comparative effectiveness of trauma-informed or emotional acknowledgement resources that focus on increase of productivity versus overall well-being would be useful.

Trauma-informed skills are not tangential to lawyering, they are primary. The optional nature of trauma-informed courses does not match data regarding the effects of trauma and how widespread these are amongst the general population. This is not to detract from the very real impacts of trauma on many Indigenous people or on those who experience sexual or family violence. It is acknowledged that those who experience these types of trauma desire to be considered and seen as more than their trauma. Indigenous people lived in good health with self-determination and in balance with their environments for thousands of years before colonial systems. Care must be taken by law societies to ensure that trauma-informed courses do not put people into categories of who is and is not impacted by trauma. Further, understanding and acknowledging trauma and its prevalence can help lawyers better understand a vast range of human behaviour and contexts. Without such knowledge, lawyers risk minimizing someone else’s experience when it does not fit with one’s biases or preconceived expectations about

⁵²² *Supra* note 1 at 59.

trauma. Otherwise, offering trauma-informed courses on an optional basis undermines the very message that lawyer advocates and educators like McCallum are working hard to put forth: that trauma is widespread and lawyers will encounter it whether secondarily or in other ways. It therefore makes sense that trauma-informed lawyering courses need to form a part of lawyers' ongoing professional development.

As discussed earlier in this thesis, indirect trauma “is considered to be a normal reaction of exposure to others' trauma and therefore cannot be avoided...”⁵²³ Therefore, it is the responsibility of law societies to ensure lawyers are educated on the prevalence of indirect trauma and to provide tools for lawyers to help alleviate or prevent symptoms. Without the leadership of law societies, lawyers may avoid trauma-related education given that it is inherently uncomfortable material that can bring up difficult feelings for those who start learning about it.

Lawyers are bound by their respective codes of professional conduct to act in the best interests of the client. This thesis argues that the best interests of the client require lawyers to keep up-to-date with verifiable science about human beings and their behaviour, including how trauma can impact people. As people who already face adversity are more vulnerable to experiencing legal problems,⁵²⁴ those who face both adversity and encounter legal problems are then at an even higher risk of developing even more legal problems. Thus, these issues further compound and compromise opportunities for peaceful resolution.⁵²⁵ The financial costs of legal systems are considerable and largely spent on court systems, tribunal services, legal aid plans, policing, correctional facilities, and prosecutions.⁵²⁶ Trauma-informed training and greater knowledge about one's own emotions can have a positive impact on people who encounter any of these systems, regardless of their experiences with trauma. Lawyers who know how to healthily

⁵²³ *Maguire*, *supra* note 11 at 240; see also *Maki*, *supra* note 5 at 87-89.

⁵²⁴ Ab Currie, PhD & Lisa Moore, “Social-and-Economic-Adversity-Experienced-by-Canadians-and-Everyday-Legal-Problems-Ab-Currie-Lisa-Moore.pdf”, (2018), online: *CFCJ* <<https://cfcj-fcjc.org/wp-content/uploads/Social-and-Economic-Adversity-Experienced-by-Canadians-and-Everyday-Legal-Problems-Ab-Currie-Lisa-Moore.pdf>> 1 at 34.

⁵²⁵ *Ibid* at 35.

⁵²⁶ Lisa Moore, Mitchell Perlmutter & Trevor C W Farrow, “Public and Private Spending on Justice in Canada” (2018), online: *CFCJ* <<https://cfcj-fcjc.org/wp-content/uploads/Social-and-Economic-Adversity-Experienced-by-Canadians-and-Everyday-Legal-Problems-Ab-Currie-Lisa-Moore.pdf>>.

address their own emotions, pay attention to their own biases, and who understand the importance of meeting people where they are at also model how to do so to clients. Otherwise, legal matters will continue to “create and exacerbate other legal, social, and health related problems.”⁵²⁷ As noted by the Canadian Forum on Civil Justice:

A legal problem may be a health problem (stemming from the stress of mounting legal fees, for example), an employment problem (resulting from time spent away from work to address a legal problem) a social, family or personal problem (due to a relationship breakdown or other personal issue), a social assistance problem (with benefits being denied after loss of employment), a housing problem (caused by an inability to make mortgage payments due to legal fees) and so on... Ironically, these ‘non-monetary’ ‘knock-on’ costs are actually quite expensive, running the state an estimated \$800M annually in additional employment insurance, social assistance and healthcare costs.⁵²⁸

Rather than setting a client up to experience all of the above challenges and costs, lawyers can instead draw on trauma-informed lawyering skills to help their clients accurately assess their desired actions and outcomes towards making informed decisions.

4.3 b) Requiring Organizations and Law Firms to Set Lawyers Up for Success in Addition to Individual Mental Health Services

Much of what has been discussed has focused on the lawyer’s responsibility to acknowledge one’s emotions, the costs of emotion suppression, and the impacts of trauma. However, there remains a tension as to whether the average lawyer has the time, emotional energy, or mental energy to learn about their emotions or reduce harm by learning trauma-informed lawyering skills. Learning how to acknowledge one’s emotions is not easy, and there are reasons why many people, not simply lawyers, tend to avoid them. It takes a great deal of energy and effort to confront one’s self in such a vulnerable way while practicing in a profession that both implicitly and explicitly encourages fragmentation of the self. It is possible to do so even amid the high demands from the legal profession. However, with the stress of billable hour targets, demands from too many files, expectations of long hours at the expense of personal relationships, hobbies,

⁵²⁷ Ab Currie, “The legal problems of everyday life” in Rebecca L Sandefur, ed, *Sociology of Crime, Law and Deviance* (Emerald Group Publishing Limited, 2009) 1.

⁵²⁸ *Supra* note 526 at 5.

and interests, and other stresses, lawyers may not have the energy, time, or interest to make such changes. Further, while a shift in viewing mental health seriously has started in law schools, this cannot be the only place. These students may ultimately work for people who do not understand the importance of learning about trauma, mental health, or emotions which is why mandatory trauma-informed training is essential for all legal professionals.

The emphasis law societies have made on mental wellness for lawyers in recent years is important for emotional acknowledgment and trauma-informed skills. However, “[w]ithout directly and openly addressing the crucial issue of childhood adversity in the national legal community conversation, attempts at increasing lawyer wellness will inevitably fall short.”⁵²⁹ If lawyers are not taught about the impacts of their childhood context, efforts to address mental health may only deal with narrower or short-term issues. In the long-term, people in the profession may continue to experience mental health challenges. The ongoing statistics on lawyers’ rates of reported depression, suicide, substance use, anxiety, and other issues show that current law society efforts are not addressing the root causes of lawyers’ poor well-being.⁵³⁰ The concerning trends related to lawyers’ mental health are also found in law students, all of which supports that those who pursue a legal career need self-awareness skills, trauma-informed skills, and emotional acknowledgment to buttress their well-being.

Reducing harm for a client and reducing harm for lawyers goes hand in hand. This is where law societies have the ability to lead and step in to encourage change in legal culture. The necessary changes must also come from the broader scope of law firms and other organizations who employ lawyers. Research that collects data on the impacts of trauma-informed training or emotional acknowledgment teachings on a lawyer’s perspective, stress, and emotional state would be helpful to determine whether such courses are useful. Currently, there appears to be no data collected by any of the law societies, the CBA, or the Federation regarding the efficacy of trauma-informed courses, mental wellness services, or other related resources. This untracked information is a lost opportunity that law societies could utilize to ensure their resources are

⁵²⁹ *Oehme*, *supra* note 120 at 1315.

⁵³⁰ “New study on lawyer well-being reveals serious concerns for legal profession” (December 2017), online: *American Bar Association* <<https://www.americanbar.org/news/abanews/publications/youraba/2017/december-2017/secretcy-and-fear-of-stigma-among-the-barriers-to-lawyer-well-bei/>>; *Krill*, *supra* note 3.

making positive impacts on the profession and the public. As stated, law societies have a mandate to protect the public. In the context of trauma-informed lawyering and emotional acknowledgment, a lawyer's interest in their mental health directly impacts the public that they serve, including their ability to act ethically.

By requiring employers and organizations to be accountable for bettering the health of the lawyers who work for them, they will also support improvements in lawyers' health and well-being. Law societies need to measure the impact of the services they offer to lawyers continually to determine their effectiveness. Law societies can also support lawyers to safeguard vulnerable clients where needed. Where it is possible for law societies to regulate employers, this will more clearly direct change and action towards mandatory training about trauma, emotions, and the need for trauma-informed practices. Law firm regulation is starting to take shape in Saskatchewan and in Ontario.⁵³¹ Other law societies may not have the legislative authority to regulate firms but these jurisdictions can still strongly encourage employers to require trauma-informed education and teach about emotional acknowledgment. A further recommendation for law societies that do not currently have the ability to regulate law firms is to amend their statutes to allow for this regulation. It is likely that a bigger cultural shift in legal practice will occur when law societies take ownership of their responsibility to ensure lawyers are up-to-date about trauma and human behaviour, pursuant to their respective professional statutes. Even though most law societies have 24/7 telephone lines to mental health services, videos, pamphlets, self-care webinars, peer support systems, etc., much of this is moot if lawyers access these services and then return to work in the same unhealthy and toxic conditions.

4.4 Conclusion

Law societies are responsible for protecting the public's interest and as trauma is a public health issue, it follows that lawyers must be educated about it. The above resources found on law society websites across Canada generally point towards a positive direction of developing trauma-informed lawyering as a core competency requirement. However, trauma-informed

⁵³¹ "Firm Regulation" online: *The Law Society of Saskatchewan* <<https://www.lawsociety.sk.ca/regulation/firm-regulation/>>; "Firm Regulation" online: *Law Society of Ontario* <<https://lso.ca/about-lso/initiatives/firm-regulation>>.

lawyering needs to be primary in legal practice to even begin to adequately address the prevalence of trauma. Many of the available resources take disparate approaches to trauma, including differing definitions of trauma as well as differing ideas about lawyers' responsibilities. More consistency across law societies and mandatory resources are needed. Courses on trauma-informed lawyering, the costs of emotional suppression, and how all of this connects to one's own biases, well-being, and the experience of their clients has the potential to reduce harm for everyone. It is also law societies' responsibility to make the distinction to lawyers about the importance of improving mental health for the betterment of the profession as a whole over increasing productivity. Care has to be taken in providing resources and services to ensure that the priority is to improve the health for all, rather than for higher productivity. Healthier lawyers will make for a healthier profession and healthier working relationships with clients.

Learning about emotions and how to engage in self-reflective practices, especially for those who may be accustomed to suppressing emotions, will likely involve a lot of discomfort. Each individual will handle their emotions differently, and have different levels of empathy, humility, or emotional awareness. Great care must be taken in teaching trauma-informed lawyering as each individual will learn at a different pace and in different ways. Lawyers learning these skills will need support from broader structural entities including from colleagues, employers, and law societies. Similarly, but on the other end of the spectrum, some lawyers may have already experienced trauma and may be more empathetic but not know how to keep healthy distance between themselves and clients. Other lawyers may already be familiar with their own emotions, biases, and trauma-informed lawyering. However, as neuroscience and trauma continue to evolve along with trauma-informed skills, ongoing education on these topics is a must. Finally, law societies need to provide clear pragmatic solutions that are consistently tracked and reviewed for effectiveness and impact on lawyers and clients. All of this can be achievable through firm regulation and holding employers accountable, where statutorily possible.

Chapter 5: A Bridge From Knowledge to Action – Recommendations for Next Steps Towards Trauma-Informed Lawyering, Harm Reduction, and Healing

After discussing the prevalence of trauma in life and in legal practice, the connection to emotional acknowledgment, and the responsibility of law societies to educate and support lawyers as they encounter trauma, the next question that arises is: “What now?” This chapter outlines recommendations that I have identified as possible steps to move towards trauma-informed lawyering. These recommendations aim at shifting the legal culture, and what law societies can do or consider in order to facilitate that shift. Resources targeting harm and trauma-reduction measures from other professions, will be referenced. The last section lays out recommendations for 1) further research and action, 2) other information which ought to be collected to show the harmful impacts of legal systems at present on both clients and lawyers, and 3) other ways that data be collected in order to measure whether any trauma-informed required courses and changes are positively impacting lawyers, legal systems, and clients.

Most importantly, this section seeks to impart on the reader that while trauma, trauma-informed lawyering skills, and emotional acknowledgment may be difficult to learn or confront, ultimately, having these skills leads to pragmatic harm reduction skills and a stronger sense of agency amongst all parties. Actively questioning and noticing one’s own emotions can include feelings of discomfort, apprehension, and defensiveness. This comes hand-in-hand when learning how one’s own biases and previous emotional reactions have influenced how they practiced law or behaved towards clients or legal professionals. It allows the individual to hold themselves accountable to their own actions and to create space for what ultimately promotes healing and empathy towards a successful and healthier way to practice law.

5.1 Recommendations for Law Societies in Canada

Law societies have the opportunity right now to seize the wealth of information available from other professions that are adhering to trauma-informed practices and methods and adapt these to

the legal profession.⁵³² First, I recommend that law societies consider clarifying their intentions in acting for the public interest, how this has been demonstrably achieved in the past, and what the law societies could improve upon. In my view, the public interest can (and arguably must) overlap with supporting lawyers towards better overall health and healthily sustainable legal practice. As statistics about the rates of depression, anxiety, or substance use among the profession remain relatively consistent, the question then is: how much worse must the health of lawyers become before organizational and structural levels are held accountable for their contribution towards the undue stress and high demands in legal practice? How can organizations and law firms be supported to understand the importance of mental well-being and trauma-informed practice?

In order to significantly shift legal culture, my second recommendation is for law societies to research extensively about trauma through interdisciplinary projects with different helping professions, such as social work, medicine including nursing, physicians, and surgeons, mental health and substance use professionals, along with neuroscience researchers. This way, each discipline can learn from the other and work towards reducing harm in systems together. For example, disciplines could work together towards creative ways to provide wrap-around services for individuals that address existing barriers to justice, safe shelters, resources for the family, and access to nutritious food. What is gathered from research and these interdisciplinary projects can then be used to educate lawyers and law students towards understanding the prevalence of trauma and its impacts.

Additionally, law societies may wish to create a separate department or working group that researches and learns how to implement trauma-informed skills into practice for professors, lawyers, law students, law offices, and courts. For example, the Medical Council of Canada offers the MCC 360 program which “was developed to provide physicians with meaningful and actionable feedback that leads to positive practice changes.”⁵³³ For law societies, these research

⁵³² See e.g. *Trauma-Informed Practice Guide* (BC Provincial Mental Health and Substance Use Planning Council, 2013); *Paddling Together - Report* (First Nations Health Authority, 2020); Justine Huang, “Trauma Informed Practice Institute 2021 Training” (11 May 2021), online: *Department of Educational and Counselling Psychology, and Special Education - UBC* <<https://ecps.educ.ubc.ca/trauma-informed-practice-institute-2021-training/>>.

⁵³³ “MCC 360 – Homepage”, online: *Medical Council of Canada* <<https://mcc.ca/assessments/mcc360/>>.

projects could lead to an actionable project like MCC 360 with the intention to ultimately center on the humanity and dignity of individuals by building empathy and compassion. Alternatively, these organizations may consider hiring consultants, people from different disciplines including law who have researched trauma-informed practices and can give talks or host group sessions. Consultants or researchers could meet with organizations and work together with law societies to reimagine the workplace as safer and healthier for both lawyers and clients.

My third recommendation to shift the legal culture is to create ways in which lawyers and law societies are more accountable to clients with the goal of improving communication and transparency (as opposed to punishment). In many sectors, particularly with non-profit organizations, people with lived experiences relevant to the organization are required as contributing members of the board of directors. As part of the MCC 360 national program, feedback is gathered from patients, colleagues, and co-workers to let people know how they are doing. This type of format can be augmented towards positive change for lawyers.⁵³⁴ Clients who wish to share about their experience hiring or working with a lawyer and their experiences with the legal systems need to have a way to share these with law societies and lawyers in order to hold lawyers more accountable to their everyday actions. I understand there are a lot of considerations to factor in regarding privacy and confidentiality matters. However, without ever hearing from clients (unless a legal matter amounts to a law society disciplinary decision), organizations, law firms, and lawyers will not have the opportunity to hear about the impact they are making on their clients. Allowing a way for clients to provide feedback in a safe way will provide clarity on what can be improved and what is most impactful to the client. For example, a client could, with their consent, provide anonymized feedback to be shared with the firm's lawyers for consideration. The lawyers could address any concerns together by changing practices, reconsidering any biases, or sharing what is working with everyone on the team.

A fourth recommendation is for trauma-informed lawyering to be added as a required core competency skillset for all lawyers. For this, more courses will be needed. Courses that follow the SAMHSA trauma-informed service delivery elements, discussed in chapter 1.2 and briefly

⁵³⁴ See Kenya Rogers, *Honouring the Stories of Student-Survivors: Trauma Informed Practice in Post-Secondary Sexualized Violence Policy Review* (Thesis, Master of Arts, University of Victoria, 2018) [unpublished].

repeated here, would set a strong foundation towards trauma-informed lawyering skills with at least one workshop for each of the three elements: 1) the prevalence of trauma; 2) how trauma affects everyone including those who work in the legal system; and 3) responding to these elements by putting this knowledge into practice. An example of putting this knowledge into practice would be a lawyer who can, in the midst of a trial, acknowledge challenging emotions while also keeping herself regulated and focused on her role in court.⁵³⁵ These workshops and courses ought to be included as part of the bar courses or exams taken by all articling students before they become lawyers. Other necessary courses would need to build on emotional acknowledgment and emotional intelligence. In addition to more courses, the ways these are taught can be creative as well. For example, courses may be introduced with practical methods to use immediately at the start of a busy litigation season. After several weeks, this group of lawyers can check back in with their instructors to discuss what impact these methods made on their legal practice, what worked, what was challenging, and what did not work. Trauma-informed skills can also be an appropriate response to trauma and adverse impacts arising from the pandemic as it calls upon everyone to approach each other with empathy and openness to the possibility of trauma. Even if not all lawyers will work with clients who have experienced trauma, the resulting focus on trauma-informed practice and wellness becomes a useful framework to prepare for legal practice (and working with people).⁵³⁶ There is no limit to how creative law societies can be in shaping a more sustainable profession over the long-term.⁵³⁷

5.2 Recommendations for Future Research/Measurements of Impact

Alongside these recommendations, and with any attempts to address legal culture, the harm arising out of legal systems, lawyers' mental health, or trauma-informed education, data needs to be collected at every level to trace the impact of these efforts. This is a broader application of considering intention (for example, an intention could be healthier legal practice with healthier lawyers and healthier clients) and such data can be used to track the efficacy of meeting these

⁵³⁵ Cheryl Giesbrecht & Brenda Yuen, *CBA Articling Students North: Trauma Informed Lawyering: Introduction to Bringing Balance to Legal Practice* (Zoom webinar, Apr 2022).

⁵³⁶ Katz, *supra* note 29 at 377.

⁵³⁷ See Sarah Katz, "The Trauma-Informed Law Classroom: Incorporating Principles of Trauma-Informed Practice into the Pandemic Age Law School Classroom" (2020) 25:1 UC Davis Soc Just L Rev 17.

intentions. Otherwise, any positive changes may go unrecognized and unutilized. Efforts must be tracked and projects or actions be continually revisited so they can be improved upon for the betterment of lawyers and clients. This can also be done on an individual level for a lawyer to track their own experience or progress in learning different ways to practice, which merges with the concept of self-reflective practice. Medical research fields are well-acquainted with tracking the efficacy of transformative projects to both measure their impact and to advocate for more funding and increased programming where such changes produce positive results.⁵³⁸ Law societies can utilize the data collected from building a trauma-informed legal profession to further more research, programs, services, or resources towards healthier legal practice for lawyers and healthier legal outcomes for clients.

My first recommendation towards future research on trauma-informed lawyering is to closely review current reports to consider how to address the challenges faced by the legal profession and to create practical responses to address such challenges. This includes the Barreau Report, the Sherbrooke Report and the data collected by the Canadian Forum on Civil Justice (CFCJ). CFCJ has been reviewing data, researching, and presenting reports regarding different aspects of the justice system with a view to advancing civil justice by making the system more accessible, effective and sustainable; they seek to place the citizen at the centre of the civil justice system.⁵³⁹ CFCJ findings are an excellent example of how impactful data can be when compiled to show, for example, how many consequences litigants experience when dealing with a legal matter, aside from financial costs (as discussed in chapter 4.3 a)). Similar to the CFCJ's approach, law societies must consider how to measure this data in ways that are non-traditional and prioritize health and well-being in the profession and for the client as opposed to prioritizing financial gain. If trauma-informed practice courses, emotional acknowledgment courses, or data collection of these prioritizes financial gain or productivity, they will likely fall short. Therefore, care must be taken to instead prioritize health, emotional growth, and empathy if using any of the recommendations in this thesis.

⁵³⁸ See e.g. Sue Kildea et al, "Reducing preterm birth amongst Aboriginal and Torres Strait Islander babies: A prospective cohort study, Brisbane, Australia" (2019) 12 *EClinicalMedicine* 43.

⁵³⁹ "About Us", online: *CFCJ-FCJC* <<https://cfcj-fcjc.org/about-us/>>.

My second recommendation towards data collection from trauma-informed transition efforts by law societies is to use non-traditional data collection methods. These methods would help law societies receive a more accurate read of the impacts they are making on law students, lawyers, clients, judges (perhaps collected in connection with the National Judicial Institute), and any other people who use or are a part of the legal system. An example of non-traditional data collection methods are the Social Return on Investment (SROI) method used by Health Canada or the Social Value method, adopted by the United Kingdom and codified into *The Public Services (Social Value) Act 2012*.⁵⁴⁰ SROI uses “the notion that all organizations create value that consists of economic, social and environmental value” and seeks to understand broader values created by organizations on their surrounding communities.⁵⁴¹ “Social value is about a movement of committed professionals around the world who can see a better future – one where social *and* financial value is accounted for – where people matter – and we focus on what is important to all of us!”⁵⁴² For example, these methods could be used to measure the impact on incarceration rates that are disproportionate to the population of Indigenous and First Nations people, whether family law conflict can be reduced or mitigated ahead of time, the time it takes to resolve someone’s matter in court as compared to their overall well-being or satisfaction with the process, or the overall impact on the rate of recidivism in criminal law. These methods centre around the experience of the individual to determine whether the work done is having a *positive* impact from that individual’s perspective. Ultimately, a positive impact on an individual’s long-term health and ability to thrive will benefit the larger community’s long-term health and ability to thrive as well. Social Value and SROI methods consider different people from a variety of contexts. This matches with the intent of trauma-informed lawyering to reduce harm as much as possible, to meet the individual where they are at, and to promote healthier interactions within legal systems.

5.3 Conclusion

⁵⁴⁰ “What is social value?”, online: *Social Value Portal* <<https://socialvalueportal.com/resources/what-is-social-value/>>; *Public Services (Social Value) Act 2012* (UK), 2012, c 3.

⁵⁴¹ Sara Olsen, Jeremy Nicholls & Karim Harji, “Social Return on Investment” (January 2008) 1.

⁵⁴² “What is social value?” online: *Social Value Portal* <<https://socialvalueportal.com/resources/what-is-social-value/>> [emphasis original].

A lack of understanding about trauma can lead lawyers to interact with people, including clients, in ways that may exacerbate the pain that person is experiencing. When people feel threatened or unsafe, they are much less likely to understand the complexities of legal systems, the rules and procedures that come with it, and much less likely to make informed decisions. Trauma-informed lawyering and emotional acknowledgment present different and healthier ways to practice law. Putting trauma-informed skills into practice by teaching self-reflection, emotional acknowledgment, familiarity with one's emotional reactions, and how these impact their practice and their clients is a core requirement of becoming trauma-informed. Such valuable lessons will help individual lawyers become more self-aware and learn how to mitigate the very real impacts of stress and trauma in law. To support these major changes in individual lawyers, change must also happen through law societies regulating firms (where possible), and more varied and mandatory trauma-informed courses in connection with emotional acknowledgment. Any of these changes must be concurrently measured for their impacts and efficacy amongst both lawyers and clients.

At a time when we are collectively experiencing the unpredictability of life as an effect of a global pandemic and in a profession where more than half of lawyers report experiencing psychological distress or burnout, understanding how trauma works and manifests is a key piece towards helping lawyers and clients better navigate legal systems. It will also help lawyers build a healthier practice for themselves.⁵⁴³ While trauma is a topic that people may rather avoid, learning about and understanding trauma explains a lot about human behaviour that is often hard to understand or empathize with, and it can provide explanation for why lawyers may feel frustration when their work does not impact clients as they may expect. Revisiting Peña's quote from chapter 2.1, what harm can come to lawyers and legal systems from becoming more diligent, empathetic, self-aware, and compassionate? Trauma is an inevitable part of life. It is irresponsible and even nonsensical to continue to practice in a way that ignores or avoids key evidence of basic human behaviour and the impacts of trauma on people who, for various reasons, find themselves within the legal system. We can do better. We must do better.

⁵⁴³ Darena Muça, "Elevated Incidence of Mental Illness in the Legal Profession", (28 November 2019), online: *McGill Journal of Law and Health* <<https://mjlh.mcgill.ca/2019/11/28/elevated-incidence-of-mental-illness-in-the-legal-profession/>>.

Trauma-informed skills and emotional acknowledgment are just two root aspects that connect to many longstanding issues within the legal profession, legal culture, and legal systems.

Witnessing the legal system break a person down has an adverse impact on everyone who is involved or related to that person, even tangentially. Ultimately, this thesis argues first, that the lives of lawyers and people who use legal systems can be improved upon by first recognizing that people are inherently worthy of consideration regardless of who they are or what they have done. Second, it illustrates how fragmentation of the self from emotions impairs, rather than improves one's ability to lawyer. Third, it demonstrates how learning to be trauma-informed requires a commitment to more than simply learning what these skills are. It requires a commitment to also embody these skills, use these skills to confront one's own biases and initial emotional reactions, and to practice these skills with one's self as much as with others.

While trauma-informed skills are a somewhat new concept, the foundational principles behind these skills share similarities with a lot of Indigenous and First Nations cultural teachings that have been historically practiced for thousands of years before colonial contact. Many Indigenous and First Nations people practiced holistic wellness of the individual, understanding that each individual is a part of a larger community; sustainable stewardship of the land; balance with the natural world and spirit world, anti-oppression, non-interference, and self-determination.⁵⁴⁴ Therefore, trauma-informed skills are essentially a return to these ways of relating to one's self and one another. Indigenous and First Nations people may therefore benefit the most from trauma-informed lawyering as they are the most impacted in criminal law and child welfare matters; two very litigious and traumatizing areas of legal practice with far reaching impacts, including cyclical intergenerational impacts. Trauma-informed lawyering skills, emotional acknowledgment and management skills, and increased empathy and consideration for one another, will therefore be a triumph in progression for Indigenous and First Nations people, lawyers, and all people in the country known as Canada.

⁵⁴⁴ Brianna Olson, *Trauma-Informed Interventions through an Indigenous Worldview* (Western University, 2018), online: <https://www.vawlearningnetwork.ca/webinars/recorded-webinars/2018/webinar_2018_5.html>; Chad Pawson, "Indigenous Land Stewardship program applies old solutions to modern problems" *CBC News* (14 October 2019), online: <<https://www.cbc.ca/news/canada/british-columbia/indigenous-land-stewardship-native-education-college-vancouver-1.5319029>>.

While trauma-informed lawyering skills are not mentioned in the Truth and Reconciliation Calls to Action, meeting a person where they are at and considering their context and experiences are directly related. These skills are a key part of ensuring that human rights are respected and preserved by doing the hard work of enacting these skills in the present with the hope of a more sustainable and healthy future. In the Honourable Senator Murray Sinclair’s words:

...[R]econciliation is not a spectator sport. You have to do something. So, many people took that to heart and are doing something... and those things are good.

*[T]hose who have more power have more responsibility. So that means that everybody has to convince them to use their power wisely, to use their privilege wisely, to be more open to recognizing the impact that they can have.*⁵⁴⁵

Lawyers have a great deal of power, privilege, and responsibility in legal systems. We are responsible to use our power and privilege in a way that acknowledges and addresses trauma in order to benefit our overall communities. We are responsible for the impact we make on other people, on our communities, and this requires us to take responsibility over how we see and understand ourselves.

⁵⁴⁵ Marie-Danielle Smith, “Murray Sinclair on reconciliation, anger, unmarked graves—and a headline for this story”, online: *Macleans.ca* <<https://www.macleans.ca/longforms/murray-sinclair-on-reconciliation-anger-unmarked-graves-and-a-headline-for-this-story/>> [emphasis added].

Appendix

Adverse Childhood Experiences Study Questionnaire

While you were growing up, during your first 18 years of life:

1. Did a parent or other adult in the household often or very often...

Swear at you, insult you, put you down, or humiliate you?

or

Act in a way that made you afraid that you might be physically hurt?

Yes No If yes enter 1 _____

2. Did a parent or other adult in the household often or very often...

Push, grab, slap, or throw something at you?

or

Ever hit you so hard that you had marks or were injured?

Yes No If yes enter 1 _____

3. Did an adult or person at least 5 years older than you ever...

Touch or fondle you or have you touch their body in a sexual way?

or

Attempt or actually have oral, anal, or vaginal intercourse with you?

Yes No If yes enter 1 _____

4. Did you often or very often feel that ...

No one in your family loved you or thought you were important or special?

or

Your family didn't look out for each other, feel close to each other, or support each other?

Yes No If yes enter 1 _____

5. Did you often or very often feel that ...

You didn't have enough to eat, had to wear dirty clothes, and had no one to protect you?
or

Your parents were too drunk or high to take care of you or take you to the doctor if you needed it?

Yes No If yes enter 1 _____

6. Were your parents ever separated or divorced?

Yes No If yes enter 1 _____

7. Was your mother or stepmother:

Often or very often pushed, grabbed, slapped, or had something thrown at her?

or

Sometimes, often, or very often kicked, bitten, hit with a fist, or hit with something hard?

or

Ever repeatedly hit at least a few minutes or threatened with a gun or knife?

Yes No If yes enter 1 _____

8. Did you live with anyone who was a problem drinker or alcoholic or who used street drugs?

Yes No If yes enter 1 _____

9. Was a household member depressed or mentally ill, or did a household member attempt suicide?

Yes No If yes enter 1 _____

10. Did a household member go to prison?

Yes No If yes enter 1 _____

Now add up your "Yes" answers: _____ This is your ACE Score.

Adapted from: “Original ACE Questionnaire - Trauma-Informed Care Implementation Resource Center - Resource” (3 March 2020), online: *Trauma-Informed Care Implementation Resource Center* <<https://www.traumainformedcare.chcs.org/resource/original-ace-questionnaire/>>.

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