



REVIEW OF THE RCDSO'S PROFESSIONAL LIABILITY PROGRAM

PLP Expert Review Task Force Report

July 2023

Task Force Review of the RCDSO’s Professional Liability Program

Final Report

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Letter to Council

Dear RCDSO Council,

The RCDSO has the responsibility to serve and protect the public interest as it carries out its duties of regulating the dental profession in Ontario. It is with this commitment in mind that in December 2022, the Council appointed the Task Force to conduct its review of the Professional Liability Program (PLP). Over the past six months, the Task Force has conducted a thorough review, acting according to the guiding principles assigned to us. Although developing recommendations that support the financial long-term sustainability of the RCDSO was of utmost importance, all our recommendations were made through the lens of public protection, with the intent to instill continued confidence in RCDSO's ability to act according to its public protection mandate. We have made fifteen recommendations based on the reputational, financial, and regulatory risks we have uncovered. We present this report to you, not as a "yes or no" decision, but rather as an analysis of the current model and a set of options for you to consider.

Now that our recommendations have been made, the RCDSO Council has the opportunity to demonstrate its continued commitment to excellence and quality improvement, as it assesses the identified risks, and determines which mitigation methods meet the risk appetite of the College.

We are grateful for the ongoing access to resources provided by your staff. The information they provided was unbiased, professional, and reliable. The RCDSO should be commended for embarking on this external review, and the Task Force was honoured to have had the confidence of the RCDSO Council in this endeavour.

Respectfully submitted in July 2023, with thanks for this opportunity,

The PLP Expert Review Task Force:

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Executive Summary

All regulators of health professions in Ontario are required to ensure their members have professional liability protection. The Professional Liability Program (PLP) of the Royal College of Dental Surgeons of Ontario (RCDSO) was created in the 1970s to administer this malpractice protection for Ontario's dentists. RCDSO is one of the few health regulatory Colleges in Canada that directly operates an in-house liability program, and recently, the RCDSO has started to consider whether the program should remain in-house. The RCDSO Council established a PLP Expert Review Task Force to conduct a review of the program, to understand PLP's contribution to the public interest, as well as any associated potential financial, reputational and regulatory risks.

The Task Force recognised important benefits associated with the current PLP structure. First, tying PLP to College membership provides assurance that all dentists have access to liability protection, ensuring that all patients experiencing harm or injury through negligence have access to appropriate compensation. The current model also offers simplicity. Inquiries and incidents can be addressed with a simple report to PLP, patients know that any awards and settlements will have adequate resources to fulfill payment obligations and are often provided access to early settlement. Finally, having the oversight of the College brings with it the expectation that protection of the public and obligations to society are part of its duty, allowing for the public interest to be a focus when establishing the objects of the PLP, its governance, and policies. Ensuring access to malpractice protection through a program that operates with the public interest in mind has its benefits, but directly administering a liability protection program also carries identifiable reputational, financial, and regulatory risks to the RCDSO.

These risks have been identified as follows:

Reputational Risk: The public may observe real and perceived conflict of interest, as the College is seen as having a dual mandate. Although it shares the College's public protection mandate, one department of the College reviews complaints about dentists and enforces standards, while another department represents and protects the interests of dentists against patient allegations. The RCDSO has been criticized for this in the past and could be disparaged in the future. This risk needs to be addressed.

Financial risk: The PLP liability is volatile. It has doubled over the last ten years and has continued to increase year over year. The PLP is part of the College's total operating budget, and the College has not been able to build a non-PLP operating reserve. This is almost exclusively due to PLP loss provisions causing several consecutive years of deficits. Two class action lawsuits were launched in 2017, demonstrating the reality of significant liability events that can occur in dentistry. The College is vulnerable should a major meritorious lawsuit occur. These have been observed in other professions, and the impact of this on the College's assets would require significant investment, through tariffs, by the profession. This risk needs to be addressed.

Regulatory risk: The RCDSO holds a monopoly over the liability protection market for Ontario dentists and there is currently no sharing of case information whatsoever between PLP and the regulatory programs. The monopoly may be seen as an abuse of the RCDSO's regulatory power, and the College's inability to address possible dentist misconduct/incapacity in the PLP area may imply that the College is not fulfilling its regulatory expectations. Given the rapidly evolving views and changes to professional regulation and the changing landscape of dental practice, the RCDSO's ability to fulfill its regulatory expectations while serving a dual mandate is a current concern. This risk needs to be addressed.

After reviewing other regulatory organizations that operate professional liability programs, the Task Force identified the following options for RCDSO to consider:

- **Status Quo:** RCDSO has the option of retaining the current structure. There are some modifications, using tools available to the College, that could be made to mitigate risk (such as greater separation of finances and governance changes).
- **Divest:** RCDSO could fully divest the PLP. This could be accomplished by either selling the book to another viable entity, or stopping intake, requiring dentists to seek their own protection in the free market as a transition strategy.
- **Create structural separation of mandate and finances:** As an intermediary option, RCDSO can undertake structural changes to establish the PLP as an independent corporation, while retaining ownership of the program. This could be done by establishing PLP as a subsidiary corporation.

To achieve zero-risk, divestment would have to occur; retaining PLP in any form will always carry risks. However, for the benefits associated with retaining the program to be maintained, an effective mitigating safeguard against both reputational and financial risks is to create structural separation of mandate and finances. This can be achieved by establishing the PLP as a subsidiary corporation. It is anticipated that an independent subsidiary and board, overseen by governance principles that are inspired by the public protection mandate of the college, is an effective way to retain the benefits of the existing model, while mitigating risk (not considering the costs involved in establishing and maintaining this change).

The Task Force has identified a set of recommendations for the RCDSO Council to consider. However, before determining a way forward, the Council will need to carefully consider the findings of this report, determine its level of risk tolerance, and identify the preferred option, based on further analysis of the human and financial resources required to implement change.

In today's changing regulatory landscape, RCDSO should be commended for its willingness to undertake an external review of the current program and identify its vulnerabilities and risks. The review has determined that Council will need to assess the identified risks, and determine which mitigation methods meet the risk appetite of the College as it continues its pursuit of excellence and quality improvement.

Overview of Task Force Recommendations

1. The PLP department has developed and implemented a claims processing program that is effective and efficient. No major changes to the program itself are being recommended at this time.
2. The current model offers the assurance that all dentists are able to access adequate liability protection. This offers public protection benefits and is supported by the Task Force. However, ensuring access to liability protection is a necessary, but not sufficient reason to continue to operate the PLP.
3. The influence of the public interest focus of the College is a benefit of the current model, and as long as the risks can be mitigated, there is value in keeping the program in-house.
4. Preserving and building public trust must be a key focus for both the RCDSO and the PLP.
5. To preserve and build public trust, steps should be taken to demonstrate PLP's independence from RCDSO. The most effective way to do this is by establishing the PLP as a subsidiary corporation, with its own Board of Directors.
6. The independence of a Board is an important way to mitigate against reputational risk, and there are ways to ensure that the public interest mandate of the College can endure.
7. Above all else, the PLP should operate based on principles of good governance.
8. It is suggested that RCDSO seek guidance on the most appropriate governance structure (including whether RCDSO board members should be represented on the PLP board) and determine a set of public interest-based principles or objects to guide the decision-making of the board.
9. The most effective way to protect the College from financial risk associated with the PLP is through the subsidiary model, with complete separation of finances. This may isolate potential losses and protect RCDSO's operating reserves.
10. RCDSO should consider re-assessing the costs of the PLP, to factor in the indirect costs that are associated with running the program.
11. The regulatory oversight associated with a formally designated insurance company would incur significant new costs, and is not considered necessary to mitigate the PLP's financial risk. However, the RCDSO should consider other ways to strengthen financial accountability and oversight.
12. The College may consider establishing protocols for the exchange of information from PLP to the College to support the college in its duty to address competency issues the PLP may uncover. However, it is suggested that this be done with caution, only after carefully reviewing potential due processes, fairness, and ethical concerns.
13. The College should undertake proactive communications to demonstrate the public benefit of the program.
14. Analysis will be required to determine the implications of implementing the various options presented. Council will need to decide whether the desired reduction in real or perceived conflict of interest justifies the investment that will be required.
15. Regardless of the decision the RCDSO Council chooses to make, it is recommended that a phased approach be applied to implementation. Although risks have been identified, the program is currently running well, and the recommendations can be responded to in stages.

Introduction

The Professional Liability Program (PLP) of the Royal College of Dental Surgeons of Ontario (RCDSO) was created in the 1970s to administer malpractice protection for Ontario’s dentists. Its mission and function are distinct from the rest of the College’s, whose mandate is to “serve and protect the public interest.” Although all regulators of health professions in Ontario are required to ensure their members have professional liability protection, RCDSO is one of the few health regulatory Colleges in Canada that directly operates an in-house liability program.

The College is considering the PLP’s contribution to the public interest, in relation to the potential financial, reputational and regulatory risks that may be associated with it. After consideration by the RCDSO’s Audit Committee, the RCDSO Council established a PLP Expert Review Task Force to mobilize risk and liability expertise to conduct a review of the program.

The findings of the review are detailed in this report.

Methodology

A panel of experts was recruited to take on the role of the Task Force, representing expertise in the insurance, professional liability and/or risk management sectors, experience in a regulatory organization that operates a professional liability program, public representation, and a member of the dental profession. The RCDSO established a Terms of Reference for the Task Force, outlining its expectations.¹

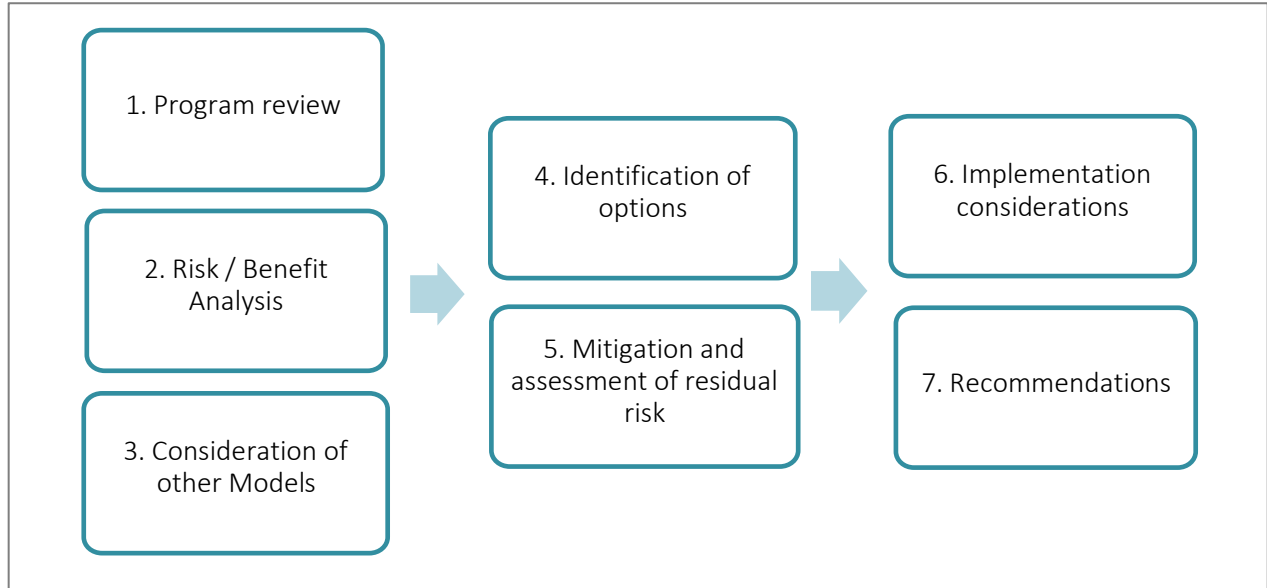
The Task Force applied a risk-based approach to its review and recommendations, applying the following guiding principles:

1. Mitigate risks and promote the College’s public interest mandate;
2. Achieve financial goals and long-term financial sustainability, including compliance with external standards (for example, the ministry’s College Performance Measurement Framework);
3. Provide assurance that all Ontario dentists will have adequate liability protection; and
4. Consider ways to address competency issues revealed from dentist’s contact with the existing liability protection program.

¹ See [Appendix 1](#).

The methodology used by the Task Force is illustrated and described below.

Figure 1: PLP Task Force Review Process



The methodology consisted of:

1. **Program review:** Establishing an understanding of the existing program, its structure, operations, and relationship with the RCDSO.
2. **Risk/Benefit analysis:** A review and assessment of the reputational, financial, and regulatory risks associated with the current program, as well as assessment of the public benefits.
3. **Consideration of other models:** Review and consideration of examples from other contexts and jurisdictions (representatives from each of these models provided direct input to the Task Force).
4. **Identification of options:** Presentation of a set of options, based on the review of other models.
5. **Mitigation and assessment of residual risk:** Analysis of each option to determine the mitigation offered, weighing the benefits against the risks.
6. **Implementation considerations:** Discussion on implementation considerations; and
7. **Recommendations:** Identifying a set of recommendations for the RCDSO to consider.

The Task Force met six times between February and July 2023. Research and facilitation were conducted by an external project manager, and RCDSO staff provided unbiased analytical support.

1. Program Review

The RCDSO independently operates a liability protection program for Ontario’s dentists. Aside from an optional “top-up insurance” that can also be purchased, the entire program is operated in-house. The claims generated by this program are managed and settled, where appropriate, by the staff of RCDSO (for cases that cannot be retained in-house, external defence counsel is engaged).²

All members of the College (all Ontario dentists) are required to pay annual fees, and these fees include malpractice protection. The number of incidents reported to PLP have remained relatively stable over the past ten years (approximately 1,500 per year). Payouts have been relatively steady, and there is no indication historically that costs are rising,³ even while the number of dentists has increased by 46%.⁴

The College currently maintains the PLP as a department within the RCDSO’s organizational structure. It is surrounded by a ‘firewall’ of infrastructure, policies and practices. The Department consists of 19 staff, who have developed and implemented a claims processing program that is effective and efficient. Although many protections are in place to support confidentiality, the interrelationship between PLP and the College is still a concern and is discussed below.

PLP is a program/department within the College and does not have its own revenue stream. The RCDSO charges an annual membership fee, which supports all regulatory activities and includes malpractice protection (PLP does not collect separate fees to operate its program). As expenses arise for the PLP program, College funds are used to cover the costs, as is done for any other department within the College. Recent analysis⁵ indicates that PLP utilizes approximately 30% of the College’s annual budget. Recent fee increases (from 2018 onward) have almost completely been used to fund the growing PLP cost base.⁶

The PLP liabilities have doubled over the last ten years.⁷ This directly impacts the expense side of the College and requires savings to be found that generally have drawn from the regulatory program areas. A reserve fund has been established for the PLP, which was created from the RCDSO’s operating surpluses.⁸ The College currently maintains the restricted net asset at \$22 million, an amount that was deemed sufficient when last reviewed by an actuary in 2017 (a follow-up review is currently being conducted, with results expected in fall 2023).

This asset is internally restricted to manage risk and support future claims and it is not available for broader regulatory purposes. The College is expected, through the College Performance Measurement

² An overview of the program is provided in [Appendix 2](#).

³ There are cases dating back to 2012 that remain open (approximately 700 claims), and so the loss provisions are estimates, based on expected payouts in the future.

⁴ Additional detail is provided in [Appendix 3](#).

⁵ RCDSO has published an assessment of the breakdown of how fees are spent, *Your Fees At Work*: <https://az184419.vo.msecnd.net/rcdso/pdf/financial-statements/RCDSO%205221%20Your%20Fees%20At%20Work.pdf>. Accessed January 31, 2023.

⁶ RCDSO Council Briefing Note, *Membership Fee*. June 16, 2022. <https://cdn.agilitycms.com/rcdso/pdf/council-minutes/2022-06-16%20Council%20Meeting%20Materials.pdf>. Accessed June 15, 2023.

⁷ It should be noted that the loss provision is showing signs of decreasing, with lower than expected liabilities in 2022.

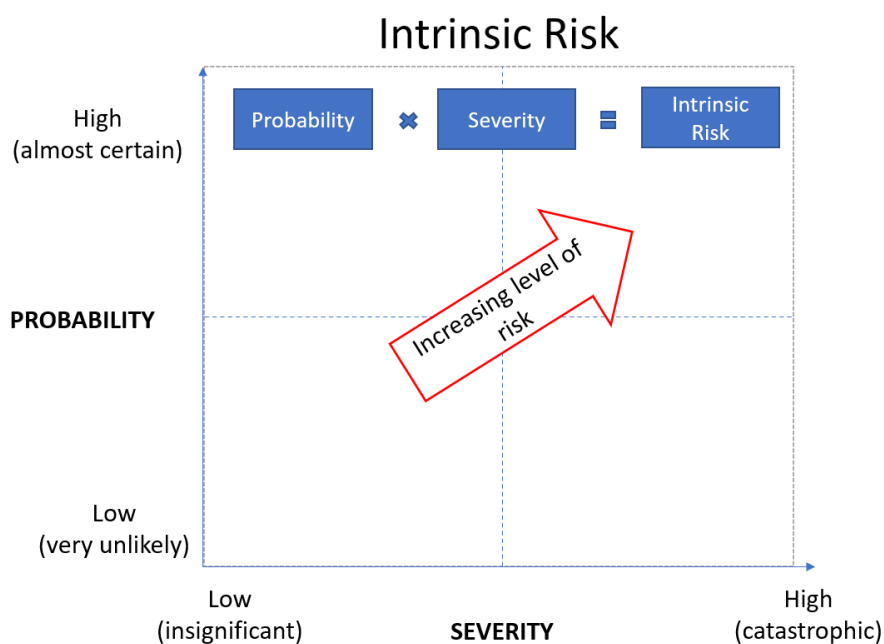
⁸ It should be noted that this fund is internally restricted to PLP and not available for broader regulatory purposes.

Framework (CPMF),⁹ to carry an operating reserve for unplanned events related to its role as a regulator. However, it has not yet been able to fully build this reserve, due to several consecutive years of deficits. This is almost exclusively due to recent PLP loss provisions.¹⁰

2. Risk/Benefit Analysis

After developing an understanding of the program, the Task Force set out on the risk/benefit analysis. The critical question for RCDSO to address is whether the College should continue to directly provide an in-house professional liability protection program. If the answer is yes, what modifications to the current program may be required to mitigate existing risks? To support this analysis, the Task Force applied a risk-based approach in its review. First, the benefits associated with the current program were reviewed. Next the risks were considered. To assess the risk, the following approach was taken:

1. Determine the “**probability**” associated with the risk. This is the likelihood or potential for exposure and can be scored from low (very unlikely) to high (almost certain). The probability (likelihood) is ideally collected through evidence and experience (for example, public complaints, legal actions, government intervention, media attention, etc.).
2. Identify the “**severity**” of harm. This is the magnitude of the potential impact, ranging from low (insignificant) to high (catastrophic/irreversible). When assessing the severity of harm in this case, it is understood as harm caused to the College.
3. Calculate the **Intrinsic** risk. This is the current level of risk, based on the product of the “**probability**” (likelihood or potential for exposure) and the “**severity**” of harm. If the probability and severity of harm are both high, the intrinsic risk is high.



⁹ The Ontario Ministry of Health has established a College Performance Measurement Framework (CPMF) which outlines expectations of regulators. The CPMF outlines expectations that the College be a responsible steward of its financial resources in achieving its statutory objectives and regulatory mandate.

¹⁰ The Loss Provision includes an estimate for claim payouts for an additional calendar year of claims, and the cumulative increase (or decrease) in claim reserves of files for every open year.

Applying this approach helped the Task Force to identify which types of risk are most important and require the strongest mitigation.

2.1 Benefits and potential of a college-owned liability program

There are several benefits associated with a college-owned liability protection program. Before exploring the benefits of the specific model that RCDSO operates, it is worth noting why professional liability protection is an important safeguard for the public.

The public benefit of professional liability protection

All health care professionals are expected to have adequate liability coverage to ensure that patients experiencing harm or injury through negligence have access to appropriate compensation. This is a patient protection policy so that no patient is left without recourse in the event of negligence or malpractice by a member of a profession. The Ontario Ministry of Health has established expectations for regulatory colleges to ensure their members have liability protection.¹¹ Colleges are required to enforce this requirement through their bylaws,¹² but the mechanism by which this is done is not prescribed. Oversight varies, with some Colleges conducting audits, and others requiring registrants to declare their professional liability coverage at initial registration or annually. Some colleges specify coverage minimums and require their registrants to obtain insurance from specified acceptable insurance providers (for example, physicians use the Canadian Medical Protective Association (CMPA)).

Access to coverage

Ensuring that all regulated health professionals have liability protection supports patients in the event of negligence or malpractice by a member of a profession, and the Ministry of Health expects that the RCDSO has a way of ensuring that all practitioners have liability protection.¹³ RCDSO currently uses one of the most effective ways of guaranteeing this: tying PLP to College membership ensures that all dentists who have a certificate of registration also have malpractice protection. Commercial insurance companies on the other hand can deny coverage and/or require high premiums based on claims history. PLP, unlike commercial insurance providers, cannot deny protection to anyone with a certificate of registration. The PLP ensures that all dentists have liability protection and have claims against them responded to. This is unlike malpractice providers which can provide assistance on a discretionary basis (there has been growing concern that patients are not adequately protected under providers such as these).^{14,15}

¹¹ See [Appendix 4](#) for an overview of the Ministry expectations

¹² The legislated requirements for Colleges to ensure their members hold professional liability insurance have evolved over time, and the history is outlined in Appendix 4.

¹³ See [Appendix 4](#).

¹⁴ Lee, S. K., Rowe, B. H., Flood, C. M., & Mahl, S. K. (2021). Canada's System of Liability Coverage in the Event of Medical Harm: Is It Time for No-Fault Reform?. *Healthcare policy = Politiques de sante*, 17(1), 30–41. <https://doi.org/10.12927/hcpol.2021.26580> (accessed June 3, 2023).

¹⁵ Goudge, S. (2017). *Report to Ontario Ministry of Health and Long Term Care Re: Medical Liability Review*. Government of Ontario.

https://www.health.gov.on.ca/en/common/ministry/publications/reports/medical_liability/docs/medical_liability_review_en.pdf (accessed February 1, 2023).

In addition, being the sole source provider allows rates to be kept low.¹⁶ Although the Task Force noted that the median dentist salary is about \$115,000¹⁷ and higher PLP fees would generally not be a large concern to their livelihood, there may be some situations in which higher fees could be problematic from a public protection perspective. Keeping costs low may help to keep certain groups of dentists protected and, in the workforce (for example, those working part-time¹⁸ or operating small businesses). Similarly, keeping rates low allows opportunity for new dentists just starting out to be able to afford liability protection, thus helping new members start practices. The group liability protection offered through PLP may be assisting these individuals to stay in business, by providing low-cost protection. In these situations, it could be argued that low fees help support patient access to care.

However, it was noted that the College in-house liability protection program is not the only model that could offer adequate protection. The Task Force acknowledged that there are other ways beyond an in-house program to ensure dentists have liability protection and reassure the public that dentists have access to a prescribed level of protection. For example, the CDSPI offers group malpractice insurance, with varying rates depending on the limits selected. Although coverage varies and it is difficult to make direct comparisons, the rates appear to be higher, but comparable to those of PLP.¹⁹

The current model offers the assurance that all dentists are able to access adequate liability protection. This offers public protection benefits and is supported by the Task Force. However, ensuring access to liability protection is a necessary, but not sufficient reason to continue to operate the PLP.

Public ease and College influence

Perhaps a more important benefit associated with the current model is the influence of the College's public protection mandate. The program offers simplicity. Inquiries and incidents can be addressed with a simple report by a dentist to PLP, often providing access to early settlement. Patients can commence claims and know that any awards and settlements will be paid through the PLP. This may not be the case in dealing with a separate insurer that is not operating with the public interest in mind.

In addition, due to its oversight by and accountability to the College, PLP operates according to a different approach from an independent company. The PLP is part of the College, and shares its public protection mandate,²⁰ and the expectation that protection of the public and obligations to society are part of its duty. This allows the PLP to explore ways to improve its functioning that are in the best interest of the public, similar to the approaches taken by other indemnity programs operated by regulators.²¹

¹⁶ Currently of the \$2,995 annual renewal fee, approximately \$1,000 goes towards the PLP (this does not include indirect costs such as administrative costs). 2023 Fee Increase: <https://www.rcdso.org/permits-and-renewals/annual-license-renewal/2023-fee-increase> (accessed February 2, 2023). RCDSO has started indicating the PLP fees on the invoice, at annual renewal.

¹⁷ The Job Bank: <https://www.on.jobbank.gc.ca/marketreport/wages-occupation/4092/ON;jsessionid=399FD2F2EB453251085B74B983BC1498.jobsearch75> (accessed June 3, 2023).

¹⁸ RCDSO does not set a minimal number of hours that each dentist must work to be licenced, so for those practicing minimally, high liability protection fees could be more challenging.

¹⁹ Members of dental associations in other provinces are required to pay approximately \$1,700 (plus tax) for their policies, while dentists in Ontario pay approximately \$1,000 for PLP. Those who are not members of a dental association pay more (\$2,100). See CDSPI website for more information: <https://www.cdsapi.com/insurance/malpractice-plansheet/?source=malppage> (accessed June 3, 2023).

²⁰ The Relationship between PLP and the RCDSO, <https://plp.rcdso.org/about-plp/plp-and-the-rcdso> (accessed June 22, 2023).

²¹ See [Appendix 5](#) and [Appendix 6](#).

The influence of the public interest focus of the College is a benefit of the current model, and as long as the risks can be mitigated, there is value in keeping the program in-house.

Although the PLP has an important role to play in protecting the public, directly administering a liability protection program also carries identifiable reputational, financial, and regulatory risks to RCDSO. An assessment of each type of risk is provided below.

2.2 Reputational Risk

Can the College adequately fulfill its duty to the public interest while operating a malpractice protection program for dentists? The College's legislated regulatory mandate is to protect the public. The PLP notes that it shares the public protection mandate of the College, but its role is to provide malpractice protection for dentists. The program structure as it is currently set up creates confusion for both the public and dentists. Although attempts have been made to clearly communicate the firewall protections, there is ongoing skepticism that one department of the College reviews complaints and enforces discipline measures while another department of the College is representing and protecting the dentists. This concern came to the forefront in recent years through negative media stories.²² Since then, the Ministry of Health, possibly in response to media attention, has asked questions about the College's operation of the Program.

When patients file a claim, the dentist is defended by the PLP or its retained lawyers (funded by RCDSO's budgets) with settlements and full trial proceedings where necessary. The objective of the PLP is to defend dentists in cases where they are not negligent, and to pay patients reasonable compensation otherwise. Patients must file a legal claim and hire their own legal counsel, and some cases involve complex settlement discussions and trials. From a financial perspective, this puts the patient at a power disadvantage and in a vulnerable position.

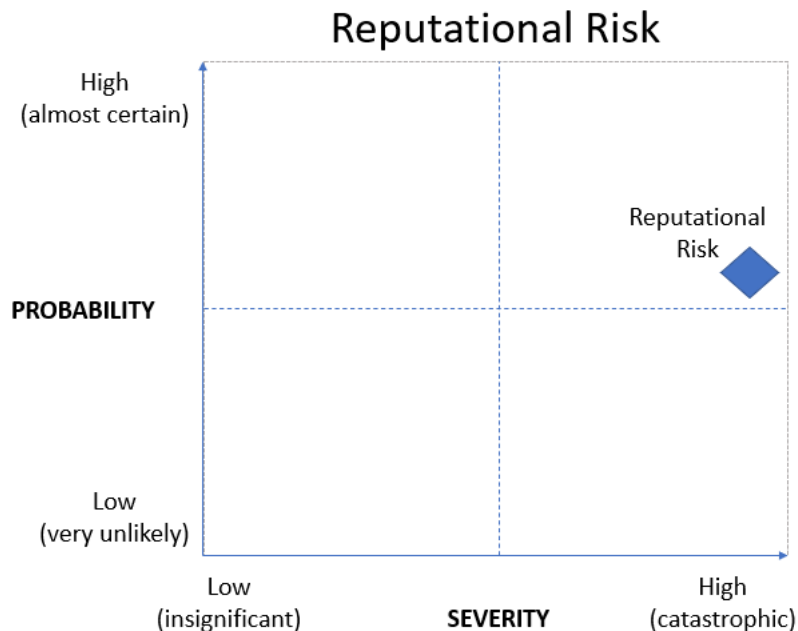
Within the existing financial structure of PLP, the College has assumed more of the risk (it has taken on a high aggregate deductible, which means payouts are made by PLP and not the insurer).²³ Because the funds of the PLP are connected with those of the College, this inherent drive to reduce payouts will always appear to be in direct conflict with public protection.

Another concern to individual patients is that the PLP may advise dentists to settle claims with reimbursements in exchange for a patient non-disclosure agreement (NDA). Although the NDA does not include a prohibition on filing a complaint against the dentist to the College, it is possible that a patient could assume that there is no further avenue, or no further reason, to use the regulatory and competency-based tools available to the College. Depending on the NDA structure and language, it is not likely a tool that is in the best interest of the patient or the broader public that the regulator must serve. Although this is all expected of an insurance/indemnity provider, the connection of PLP with the regulator creates a conflict of interest that cannot be dismissed.

²² See [Appendix 7](#) for samples.

²³ The aggregate deductible is set at \$10 million, and is paid by the RCDSO. The Insurer is an independent insurance provider. The insurer's coverage is triggered once the aggregate payouts reach \$10 million, up to a maximum of \$20 million.

Overall assessment of reputational risk



The public and government may observe real and perceived conflict of interest associated with the current PLP model. The tension of this conflict is especially troubling in the current health care context, where the intrinsic risk of harm is extremely high.²⁴ Although the likelihood of the risk asserting itself today is moderate (there has been no evidence of media coverage in the past five years and ministry inquiries are not frequent), the scale of harm associated with sudden traditional or social media attention could be damaging to the reputation of the RCDSO, requiring significant time to repair the impact. Mitigating this risk is critical to the sustainability of the current regulatory PLP model.

2.3 Financial Risk

Financial expectations

Colleges are required to be responsible stewards of their resources, and poor financial management is one of the reasons the Minister can request that the Lieutenant Governor in Council appoint a College supervisor. In addition, the CPMF outlines expectations that the College be a responsible steward of its financial resources in achieving its statutory objectives and regulatory mandate.²⁵ It also expects that the College have a “financial reserve policy” (and associated regulatory operating reserve fund) that sets out the level of reserves the College needs to build and maintain in order to meet its legislative requirements. The RCDSO has not yet been able to fully fund this reserve, due to several consecutive years of deficits, almost exclusively due to losses associated with the PLP.

²⁴ See [Appendix 8](#).

²⁵ Domain 2 (Resources), Standard 4 of the CPMF. The CPMF was developed by the Ministry of Health with the aim of answering the question “How well are Colleges executing their mandate which is to act in the public interest?” All Colleges are required to complete the CPMF annually and provide reports to the ministry.

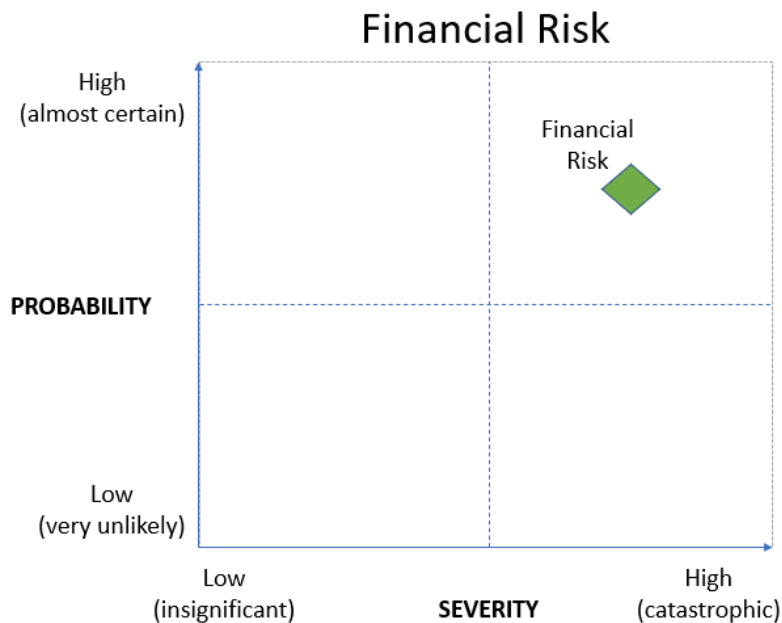
Current status

The current financial structure of PLP includes a high aggregate deductible, low premiums, and an increasing College liability and loss provision. The program is impacting the College's ability to set aside a regulatory operating reserve fund, which is an expectation of the Ministry of Health.

Future risk

As noted above, the current model does not distinguish between the finances of PLP and those of regulatory operations. This means the RCDSO regulatory reserves are not protected from liability should a large lawsuit be successful against a dentist. PLP has been associated with two class action lawsuits recently, and these have been in the \$2 million range. If an unpredictable, severe event was to occur (one that exceeds the current \$22 million reserve fund plus the \$20 million available in reinsurance), the RCDSO would be required to draw from its regulatory reserves, having a catastrophic effect on the College. Although the likelihood of an event such as this is rare, there is precedent for it. A hepatitis outbreak associated with the use of unsterilized needles in an Ontario physician's clinic led to a \$27.5 million settlement over 20 years ago.²⁶ Dentists work in high-risk environments where infection prevention and control is of great import, and so there is potential for significant harm to multiple patients which could impact the PLP and the College. There is also potential for other future class action lawsuits.²⁷

Overall assessment of financial risk



²⁶ *Hepatitis outbreak leads to record settlement*. CBC News, December 9, 2001.

<https://www.cbc.ca/news/canada/hepatitis-outbreak-leads-to-record-settlement-1.255636>. Accessed May 16, 2023.

²⁷ For example, the Band Members Advocacy Alliance Association of Canada has alleged inappropriate dental care provided by Indigenous Services Canada (see Lang, Brady. *'That smell. That's that trigger': Indigenous class action aimed at dental work done by ISC*. April 5, 2023, CTV News. <https://regina.ctvnews.ca/that-smell-that-s-that-trigger-indigenous-class-action-aimed-at-dental-work-done-by-isc-1.6344901>. Accessed June 22, 2023).

The financial risk associated with the PLP is high. The likelihood of the risk asserting itself today is high (there are current challenges that exist, and the potential for future catastrophic events is real), and the scale of harm associated with an unpredictable major event could be severe. Mitigating this risk is critical to the sustainability of the current model. Fortunately, although the impact of this risk to the College is high, there are concrete ways to manage it (through structures, expertise, and program policies). In one analysis from 1996, a report done for the Law Society indicated that in-house mandatory models are “the most efficient, cost-effective model for delivering liability insurance to the whole profession.”²⁸ With this in mind, mitigation strategies are suggested to address the financial risk associated with PLP.

2.4 Regulatory Risk

Regulatory risk is especially complex, given the changing landscape of professional regulation. Politically, self regulation itself has been called into question, and there have been signals of mistrust in the concept of professional regulation. Examples include: questions about whether regulators are truly serving the public interest, demand for more transparent measures to assist the public in their own health care decisions, requirements for more public input in College decisions, a move towards competency-based election processes, or the elimination of elections. Colleges also must be mindful of robust competency and performance-based assessment tools to assure the public that members of the profession are meeting their high standards for quality of care. In addition, regulators have been subject to measurement and assessment initiatives. In Ontario, the ministry has developed a College Performance Measurement Framework (CPMF)²⁹ which all 26 colleges are required to complete annually. BC has taken this further with the establishment of oversight bodies (overseen by superintendents). Concern about the capacity and resources of regulators has also come into question, and amalgamation of regulators is being seen in BC and the UK. All these changes are aimed at restoring trust in professional regulation.

When assessing regulatory risk, it is critical to confirm that the College is steadfast in its ability to execute on its mandate of protecting the public. If operating the PLP interferes with this, others may question the RCDSO’s judgment and competence in fulfilling its regulatory role.

Regulatory expectations

The [Regulated Health Professions Act \(RHPA\)](#) sets out the governing framework for regulated health professions in Ontario. Within the RHPA, the *Health Professions Procedural Code* (“Schedule 2 to the RHPA), sets out the practical rules, and “Objects” of the College. These include the responsibility to regulate the practice of the profession, assess the quality of the profession, promote continuing competence and improvement among members, and maintain standards of professional ethics.

Although not as strong as legislation and regulation, the Ontario Ministry of Health has also established a College Performance Measurement Framework (CPMF) which outlines expectations of regulators.³⁰ The ministry expects that the College remediates and monitors registrants who demonstrate unsatisfactory knowledge, skills, and judgment. It expects that the College enables and supports anyone who raises concerns about a registrant and completes a rigorous and fair review process of the health care

²⁸ *Lawyers’ Professional Indemnity Company Report to Convocation*. September, 1996.

²⁹ The CPMF was developed by the Ministry of Health with the aim of answering the question “How well are Colleges executing their mandate which is to act in the public interest?” All Colleges are required to complete the CPMF annually and provide reports to the ministry.

³⁰ The Ministry’s 2020 summary report is available here:

https://health.gov.on.ca/en/pro/programs/hwrob/CPMF_summary_report.aspx [Accessed February 21, 2023].

practitioner. And it expects that the College prioritize reports and investigations based on public risk.³¹ However, when the PLP receives claims regarding a dentist who has harmed a patient, they currently share no information whatsoever with the regulatory programs, even if the dentist could be considered incompetent and high risk to current and future patients. The public might expect that the College would have knowledge of situations where an individual dentist could pose harm to the public, and some would argue that if the College owns the program, it has a duty to do something with this information. From the College's perspective, action needs to be taken based on any misconduct or incapacity concerns it is aware of. However, from the PLP's perspective, this type of information needs to be kept confidential, and is not shared with the College. These opposing perspectives put the College in a difficult position. If a dentist has possible misconduct, incompetence, or incapacity issues, should the College be automatically involved to fulfill its regulatory expectations? **Perhaps the College needs to be more proactive and explore whether mitigation options are available to prevent potential regulatory risk associated with the prescribed "firewall" between PLP and the regulatory operations.** Given that the Ministry of Health has appointed College supervisors in the past, when the judgment, performance, and decisions made by the regulator are seen to be inappropriate, irrational, or not in the public interest,³² this continued risk may be untenable.

Questioning the monopoly

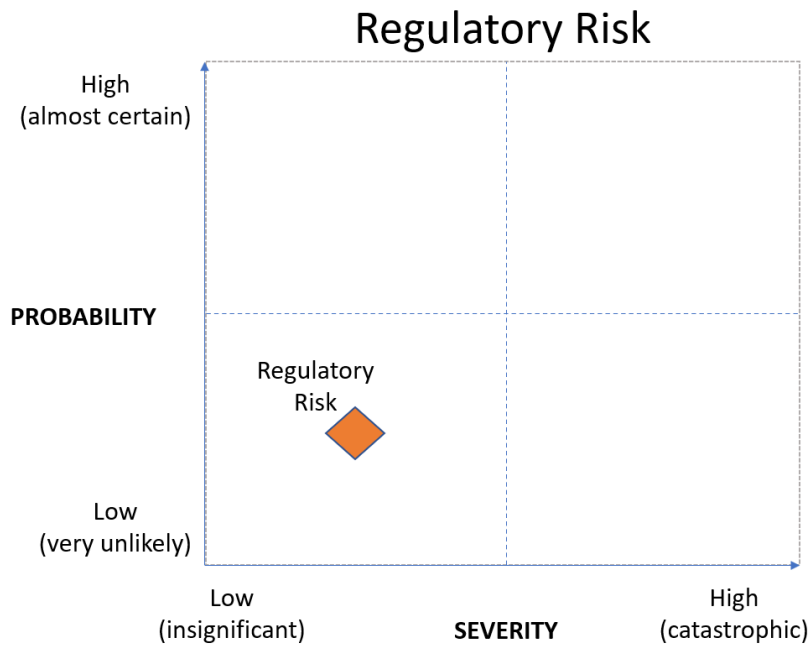
Another theme that might raise questions about the RCDSO's judgment and regulatory role is the monopoly it holds over liability protection for Ontario dentists. This monopoly could be perceived as an abuse of the RCDSO's regulatory authority. In the context of international calls to end self-regulation, scrutiny of regulators is high, and conflict of interest is seen as a serious issue. In addition, the landscape of dental practice is changing (for example, growing corporatization), and future pressures for choice should be anticipated. Although there has been no criticism to date and the program has been in operation since the 1970's, other jurisdictions that have moved to single source insurance providers have faced criticism. There may be a risk in defending the College's monopoly if there are other products that can adequately protect the public, and some jurisdictions allow for choice.

The ministry expects that the College respond in an effective manner to changing public expectations. As the landscape of dental practice is changing, some may argue that the College should adapt and rethink its liability program, in response to this. It is anticipated that future pressure for choice should be expected.

³¹ See [Appendix 9](#) for an overview of the standards.

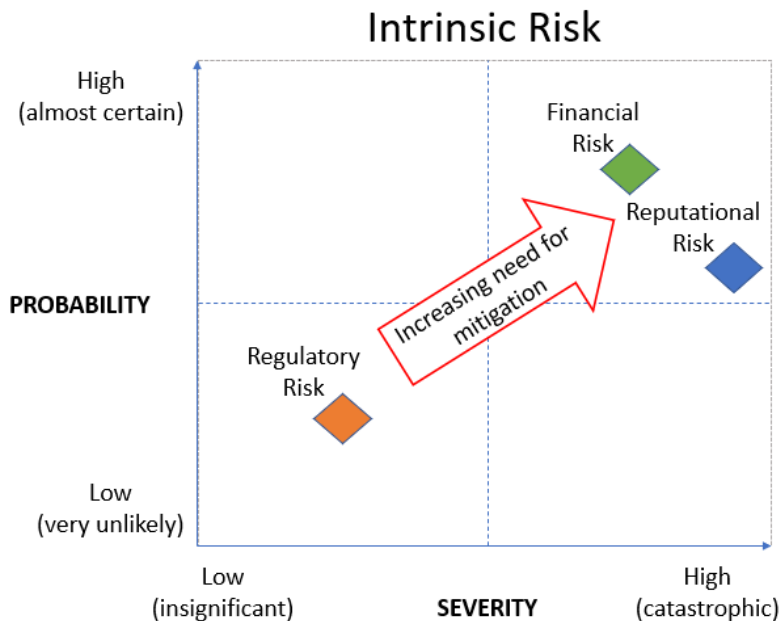
³² Blackwell, T. "Supervisor appointed to oversee denturists". *National Post*, December 16, 2011. <https://nationalpost.com/news/canada/supervisor-appointed-to-oversee-denturists>. Accessed May 16, 2023.

Overall assessment of regulatory risk



Regulatory risk cannot be ignored. The RCDSO is accountable to the Minister of Health and must carry out the intent of the RHPA. Ensuring the RCDSO is upholding the expectations set out in the RHPA is its sole purpose.

2.5 Summary of intrinsic risk



The analysis indicates that although regulatory risk is lower, the College is vulnerable to high levels of intrinsic risk, both in the form of reputational and financial risk. Fortunately, mitigation strategies are available to address these identified risks. To identify which mitigation strategies might be most effective,

the Task Force reviewed the structure and composition of other similar models to determine a set of options.

3. Consideration of other models

The Ontario Ministry of Health makes no distinction as to the type or model of professional liability protection that professionals under the [Regulated Health Professions Act \(RHPA\)](#) are expected to have. Although all regulators of health professions in Ontario are required to ensure their members have professional liability protection, the RCDSO seems to be the only health professional college in Ontario that owns and operates an in-house liability program. Beyond Ontario, Quebec (and very recently, Alberta) also operates its own liability program. Quebec’s dental regulator (Ordre des dentistes du Québec, or ODQ) manages its own insurance fund, Le Fonds d’assurance-responsabilité professionnelle de l’Ordre des dentistes du Québec, or FARPODQ.³³ This Fund is different from PLP’s in many ways. First, its Board of Directors was recently dissolved by statute. Second, the assets of the insurance fund are separate from the ODQ’s asset base and are intended exclusively for the insurance business. Another important difference is the reporting requirements between FARPODQ and the ODQ. The insurance program is required by law to report dentists to the inspection department of the College if it believes that the public may be endangered by the dentist.

Another example of a regulatory organization that operates a professional liability program is the Law Society of Ontario (LSO). The [Law Society Act](#) gives LSO the right to operate a mandatory universal insurance program, and the LSO has established LAWPRO, the Lawyers’ Professional Indemnity Company, to provide this. LAWPRO is an independent subsidiary owned by the LSO and licensed as a regulated insurance provider. LAWPRO is wholly owned by the LSO but operates independently with its own Board of Directors and CEO.

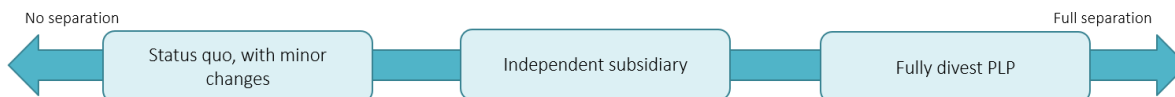
The Law Society of British Columbia (LSBC) also operates its own professional liability program, but according to a different model.³⁴ All of the models reviewed have some or many elements of risk mitigation built into their structure, processes and practices, but there is no “gold standard” structure that is consistently applied.

³³ Other provincial dental regulators (except for Alberta and Quebec) require registrants to purchase their malpractice insurance independently (often from [CDSPI](#), a national not-for-profit insurance provider).

³⁴ A detailed summary of the programs described above is provided in [Appendix 5](#).

4. Identification of options

The Task Force considered several options for addressing the risk that has been identified. These options can be placed on a continuum, ranging from status quo to fully divesting the program, and are illustrated and outlined below:



- **Status Quo:** On the left side of the continuum, RCDSO has the option of retaining the current structure. There are minor modifications, using tools available to the College, that could be made to mitigate risk (such as greater separation of finances and governance changes).
- **Divest:** On the right side of the continuum is the option to fully divest the PLP. This could be accomplished by either selling the book to another viable entity,³⁵ or stopping new intake of claims and inquiries, and requiring dentists to seek their own coverage in the free market.³⁶ As existing claims are completed, PLP would no longer be a viable enterprise of the RCDSO.
- **Create structural separation of mandate and finances:** As an intermediate option, RCDSO can undertake structural changes to establish the PLP as an independent corporation, while retaining ownership of the program. This could be done by establishing the PLP as a subsidiary corporation.

Each of these options are explored below.

5. Mitigation and residual risk

The analysis indicated that the College is vulnerable to high levels of intrinsic risk, both in the form of reputational and financial risk. Part of the risk-based assessment process involves identifying what **mitigating factors** or safeguards can be put in place to reduce the intrinsic risk that has been identified. The Task Force has assessed the effectiveness of each of these mitigating factors, along with any trade-offs that are associated with implementing them. After weighing the effectiveness of the mitigating factors against the intrinsic risk, the **residual risk** can be identified. It is expected that the option which is associated with the lowest residual risk to the College is the most ideal, but there are several considerations that need to be made first.

5.1 Mitigating Reputational Risk

The Task Force considered several approaches for mitigating reputational risk. These are outlined below, but before describing each method, it is important to note that they are all associated with building trust. Trust has been defined as “the willingness to be vulnerable to the actions of others based on positive expectations of their intentions and behaviour,” and is built through **ability** (How well does a product or service work for the user?); **benevolence** (Does the organization show empathy and caring in how it operates?); and **integrity** (Are decisions rooted in values and ethics, with promises kept?).³⁷

Preserving and building public trust must be a key focus for both the RCDSO and the PLP.

³⁵ Further analysis is required to understand the financial impact of this on the RCDSO.

³⁶ RCDSO would be required to maintain staff and funds to address the approximately 700 claims currently underway.

³⁷ Bhardwaj, Gillespie, MacLellan, McEvily & McGinn (2021). **Trust Matters Toolkit**. Proof Strategies Inc., Trustlab and The Institute of Corporate Directors. <https://hdl.handle.net/1807/107833> (accessed May 10, 2023).

5.1.1 Divesting the program

All options were available to the Task Force, including the option to recommend that RCDSO divest the program completely. Divesting the program would fully remove the conflict of interest and reputational risk described above. However, all the advantages of the current model would be lost, many of which offer benefits to the public. Before deciding to divest the program, the RCDSO should carefully consider the costs associated with this option, and whether the alternatives described below provide adequate mitigation to protect against reputational risk while maintaining the public protection benefits associated with the current program.

5.1.2 Demonstrate PLP's independence from RCDSO

To help address the reputational risk associated with the college operating the PLP, the independence of PLP from RCDSO needs to be clear. An effective way of establishing increased independence between the PLP and the RCDSO is to establish a subsidiary. A subsidiary is a legal entity controlled by another legal entity, and can be created for several reasons, including controlling risk. Being a legally independent, distinct incorporated entity allows risk to be isolated to the subsidiary.³⁸ Establishing a subsidiary that is wholly separate but owned by the “parent” (RCDSO) can clearly show independence, while allowing its objects to be aligned with the public protection mandate of the College.

Steps should be taken to demonstrate PLP's independence from RCDSO. This could be accomplished by establishing the PLP as a subsidiary corporation.

5.1.3 Establishing a separate board of directors

Subsidiaries can be structured in different ways. Some have their own independent board. In others, the parent company plays a role in approving actions and spending.³⁹ Although establishing the PLP as a subsidiary alone helps to mitigate against reputational risk, **the Task Force recommends that the PLP be governed by its own Board of Directors.** Establishing a separate board of directors helps establish the independence of PLP and mitigate reputational risk. However, through the subsidiary model, the College can continue to have oversight (for example, by directing the objects of the board, board composition, and having the power to dissolve the board if governance issues arise).

Establishing an independent subsidiary with a separate board will never mitigate all reputational risk, as the conflict of interest associated with owning the program will persist. However, RCDSO can use its oversight of the PLP to the public's benefit. By maintaining the influence of the College (which has a duty to act in the public interest), RCDSO has the ability to control the “objects” and “philosophy” of the program. This can be done through applying the governance principles described below. It should be noted that as long as the RCDSO continues to own the program (whether a subsidiary or not), there will always be perceived conflict of interest, and that establishing an independent board will help to minimize, but will not eliminate, this conflict. **It is suggested that RCDSO seek guidance on the most appropriate governance structure (including whether RCDSO board members should be represented on the PLP**

³⁸ Definition of Subsidiary, Business Development Bank of Canada. <https://www.bdc.ca/en/articles-tools/entrepreneur-toolkit/templates-business-guides/glossary/subsidiary>. Accessed April 4, 2023.

³⁹ Governance of Subsidiaries: A survey of global companies (Deloitte, 2013). <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/risk/Corporate%20Governance/in-gc-governance-of-subsidiaries-a-survey-of-global-companies-noexp.pdf>. Accessed March 30, 2023.

board) and determine a set of public interest-based principles or objects to guide the decision-making of the board.

5.1.4 Applying principles of good governance

Above all else, the PLP should operate based on principles of good governance. [Imagine Canada](#) has developed a [Standards Program](#) for accreditation of Canadian charities. This includes an assessment of board governance, based on established principles.⁴⁰ Similarly, the International Corporate Governance Network (ICGN) has established a set of [Global Governance Principles](#) that provide a good model to strive for. Although these sets of principles can be relevant to organizations ranging from international publicly traded companies to small non-profits, RCDSO should also consider that as a health regulator, it is subject to additional scrutiny. For this reason, the PLP's governance principles should be consistent with governance principles expected of health regulators. The Professional Standards Authority (PSA, the organization that oversees the professional health colleges in the UK) has established Standards of Good Governance.⁴¹ RCDSO has developed its own *Guiding Principles for Governance*, and it is recommended that a similar set of principles be established for PLP.

Beyond establishing a checklist of principles, it will also be important for RCDSO, as the “parent” organization, to implement ongoing oversight to ensure the PLP's Board is enforcing its governance policies. The importance of this was learned through the experience with Hockey Canada and other national organizations overseen by Sport Canada.⁴² Some ways to support effective operation are through determining board composition,⁴³ setting Terms of Reference,⁴⁴ establishing policies such as Conflict of Interest⁴⁵ and Board Members' Code of Conduct,⁴⁶ and through setting expectations for Board member competency.⁴⁷

5.2 Mitigating Financial Risk

The Task Force was asked to consider what financial solutions could be developed and implemented to optimize public interest benefits and minimize financial risk. The Task Force considered several options, outlined below.

⁴⁰ A detailed overview is provided in [Appendix 10](#).

⁴¹ Included in [Appendix 11](#).

⁴² Robertson, Grant. *Sport Canada gave top marks to national organizations under scrutiny*. The Globe and Mail, May 9, 2023.

<https://www.theglobeandmail.com/canada/article-sport-canada-gave-top-marks-to-national-organizations-under-scrutiny/> (accessed May 10, 2023).

⁴³ MacDonald, E. Grant (2017). *The Pros and Cons of Representative Boards*. Not-for-Profit Resource Centre, Institute of Corporate Directors, July 2017. A similar version is available at: <https://www.governinggood.ca/wp-content/uploads/2017/04/Pros-and-Cons-of-Representative-Boards.pdf> (accessed May 10, 2023).

⁴⁴ MacDonald, E. Grant (2017). *Creating Terms of Reference for Not-for-Profit Board Committees*. Not-for-Profit Resource Centre, Institute of Corporate Directors, October 2016.

⁴⁵ MacDonald, E. Grant (2021) Governing Good. *Conflict of Interest Policy*. <https://www.governinggood.ca/wp-content/uploads/2021/06/Conflict-of-Interest-Policy.pdf> (accessed May 10, 2023).

⁴⁶ MacDonald, E. Grant (2017). *Board Members' Code of Conduct*. Not-for-Profit Resource Centre, Institute of Corporate Directors, April 2017. A similar version is also available at: <https://www.governinggood.ca/wp-content/uploads/2023/04/Board-Members-Code-of-Conduct.pdf> (accessed May 10, 2023).

⁴⁷ The Rotman Institute of Corporate Directors has established a set of Key Competencies for Director Effectiveness. These includes competency groups related to knowledge, analytical & technical skills, thinking, personal style, and social style.

5.2.1 Divesting the program

Divesting the PLP was considered as the best way to remove financial risk, but as has been discussed above, all the benefits of the current program would be lost. In addition, careful consideration should be made of any unintended consequences that could occur as a result (for example, lost investment income related to the existing PLP reserve fund).

5.2.2 Status quo

Another option is to maintain the status quo, addressing financial events when they happen (by charging levies to the dentists of Ontario to subsidize debt and avoid drawing from College regulatory reserves). This is what was done in 2023, when annual renewal fees were increased by \$485.⁴⁸ However, if a large lawsuit were to impact PLP, relying on the College's levying power may not be viable. It is possible to do debt financing and levy in increments, but those in isolated practices will be most vulnerable, as they may not be able to afford the higher fees. There is also the option to purchase more reinsurance to mitigate the risk, but this additional reinsurance may not be sufficient to cover a potential unpredictable, severe event. As well, annual reinsurance costs could be prohibitive if the limits are increased significantly.

5.2.3 Independent finances

The most effective way to protect the College from financial risk associated with the PLP is through the subsidiary model described above, with complete separation of finances between the parent and the subsidiary. It is possible to separate the finances of PLP without establishing a subsidiary (for example, by separating the PLP finances (including indirect costs) from the regulatory budget. However, true separation through establishing a subsidiary corporation helps to isolate the RCDSO from potential losses associated with PLP and to protect RCDSO's operating reserves.

The reviewed liability protection programs set up their finances in different ways. However, generally, the insurance/liability protection program's finances are held separate from the parent organization.⁴⁹ Implementing separation of finances should not be a challenge, as RCDSO has already started differentiating between registration fees and PLP fees. Of RCDSO's \$2,995 annual renewal fee, it has been determined that approximately \$1,000 is used to fund the liability program (when a member pays their annual renewal, the invoice indicates that \$1,000 of the fee is going towards PLP).⁵⁰ This distinction is important as it allows for transparency and separation between the regulatory role and the liability protection program. However, it is only a first step in establishing independence of the PLP's finances.

If a subsidiary is established, the finances of PLP would be fully separated from those of RCDSO. This provides additional protection to the RCDSO's regulatory operating reserves, were a large lawsuit to ensue. However, for this to be effective, it will be important for the College to ensure that it is clear that the PLP demonstrates independence of action, and that the College is not directing any of the day-to-day affairs of PLP. Otherwise, as the parent organization, the RCDSO will assume additional, or different risk.

⁴⁸ RCDSO 2023 Fee Increase: <https://www.rcdso.org/permits-and-renewals/annual-license-renewal/2023-fee-increase#:~:text=The%202023%20annual%20fee%20is,increase%20on%20September%2015%2C%202022.> (accessed May 16, 2023).

⁴⁹ See [Appendix 5](#).

⁵⁰ RCDSO 2023 Fee Increase: <https://www.rcdso.org/permits-and-renewals/annual-license-renewal/2023-fee-increase> (accessed February 2, 2023).

It should be noted that, even if a subsidiary is set up, the RCDSO (as the parent) could remain the levying authority. If PLP fees need to be increased to pay for an unpredictable, severe event, it could be the regulator that has to collect these fees, on behalf of PLP.

5.2.4 Addressing indirect costs

Whether or not a subsidiary is established, RCDSO should consider re-assessing the costs of the PLP, to factor in the indirect costs that are associated with running the program. As noted, RCDSO has transparently demonstrated that \$1,000 of the annual renewal fee is used to fund the liability program.⁵¹ However, this amount was calculated based on direct costs only and does not consider the additional costs associated with back-office supports required to maintain PLP. It is important to consider these costs and be transparent about how they are accounted for. To preserve the economies of scale, there are ways to allow for these services to continue to be shared with RCDSO, even with a subsidiary model. For instance, shared services could be contracted through the parent organization.⁵² Analysis was conducted to obtain a realistic idea of what the indirect costs would be for PLP if RCDSO were to adopt a similar model.⁵³ In summary, if RCDSO were to carve out the indirect costs associated with operating the PLP (costs for HR, IT, communications, etc.) this would require an estimated additional \$140 per dentist (to be added to the \$1,000 which is currently allocated to the PLP).

5.2.5 Insurance vs. Indemnity

The Task Force also considered whether converting PLP into a formal insurance company would help mitigate financial risk. The PLP currently is a program that provides liability protection, not insurance coverage. The [Insurance Act](#) regulates the insurance industry in Ontario. An insurance company issues and sells comprehensive financial products, including individual or group insurance policies to individuals and employers and promises to pay benefits to holders of those policies. Insurance companies are regulated by the Financial Services Regulatory Authority of Ontario ([FSRA](#)). LAWPRO is incorporated as an independent insurance company, providing liability insurance for the Ontario Bar. In contrast, other providers, such as PLP, LIF, and the CMPA offer liability protection, but outside of the confines of the regulated insurance industry.

The Task Force considered whether the PLP should establish itself as a regulated insurance provider. **The regulatory oversight associated with a formally designated insurance company would incur significant new costs, and is not considered necessary to mitigate the PLP's financial risk. However, the RCDSO should consider other ways to strengthen financial accountability and oversight.** For example, establishing a senior insurance/risk executive responsible for managing the PLP, recruiting individuals with relevant insurance expertise on the board, and undergoing annual actuarial assessment to manage risk. The governance principles described above are also critical for supporting this approach.

5.3 Residual risk associated with each option

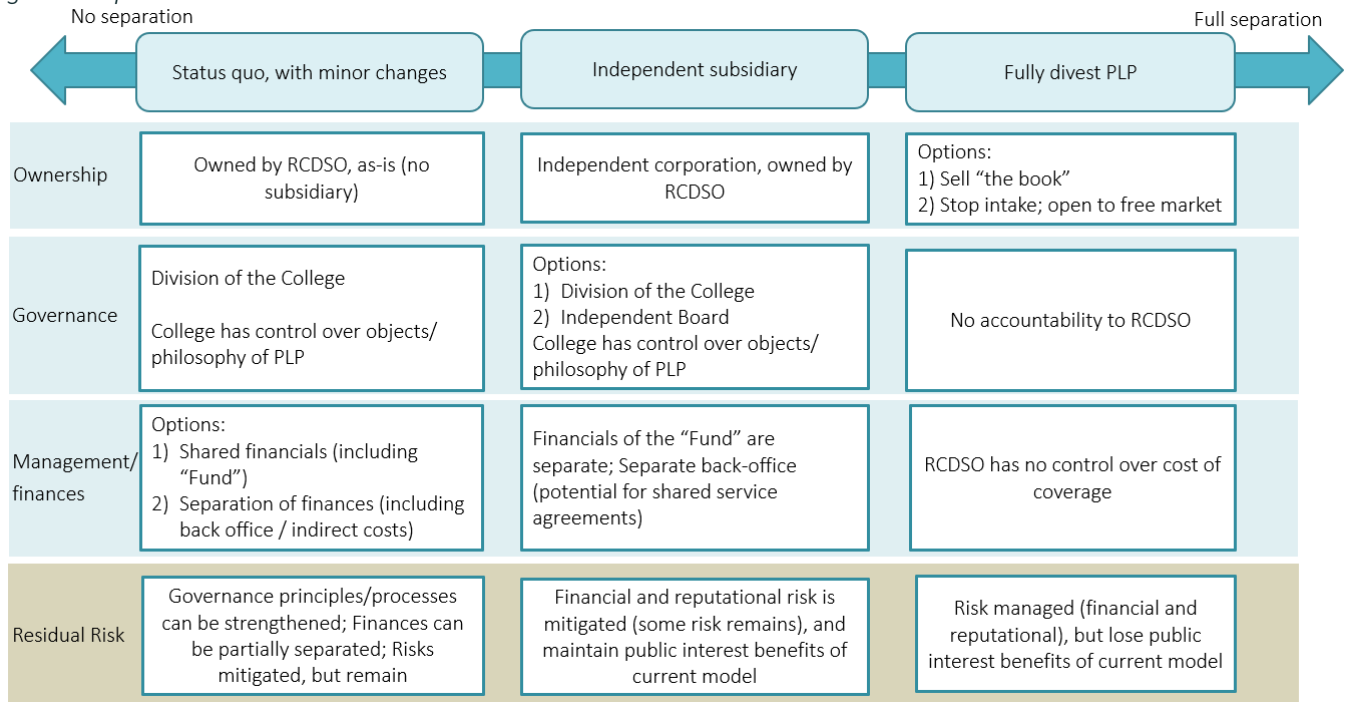
Each of the options presented above was reviewed based on the mitigating factors described. Figure 2 shows the resulting residual risk.

⁵¹ RCDSO 2023 Fee Increase: <https://www.rcdso.org/permits-and-renewals/annual-license-renewal/2023-fee-increase> (accessed February 2, 2023).

⁵² See [Appendix 5](#).

⁵³ This analysis is provided in [Appendix 12](#).

Figure 2: Options and associated residual risk



Setting aside the human and financial resources required to implement change and the level of risk tolerance, the independent subsidiary offers an effective mitigating safeguard against both reputational and financial risks, while maintaining the benefits of retaining the program. An independent subsidiary and board, overseen by governance principles that are inspired by the public protection mandate of the college, can mitigate against risk, but, as noted below, there are costs associated with implementing this change and its application in practice would need careful consideration.

5.4 Regulatory Risk

Regulatory risk is highly connected to reputational and financial risk; mitigating these latter risks will also mitigate regulatory risk. There are additional safeguards that could be implemented to protect against regulatory risk, even if their impact may be limited.

The College may consider establishing protocols for the exchange of information from PLP to the College to support the regulator in its duty to proactively address competency issues and prevent harm to the public.⁵⁴ However, it is suggested that this be done with caution, only after carefully reviewing potential due processes, fairness, and ethical concerns.

The College should undertake proactive communications, educating both the profession and the public, to demonstrate the public benefit of the program (especially given the risk of criticism of its structure).⁵⁵ The College should also maintain sufficient communications personnel in order to promptly respond to new issues, as they arise.

⁵⁴ See [Appendix 13](#).

⁵⁵ See [Appendix 13](#).

Finally, the College may consider reviewing and amending its bylaws and personnel policies to further delineate and distinguish the roles of the regulator (e.g., the Registrar/CEO) and PLP. In particular, the appointment process for PLP committee members, and communication boundaries between the regulatory and malpractice protection arms of the College may be examined.

6. Implementation considerations

The review of the PLP and risk analysis conducted is the first step towards determining the future of PLP. Before determining a way forward, the RCDSO Council will need to carefully consider the findings of this report, determine its level of risk tolerance, and identify the preferred option. This will require further analysis, particularly regarding resource implications.

6.1 Resource implications: Analysis will be required to determine the implications of implementing the various options presented. Council will need to decide whether the desired reduction in real or perceived conflict of interest justifies the investment that will be required.

If divesting the program is to be seriously considered, additional actuarial analysis is required to account for unintended consequences.

6.2 Phased approach: Regardless of the decision the RCDSO Council chooses to make, it is recommended that a phased approach be applied to implementation. Although risks have been identified, the program is currently running well, and the recommendations can be responded to in stages.

For example, RCDSO can start by:

- Retaining legal and financial expertise
- Separating the PLP finances (including indirect costs) from the regulatory budget
- Determining the appropriate funding for the two reserves (PLP and regulatory)
- Establishing governance principles and objects

Staggered implementation can also be applied to other elements, such as decisions regarding future data exchange and remediation.⁵⁶

⁵⁶ See [Appendix 13](#).

7. Recommendations

In undergoing its analysis, the Task Force has established the following recommendations:

Recommendation	Section
1. The PLP department has developed and implemented a claims processing program that is effective and efficient. No major changes to the program itself are being recommended at this time.	1.2
2. The current model offers the assurance that all dentists are able to access adequate liability protection. This offers public protection benefits and is supported by the Task Force. However, ensuring access to liability protection is a necessary, but not sufficient reason to continue to operate the PLP.	2.1
3. The influence of the public interest focus of the College is a benefit of the current model, and as long as the risks can be mitigated, there is value in keeping the program in-house.	2.1
4. Preserving and building public trust must be a key focus for both the RCDSO and the PLP.	5.1
5. To preserve and build public trust, steps should be taken to demonstrate PLP's independence from RCDSO. The most effective way to do this is by establishing the PLP as a subsidiary, with its own Board of Directors.	5.1.2
6. The independence of a Board is an important way to mitigate against reputational risk, and there are ways to ensure that the public interest mandate of the College can endure.	5.1.3
7. Above all else, the PLP should operate based on principles of good governance.	5.1.4
8. It is suggested that RCDSO seek guidance on the most appropriate governance structure (including whether RCDSO board members should be represented on the PLP board) and determine a set of public interest-based principles or objects to guide the decision-making of the board.	5.1.3
9. The most effective way to protect the College from financial risk associated with the PLP is through the subsidiary model, with complete separation of finances between the parent and the subsidiary. This separation may isolate the potential losses and protect RCDSO's operating reserves.	5.2.1
10. RCDSO should consider re-assessing the costs of the PLP, to factor in the indirect costs that are associated with running the program.	5.2.4
11. The regulatory oversight associated with a formally designated insurance company would incur significant new costs, and is not considered necessary to mitigate the PLP's financial risk. However, the RCDSO should consider other ways to strengthen financial accountability and oversight (such as oversight by a senior insurance/risk executive, undergoing annual actuarial assessment to manage risk).	5.2.5
12. The College may consider establishing protocols for the exchange of information from PLP to the College to support the college in its duty to address competency issues the PLP may uncover. However, it is suggested that this be done with caution, only after carefully reviewing potential due processes, fairness, and ethical concerns.	5.4
13. The College should undertake proactive communications to demonstrate the public benefit of the program.	5.4
14. Analysis will be required to determine the implications of implementing the various options presented. Council will need to decide whether the desired reduction in real or perceived conflict of interest justifies the investment that will be required.	6.1
15. Regardless of the decision the RCDSO Council chooses to make, it is recommended that a phased approach be applied to implementation. Although risks have been identified, the program is currently running well, and the recommendations can be responded to in stages.	6.2

Conclusion

When the RCDSO created the PLP over fifty years ago to administer malpractice protection for Ontario's dentists, it was proactively taking a step to ensure that no patient would be left without recourse in the event of negligence or malpractice by a member of the profession. The RCDSO was ahead of its time, and it took another forty years for the government to expect this of all regulators of health professionals.

In today's changing regulatory landscape, the RCDSO should be commended for its willingness to undertake an external review of the current program and identify its vulnerabilities and risks. The review has determined that it is time to reassess the current model, considering the reputational, financial, and regulatory risks it is currently facing. This is an opportunity for the RCDSO Council to take a leadership role, assess the identified risks, and determine which mitigation methods meet the risk appetite of the College.

Appendices

List of Appendices

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- Appendix 2: PLP Program Review
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- Appendix 4: Professional Liability Requirements as outlined in RHPA
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- Appendix 6: LAWPRO's contribution to the public protection mandate
- Appendix 7: PLP Media Stories
- Appendix 8: Levels of risk associated with healthcare professions
- Appendix 9: CPMF Standards
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Appendix 1

PLP Expert Review Task Force: Terms of Reference

Background / Preamble

The Professional Liability Program (PLP) of the Royal College of Dental Surgeons of Ontario (RCDSO) was created in the 1970s to administer malpractice protection for Ontario dentists. Its mission and function are distinct from the rest of the College's, whose mandate is to "serve and protect the public interest." Although all Ontario health profession regulators are required to ensure their members have professional liability protection, RCDSO is one of the few health regulatory Colleges in Canada that directly operates a PLP.

In the past year, the College has started to consider PLP's contribution to the public benefit as well as financial, reputational and regulatory risks for the College. After a thorough review by the RCDSO's Audit Committee, Council is establishing a PLP Expert Review Task Force to conduct a review of the PLP.

Purpose of Task Force

The Task Force's purpose is to review the current PLP program (including an assessment of public benefit vs. risks), recommend specific risk mitigation solutions (regulatory, financial, reputational), and develop an implementation plan.

Role

The Task force will be expected to:

- Orient itself to the existing PLP program, and conduct an analysis of its risks and benefits;
- Review, discuss, and consider best practice examples for consideration as risk mitigation options;
- Assess options and determine a recommended solution;
- Review, discuss, and consider implementation approaches for how to move forward with the recommendation; and
- Review and provide input on a Final Report that outlines the Task Force's review and recommendations, to be presented to Council in September 2023.

The Task Force will report directly to the Council of the RCDSO.

Guiding principles

The Task Force will make its recommendations based on the following guiding principles:

- Mitigate risks and promote the College's public interest mandate;
- Achieve financial goals and long-term financial sustainability, including compliance with external standards (for example, the ministry's College Performance Measurement Framework);
- Provide assurance that all Ontario dentists will have adequate liability protection; and
- Consider ways to address competency issues revealed from dentist's contact with the existing liability protection program.

Membership

The membership of the Task Force has been appointed by the RCDSO's Executive Committee, and is comprised of the following:

1. **Diana Miles**, CEO of the Law Society of Ontario, and Member of Board of Directors, LAWPRO
2. **Binah Nathan**, Member of the Board of Directors, LAWPRO; Member of Board of Directors and Audit Committee Chair, Pro-Demnity Insurance Company; and Lay Member, Competition Tribunal
3. **Bruce Palmer**, President & CEO of Pro-Demnity Insurance Company
4. **Joseph Richards**, Adjudicator, Immigration and Refugee Board; Former RCDSO and College of Opticians LGIC Public Member Appointee; and former Chair, Professional Liability Program Committee, RCDSO
5. **Hartley Stern**, Senior Associate, Gerald Pulvermacher Associates and former CEO, Canadian Medical Protective Association
6. **Dr. Sandy Venditti**, Dentist, and RCDSO Council (term complete January 16, 2023) including President (2021-2023)

Members will be compensated at the per diem rates available for Committee members of the RCDSO.

Roles and Responsibilities

Committee Members

All Task Force committee members have the responsibility to help achieve the Task Force's Purpose.

All members of the Task Force are participating because of their interest, expertise, and objectivity and all have an equal role in participating.

Task Force members are also responsible for:

- Reviewing meeting materials in advance of the meetings and arriving prepared to provide a broad perspective on the issues under consideration
- Keeping matters of the Task Force confidential (Members will be subject to all confidentiality requirements of the College, and will be required to sign a confidentiality agreement).

Project Manager

The Project Manager will be responsible for providing secretariat support for the Task Force by:

- Developing a project plan for the work of the Task Force
- Coordinating the meeting agendas and preparation of information for the meetings
- Facilitating the meetings, and summarizing discussion and decisions into a Final Report

Observers

Select members of the RCDSO staff may be asked to join the Task Force meetings (in strict confidence), to take minutes or provide content expertise.

Meetings and Term

It is anticipated that meetings will be held remotely, on a monthly-basis, but may change in order to meet the work plan and accomplish the tasks outlined.

Meetings will be scheduled to ensure all members of the Task Force are able to participate. However, in case of unexpected absence, meetings will continue as long as half (3) of the members are present. Members are not permitted to send a delegate and if unable to attend, members are encouraged to provide input through a discussion with the Project Manager.

The Task Force's term shall be concluded once its tasks are completed, and a recommendation is made to Council. It is anticipated that the work will be completed prior to September 30th 2023, with the majority of work completed by June 30, 2023.

Appendix 2

Program Review

The RCDSO independently operates an in-house liability protection program. Aside from an optional “top-up insurance” that can be purchased, the entire program is operated in-house. The claims generated by this program are managed and settled, where appropriate, by the staff of RCDSO (for complex cases or for those that reach a certain monetary threshold, external defense counsel is engaged). A brief overview of the program is provided below.

1.1 Liability coverage

All members of the College (all Ontario dentists) are required to pay annual fees, and these fees include malpractice protection. Participating in the liability program is tied to a dentist’s registration fees, making it a mandatory group professional liability protection program. This ensures that every member of the College with a valid certificate of registration also has liability protection. Individuals have protection for \$2 million per occurrence (if a dentist is deemed to be liable, PLP pays the patient the settled amount, to a maximum of \$2 million per occurrence).

Although the RCDSO manages the claims generated by the program, a policy with an outside insurance provider has been secured to provide an aggregate deductible. This aggregate deductible (set at \$10 million) ensures that the PLP will not be required to pay out more than \$10 million in claims per year. If for example, a claim year incurred payouts of \$14 million, the College would pay its \$10 million aggregate deductible and the insurance company would pay the remaining \$4 million. It should be noted that since the aggregate deductible was raised to \$10 million in 2014, claims have not gone above \$6 million (except for the class action year) and so the insurance company has not made a single payment. This large aggregate deductible is in exchange for a lower annual insurance premium, and replaces high premiums that were required before 2014, when there was also an individual case limit.

1.2 Claims and Costs analysis

The number of incidents reported to PLP have remained relatively stable over the past ten years (approximately 1,500 per year). Currently (as of March 2023), there are 810 open files, approximately 2/3 of which are related to legal action. The annual payouts (loss) of the program generally range between \$4 and \$6.5 million. Payouts have been relatively steady, and there is no indication historically that costs are rising, even while the number of dentists has increased by 46% (additional detail is provided in [Appendix 3](#)).

1.3 Structure

The College currently maintains the PLP as a department within the RCDSO organizational structure, reporting to the Chief Financial Officer (CFO). It is surrounded by a ‘firewall’ of infrastructure, policies and practices. This ensures there is no flow of information between the regulatory side (which may be investigating the conduct of a dentist) and the PLP side (which may be defending claims against the same dentist). This separation from the regulatory practices includes a separate logo, its own phone number, email domain (plpservices.org), and [website](#). Although its physical space is located in the RCDSO building, the space is enclosed and access is restricted to PLP staff only. **The Department consists of 19 staff, who have developed and implemented a claims processing program that is effective and efficient.** Although protections are in place to support confidentiality, the interrelationship between PLP and the College is a concern and is discussed below.

1.4 Governance

The PLP is governed by a PLP Committee, outlined in RCDSO's [by-laws](#). This Committee consists of five non-Council committee members, and one public member from Council. This public member is the Chair of the PLP Committee and may not sit on any statutory committee of the College, to preserve confidentiality. The PLP Committee approves proposed settlements over \$50,000 and makes program recommendations to Council (it must report to Council at least once per year). The Audit Committee has identified that the Committee is lacking a clear accountability for the decisions it makes, and would benefit from more expertise, particularly in the areas of insurance, mediation or similar.

1.5 Funding

PLP is a program within the College and does not have its own revenue stream. The RCDSO charges an annual membership fee, which includes malpractice protection (PLP does not collect separate fees for PLP). The PLP is funded through registrant fees. Since the 1970s, RCDSO has bundled the regulatory and PLP fees into one annual fee and the fees cover all College activities (including PLP).

As expenses arise for the PLP program, College funds are used to cover the costs the same as any other department programs within the College. Recent analysis⁵⁷ indicates that PLP: utilizes approximately 30% of the College's annual budget; is the largest program of the College based on budget, and is larger than all its regulatory programs. Recent fee increases (from 2018 onward) have almost completely been used to fund the growing PLP cost base (PLP's loss provision was underfunded for several years and has increased dramatically since 2018).

The PLP loss provision is volatile. Once a case is open, it takes years to be closed (and paid out if necessary). As a result, actuarial analysis is needed to predict how much money needs to be set aside to pay for a case. Although in the past 10 years, almost 95% of claims have resulted in no pay-out (see

⁵⁷ RCDSO has recently published an assessment of the breakdown of how fees are spent, *Your Fees At Work*: <https://az184419.vo.msecnd.net/rcdso/pdf/financial-statements/RCDSO%205221%20Your%20Fees%20At%20Work.pdf>. Accessed January 31, 2023.

[Appendix 2](#)), the loss provision is uncertain. The loss provision is based on calculations by actuaries and is recorded as an expense in the financial statements. Due to the magnitude of the expense, it can determine whether the College ends up in a surplus or deficit position.

The PLP liability has doubled over the last ten years. This liability, which is determined by actuaries, has continued to increase year over year. This directly impacts the expense side of the College and requires savings to be found that generally have drawn from the regulatory program areas.

The PLP has established a reserve fund (created from RCDSO operating surpluses) to fund material claims that could not be accommodated within the College's operating budget. It is normal practice for professional liability programs to establish a reserve fund to meet future liabilities because the liabilities are long tail in nature. The College currently maintains the fund at \$22,522,275 and was deemed sufficient when last reviewed by an actuary in 2017⁵⁸ (a review is currently being conducted, with results expected in fall 2023).

It should be noted that this fund is internally restricted to PLP and not available for broader regulatory purposes. Although the College is expected, through the College Performance Measurement Framework (CPMF),⁵⁹ to carry an operating reserve for unplanned events, the College has not yet been able to fully build this reserve, due to several consecutive years of deficits. This is almost exclusively due to PLP loss provisions.

Reserves are considered as a key component of the College's overall financial strategy and it is expected that, based on the results of the actuarial review currently underway, the PLP reserve fund balance will be adjusted to partially fund the RCDSO Operating Reserve Fund, and other potential priorities, while ensuring the PLP Reserve is adequately funded.

⁵⁸ In 2017, the balance of the reserve was \$24.4 million.

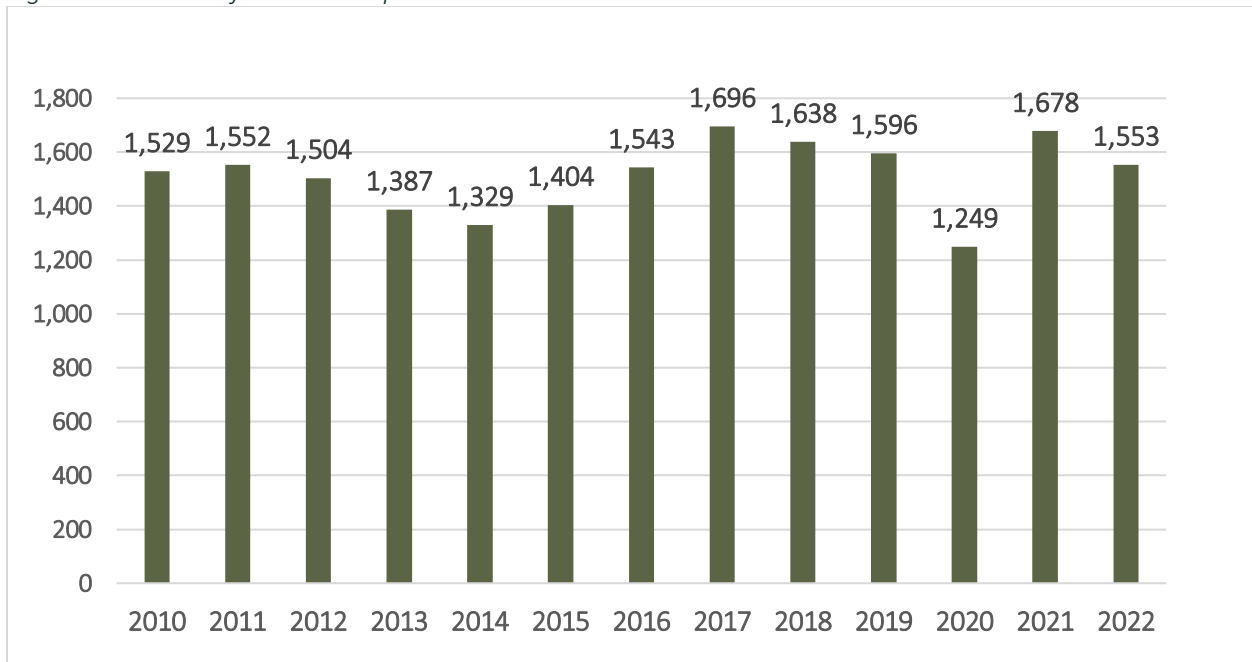
⁵⁹ The Ontario Ministry of Health has established a College Performance Measurement Framework (CPMF) which outlines expectations of regulators. The CPMF outlines expectations that the College be a responsible steward of its financial resources in achieving its statutory objectives and regulatory mandate.

Appendix 3

PLP Claims and Costs Analysis

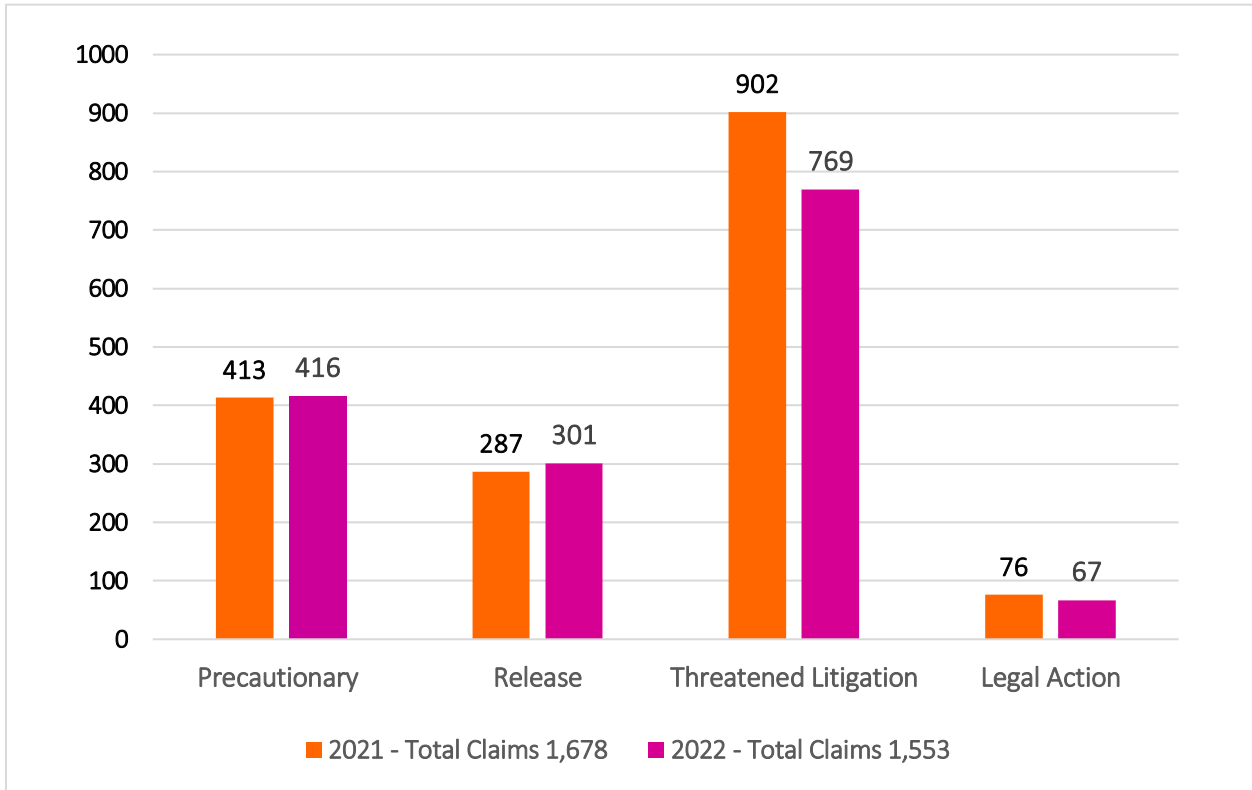
The number of incidents reported to PLP have remained relatively stable over the past ten years (approximately 1,500 per year, as shown in Figure 3). Most incidents are associated with threatened litigation (threats or demands for compensation by patients or their lawyers), and very few proceed to legal action (Figure 4).⁶⁰ As of March 2023, there were 810 open files, approximately 2/3 of which are related to legal action (Figure 5). Although as noted above, very few claims proceed to legal action, these types of claims take longer to resolve than others, making them the highest category of open files.

Figure 3: Number of Incidents reported



⁶⁰ There are few trials. Cases reaching this stage are either dropped by the plaintiff or settled. In the past 25 years, there have been approximately ten Small Claims Court trials and four Standard Procedure Trials.

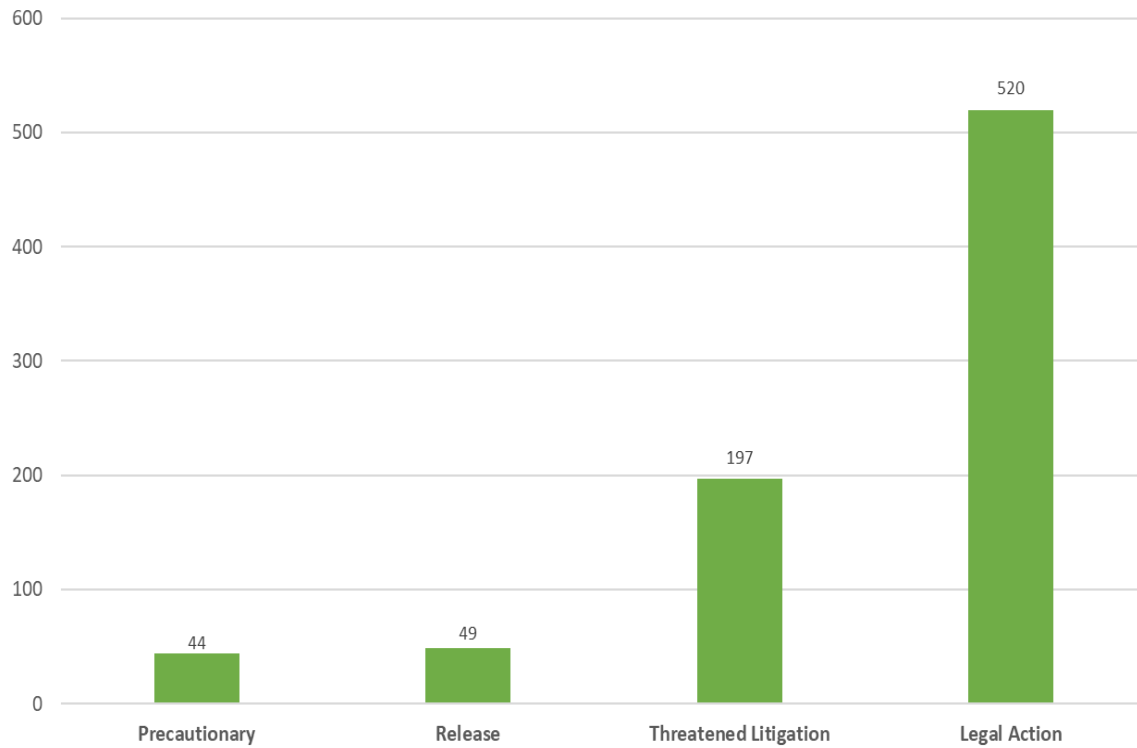
Figure 4: Types of Incidents/Claims



Interpretation

- **Precautionary:** an incident has occurred but no claim or threat has been made, yet.
- **Release:** incidents in which the dentist (not PLP) is making the payment and PLP provides the paperwork to ensure it is paid properly.
- **Threatened Litigation:** threats or demands for compensation by patients or their lawyers
- **Legal Action:** lawsuits.

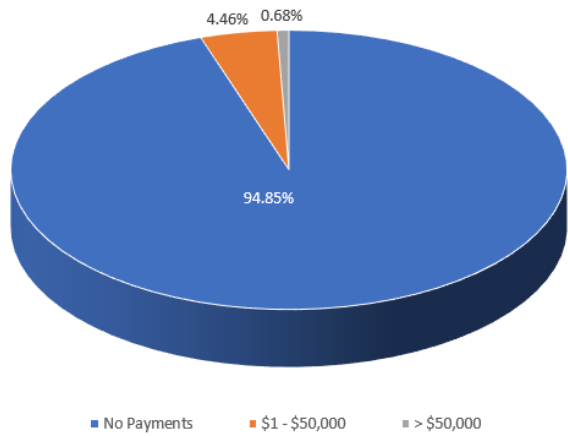
Figure 5: PLP Open Files, as of March 19, 2023



The annual payouts (loss) of the program generally range between \$4-\$6.5 million. In 2017, the predicted amount is higher due to a class action suit (at \$7.36M). Of all incidents reported between 2013-2022, only 5% have resulted in payments through PLP (Figure 6). Payouts have been relatively steady, and there is no indication historically that costs are rising, even while the number of dentists has increased by 46% (

Figure 7).

Figure 6: PLP Payments, 2013-2022



Interpretation

Total number of incidents reported: 14,517.

Payments mean any one or more of an indemnity/settlement payment, legal fees or expert fees.

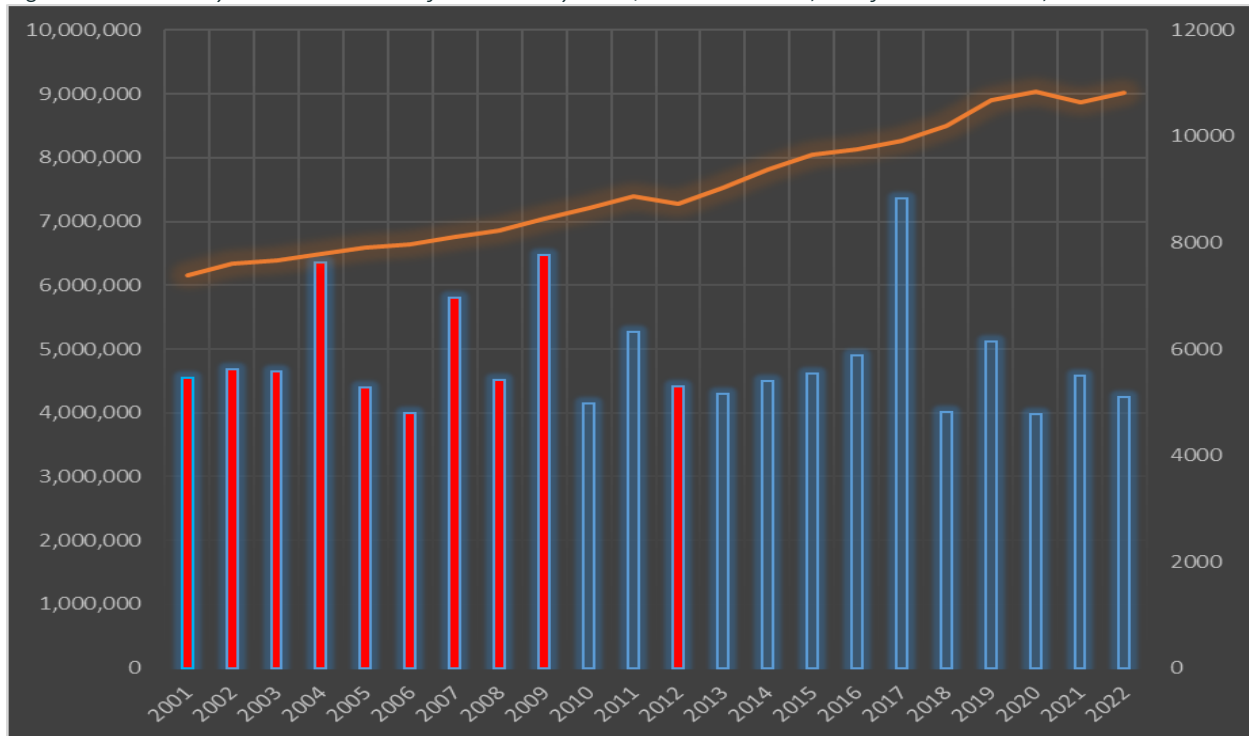
Blue slice: incidents reported with no payment by PLP (this includes payments the dentist makes and PLP assist with).

Orange slice: % of case (648/14,517) with payments up to \$50,000.

Grey slice: % of cases (99/14,517), with payments over \$50,000.

Only ~5% of reported matters result in payments through PLP.

Figure 7: Claim Payouts & Number of Dentists by Case/Calendar Year, as of December 31, 2022



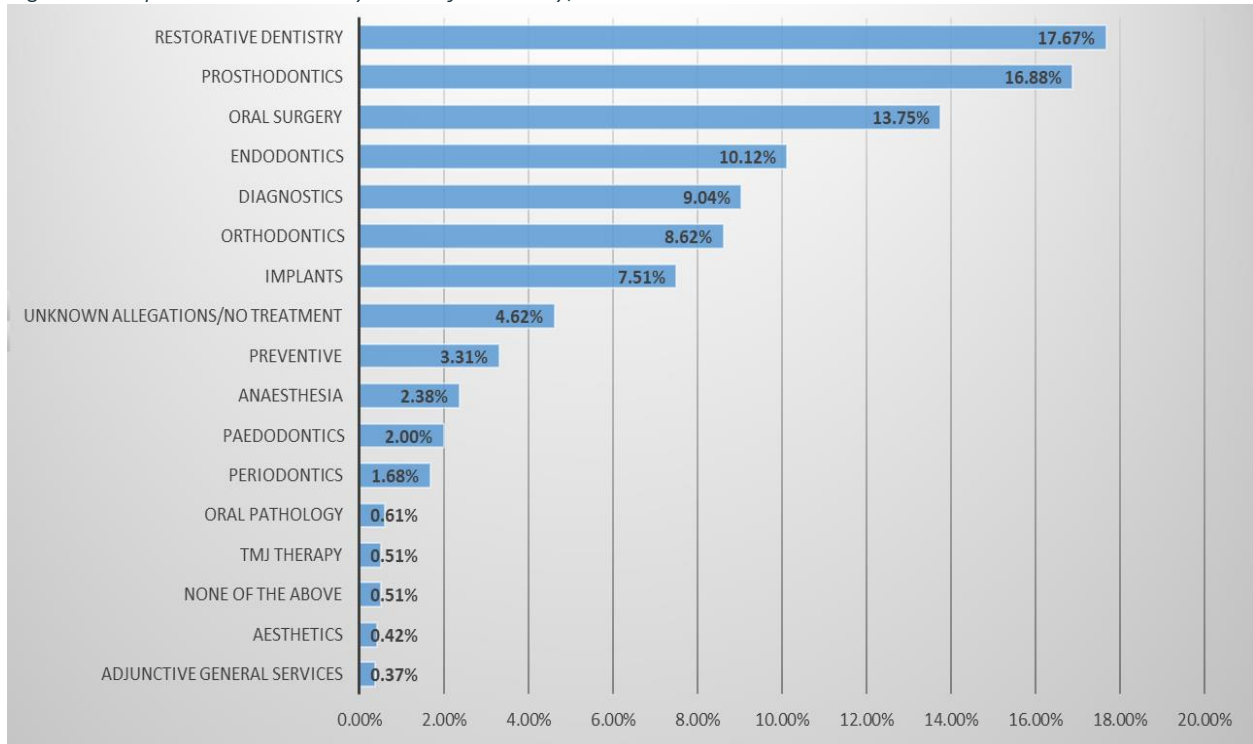
Interpretation

- **Blue bars:** estimated payouts for claims reported in the case/calendar year.
- **Red bars:** actual payouts for claims initiated in the case/calendar year (all cases closed for that year).
- **Orange line:** number of dentists registered with the RCDSO in the case/calendar year – 7,388 in 2001 and 10,822 in 2022. Increase is 46.5%.

The areas of dentistry that receive the most reported incidents are restorative (18% of incidents), prosthodontics (17%), and oral surgery (14%), as shown in Figure 8. All dentists pay the same fees, regardless of area of dentistry and number of past claims. It should be noted that in 2022, PLP files were examined to determine the extent of dentists that are “repeat offenders. During the 84-month period reviewed,⁶¹ it was determined that only 13 dentists had more than one file, and of those 13, only 8 had more than one file with payments by PLP.

⁶¹ The review period was from June 30, 2022, and the 84 months prior to this date. The 84-month period was used as it is the time period in which members are subject to a step-up deductible should they have more than one file in that period of time.

Figure 8: Reported Incidents by area of dentistry, 2022



Appendix 4

Professional Liability Requirements as outlined in RHPA

The legislated requirements for Colleges to ensure their members hold professional liability insurance have evolved over time, and the history is outlined below.

In 2009, the [Regulated Health Professions Statute Law Amendment Act](#) introduced changes to the RHPA to ensure that no member of a College in Ontario could engage in the practice of the health profession unless they are personally insured against professional liability. The Act received Royal Assent on Dec. 15, 2009. As a result, the requirements below were added to the RHPA, but were never proclaimed:⁶²

Note: On a day to be named by proclamation of the Lieutenant Governor, Schedule 2 is amended by adding the following section:

Professional liability insurance

13.1 (1) No member of a College in Ontario shall engage in the practice of the health profession unless he or she is personally insured against professional liability under a professional liability insurance policy or belongs to a specified association that provides the member with personal protection against professional liability. 2009, c. 26, s. 24 (13).

Insurance requirements

(2) A member mentioned in subsection (1) shall comply with the requirements respecting professional liability insurance or protection against professional liability specified by the College and prescribed in the regulations made under the health profession Act governing the member's health profession or set out in the by-laws. 2009, c. 26, s. 24 (13).

Professional misconduct

(3) In addition to the grounds set out in subsection 51 (1), a panel of the Discipline Committee shall find that a member has committed an act of professional misconduct if the member fails to comply with subsection (1) or (2). 2009, c. 26, s. 24 (13).

See: 2009, c. 26, ss. 24 (13), 27 (2).

Instead of proclaiming these provisions into Force, the Minister of Health, in 2013, issued a directive to the health professional colleges. The purpose of this directive was to confirm the requirement that all health professional colleges must ensure their members have professional liability protection, and set a deadline of March 31, 2014. It is understood that in the letter, the Minister acknowledged that the requirement to carry personal protection against professional liability (as set out in the Regulated Health Professions Statute Law Amendment Act) may not have recognized the full range of professional liability protection options currently available in the health care system, including employer coverage.⁶³ The Minister indicated that the government believes that it is in the best interest of patients and health care practitioners that all regulated health professionals practising in the province have professional liability insurance, but it seems the government did not feel it was appropriate to build this requirement into legislation. The provisions remained in the RHPA (not in Force) for several more years until they were finally removed⁶⁴ in 2019.

⁶² Historical version for the period December 15, 2009 to October 24, 2010:

<https://www.ontario.ca/laws/statute/91r18/v14>

⁶³ Based on an overview provided by the College of Medical Radiation Technologists of Ontario:

<https://www.cmrito.org/pdfs/wymkas/liability-insurance.pdf> (Accessed February 11, 2023)

⁶⁴ [Historical version for the period November 1, 2018 to December 30, 2019](#)

In the absence of this provision, the only expectation of the College to require its members to carry professional liability protection is written into section 94(1) of the Code:

By-laws

94 (1) The Council may make by-laws relating to the administrative and internal affairs of the College and, without limiting the generality of the foregoing, the Council may make by-laws,

...

(p) authorizing the College to make arrangements for the indemnity of members against professional liability and providing levies to be paid by members;

...

(y) requiring members to have professional liability insurance that satisfies the requirements specified in the by-laws or to belong to a specified association that provides protection against professional liability and requiring members to give proof of the insurance or membership to the Registrar in the manner set out in the by-laws;

This provision provides the College with the authority to carry out the Minister's directive through their bylaws, but the mechanism by which this is done is not prescribed. Oversight varies, with some Colleges conducting audits, and others requiring registrants to declare their professional liability coverage at initial registration or annually. Some colleges specify coverage minimums and require their registrants to obtain insurance from specified acceptable insurance providers (for example, physicians are required to use the Canadian Medical Protective Association, CMPA).

Appendix 5

Overview of other models reviewed

The table below shows a summary of the liability providers discussed and how they are structured.

Provider (and associated regulator)	Designated Insurance Company?	Owned by the College?	Separate Board of Directors?
FARPODQ (ODQ – dentist regulator, Quebec)	Yes	Yes	No. Dissolved in 2020 as a result of Bill 141.
LAWPRO (LSO)*	Yes	Yes	Yes
LIF (BC Law Society)	No	Yes	No
PLP (RCDSO)	No	Yes	No

*Pro-Demnity also has the same structure.

A detailed overview of each of the examples is provided below.

FARPODQ - Le Fonds d'assurance-responsabilité professionnelle de l'Ordre des dentistes du Québec (Ordre des Dentistes du Québec)

In Quebec, the dental regulator (Ordre des Dentistes du Québec, or ODQ) has held a professional liability insurance fund (the "Fund") since 1990. Initially, the Fund was a subsidiary of the College, with its own Board of Directors and separate accounts.

In June 2018, the Quebec government adopted [Bill 141](#) (involving changes to the [Insurers Act](#), aimed at improving the supervision of the financial sector). This bill required (among other things) the merging of governance structures associated with Colleges that operated insurance programs. In addition to dentists, five other colleges require their members to subscribe to an insurance fund they administer (architects, lawyers, chartered appraisers, notaries, pharmacists, and chartered accountants). These colleges, which had previously operated their insurance funds separately, were now required to dissolve their Boards of Directors and integrate the insurance fund within College operations.

The changes came into force on April 1, 2020.

Governance

As noted above, the Fund (Le Fonds d'assurance-responsabilité professionnelle de l'Ordre des dentistes du Québec, or FARPODQ) has been required (through legislation) to dissolve its Board of Directors. Its Board of Directors was repealed and replaced by the Board of directors of the College with the obligation to form a [Professional Liability Insurance Decisions Committee](#). This Committee has decisional powers on claims and reports to the Board. The ODQ also formed an Audit and investment committee that recommends to the ODQ Board all decisions pertaining to finance, legal, and regulatory matters.

Management, finances, and operations

Although under the same governance structure, the assets of the insurance fund are separate from the ODQ's asset base and are intended exclusively for the insurance business. ODQ and FARPODQ's accounting is independent (they even have different sets of auditors). Separate accounts are

administered by employees of the professional liability insurance directorate and the costs inherent in the Order's insurance business are only connected with the insurance fund.

FARPODQ charges an insurance premium that is dedicated to insurance activities. Any profits from the investment associated with the insurance fund do not get shared with the operating fund. The financial regulating body prevents the college from being able to use insurance capital funds.

Some services are shared with ODQ: human resources, IT, communications, payroll, workspace etc. For those services there is a monthly fee charged by ODQ. All these costs are taken into consideration by the FARPODQ actuary when recommending the annual insurance premium.

Data (Confidentiality, separation, and reporting)

Reporting:

As noted, above, legislative changes resulted in the College's board of directors forming a new committee, the Professional Liability Insurance Decisions Committee. This Committee is now required to inform the head of the discipline tribunal when it has reasonable grounds to believe that a dentist has committed an act of professional misconduct. In addition, it must inform the professional inspection committee when it has reasonable grounds to believe that a Dentist's practice of the profession or competence should be the subject of an inspection referred to in the *Professional Code*.⁶⁵

The decision-making committee must also disclose information to the board of directors of the ODQ if they have *reasonable grounds to believe* the information is required to protect the public. The communication of personal information can only be justified if it supports the protection of the public.

Determining the right balance of what should be reported and when was facilitated through the joint development of a protocol, negotiated between FARPODQ and the College. The development of the protocol included consideration of:

- What is considered privileged information?
- Clarity that FARPODQ should not investigate on behalf of the college, but provide the College with the basic elements of a potential problem (e.g. 2-3 sentences indicating the person might lack competence).
- College capacity to act on the cases it receives from FARPODQ (and associated liability) to act on the cases.

Based on these discussions, a formal protocol was developed to help guide the Professional Liability Insurance Decisions Committee's decisions on what constitutes a potential danger to the public. The Committee can take into account criteria such as:

- Frequency of notices of loss
- Severity of harm caused
- Repetition of the same fault
- Aggression
- Illegal or fraudulent acts

⁶⁵ Required under Sections 80, 86.6, 86.7 AND 86.8 of the [Professional Code](#)

LAWPRO - Lawyers' Professional Indemnity Company (Law Society of Ontario)

The material below is based on information gathered through:

- conversation with Daniel Pinnington, President & CEO, LAWPRO, February 24, 2023
- LAWPRO's [Report to Convocation](#), September 2022

History

- The [Law Society Act](#) gives LSO the right to operate a mandatory universal insurance program.
- LAWPRO is an independent subsidiary owned by the Law Society of Ontario (LSO) and licensed as a regulated insurance provider by the Financial Services Regulatory Authority of Ontario (FSRAO). This structure was established based on recommendations made by a Task Force which was struck to address major under-funding issues associated with LSO's previous indemnity fund. The underfunding was as a result of various factors, precipitated by the real estate crisis in the 1990s. After the real estate crash, many clients sued their lawyers for the financial losses they suffered. As a result, the law society's indemnity program received a high volume of claims, resulting in \$200M in unfunded liabilities in 1994.
- In response, the Task Force recommended that LSO continue to own the liability fund, but to operate it as a formal insurance company, required to abide by the Insurance Act. This formality would provide the level of expertise and regulatory oversight the Task Force felt was important for the future sustainability of the program. As a result, [LAWPRO](#) (the Lawyers' Professional Indemnity Company) was formed.
- For the last 27 years, LAWPRO has operated according to the recommendations made by the Task Force.
- An overview of LAWPRO's history is available [here](#).

Governance

- LAWPRO is wholly owned by the LSO, but operates independently with its own Board of Directors, CEO and senior management team.
- The majority of the Board Directors are external to LSO (a minority of directors are Benchers (LSO Board members) or employees of the LSO).

Objects/Principles/Philosophy

- LAWPRO's program was established with the following Principles in mind:
 1. LAWPRO should be operated separate and apart from the Law Society by an independent board of directors;
 2. The program must operate in a commercially reasonable manner (i.e., revenues must cover expenses);
 3. The cost of insurance should reflect the risk of claims (i.e., those with greater risk should pay higher premiums); and
 4. Claims should be resolved fairly and expeditiously (but not on a no-fault basis)

- While LAWPRO is a for profit entity and must meet minimum capital requirements, it essentially operates as not-for-profit. Although LAWPRO does not offer a “no fault” approach, they strive to resolve claims as quickly as possible in a fair and expeditious manner. A coordinated and principled approach to handling claims is applied, by making reasonable settlements where a lawyer truly made a mistake and defending lawyers where no clear error was made or damages suffered. They also provide free coverage for lawyers doing pro bono work in a wide variety of circumstances.
- LAWPRO operates as a captive insurance company that is not profit-driven. For each \$1.00 LAWPRO gets by way of premiums, it pays out \$1.10 in costs. Although LAWPRO does not price its product for profit, it maintains its solvency through return-on-investment income.
- LAWPRO has developed a [summary](#) of the roles and responsibilities of its Board of Directors, which includes “promoting a culture of integrity, exemplary business conduct, and due regard for the fair treatment of customers while acting in a commercially reasonable manner.”

Management, finances, and operations

- LAWPRO operates as a separate company. Fees are collected separately, back-office costs are completely separate from LSO (with the exception of a very small annual contribution for shared services paid by LAWPRO to the LSO). LAWPRO has its own Executive team, separate communications team, human resources, information services, finance, etc.
- LAWPRO occupies a separate physical space from LSO.

Confidentiality, separation, and reporting

Mandatory reporting by insurance provider

- Basic profile and practice information collected by the Law Society is shared with LAWPRO on an ongoing basis, but completely separate information systems and operational policies ensure no sharing of LSO complaints or LAWPRO claims information between the regulator and insurer takes place (unless the insured consents).
- Rules of professional conduct (ethics rules set by LSO) require a lawyer to report another lawyer. These rules apply to any lawyer working for LAWPRO.
- In LAWPRO’s insurance [policy](#), “Condition Q” states that if LAWPRO feels that there are circumstances where a client can be harmed, or a crime has been committed, they have the ability to report it to the LSO:

Q. Reporting to the Law Society: The INSURED agrees that, if the INSURER reasonably believes the INSURED to be or to have engaged in activities which the INSURER, in its sole and absolute discretion, considers may be DISHONEST or criminal or in activities which have had or may have the effect of causing someone to suffer serious damage as a consequence of an apparent breach of the rules of professional conduct, or in any circumstances that a LAWYER would be mandated to report to the NAMED INSURED in respect of other licensees pursuant to the rules of professional conduct, the INSURER may, in its sole and absolute discretion, report such activities to the NAMED INSURED and may, in its sole and absolute discretion, deliver to the NAMED INSURED such information

and documents relating thereto that the INSURER, in its sole and absolute discretion, deems appropriate.

Risk Management / remedial practices

- LSO has a Member assistance program / Lawyer wellness program, offered to all Ontario Lawyers. Recognizing that lawyers with health and wellness issues are more prone to claims, LAWPRO pays half of the costs on the basis that proactively helping lawyers that are struggling reduces claims.
- LAWPRO offers [practicePRO](#), a claims prevention effort that helps lawyers understand where and why claims happen, and provides them with practical resources to help them reduce their claims risks.

LIF - Lawyers' Indemnity Fund (Law Society of BC)

The material below is based on information gathered through discussion with **Susan Forbes, KC, Chief Operating Officer, Lawyers Indemnity Fund ("LIF")** on March 6, 2023

History

- From 1990 to 2020, the Law Society of BC (LSBC) owned a captive insurance company with a single purpose to provide liability insurance to BC's lawyers. The reserves were held within LSBC, and this had been in place since 1990. BC is the only Canadian jurisdiction with legislation permitting the formation of captive insurers, by which it was hoped to encourage the growth of the industry in the province. Captives are regulated by the provincial regulator of financial entities, FICOM (now BCFSa), on a "light touch" (few requirements) basis.
- In 2014, the Government took the position that properly structured, the reserves should be held within the captive (instead of within LSBC).
- The LSBC set up a small Task Force to study the issue and staff spent a great deal of time exploring structural options for the insurance program, and in discussion with FICOM, and policy staff of the AG and the Ministry of Finance. The Task Force agreed that the optimum structure for the profession and the public would free the program from regulation by government, allow for some separation between the LSBC and the insurance function, protect the LSBC from liabilities arising from the insurance program, and maintain the low cost of the program as those costs would be borne by the profession and passed on indirectly to clients.
- Ultimately, under new government, amendments to the [Legal Profession Act](#) (section 30 and a new section 30.1) of were made to allow LSBC to establish and operate a "society indemnification program", a wholly-owned subsidiary that would not be an insurer as defined in the [Financial Institutions Act](#) and the [Insurance Act](#). The effect of the amendments was to allow the incorporation of an independent subsidiary as an unregulated, non-profit society.
- Effective January 1, 2021, the BC Lawyers Indemnity Association (BCLIA) was created, an unregulated society, which is a wholly-owned subsidiary of the Law Society., BCLIA assumed all the rights and obligations under all earlier policies of the LSBC Captive Insurance Company Ltd.

Governance:

- BCLIA is an incorporated subsidiary of LSBC, but holds no assets, and has no CEO. The only actions it takes is issuing the professional liability policy as "indemnitor" and processing and filing the necessary annual corporate records that every society files.
- The COO of LIF reports to the CEO of LSBC and is part of the Law Society's senior leadership team. Having LIF at the table is seen as fundamental to serving the interests of the profession and the public, as it means that LSBC's public protection mandate is always front and centre to the discussions and top of mind for the COO, and the LSBC benefits from having the insurance perspective on issues it confronts.
- Other benefits to the integration of LIF and LSBC include the ability to steer the indemnity policy in the public interest. For example:
- LSBC offers free coverage to lawyers providing approved *pro bono* services, as well as part-time discounts to encourage women to remain in the profession;
- LIF takes a flexible approach to coverage when handling claims, if it is in the public interest. For instance, if a lawyer breached the policy and jeopardized their coverage (for example, by not

reporting on time), in appropriate cases, LIF will compensate the claimant and recoup costs from the lawyer later.

- Although BCLIA has a President and Director as required by statute, there is no formal Board of Directors. This is considered beneficial from an efficiency and public interest perspective. An independent Board might have conflicting accountabilities - to the parent company with its public interest mandate, and to BCLIA (even if the CEO of the parent company sits on the board, which presents its own issues) to act in its best interests. The COO navigates those perceived tensions, acting in the interests of the indemnity program while taking into account the broader interests of the public (as opposed to an individual claimant) and the profession in structuring the policy and managing operations.

- During the wind-up of the captive, the regulator BCFSa made this inquiry:

“With the creation of the new society, BCLIA, is the intent to continue with a similar setup between Law Society and [the captive]. That is, BCLIA will issue the policies and Law Society will administer and pay out all claims.”

LIF responded:

“Yes. This is the structure that has served the Law Society and the policyholders – the indemnified lawyers of BC – so well for decades, and is the envy of our counterparts across the country. Having a separate entity issue the indemnity policy, in addition to the rebranding Lawyers Indemnity Fund is presently implementing, provides an important distance between the Law Society and the Indemnitor, while having the staff and operations remain with the Law Society provides a useful public-interest perspective [and allows for fully informed operational decisions and useful synergies on both sides]. Maintaining this careful balance between the indemnitor and the public interest is a hallmark of, and vital to, the program’s success.”

- The LIF is overseen by a subcommittee of LSBC’s Finance and Audit Committee (the FAC), which consists of the Chair of FAC, 2 lawyers (not Benchers), and 1 insurance industry expert.

Management, finances, and operations

- BCLIA issues the policy that provides coverage to lawyers but as noted above, has no operating role. The program is managed by LIF, which is a division of the LSBC.
- Since it is a division of LSBC, all indirect costs (accounting, IT, HR, communications, space, cleaning, etc.) are shared. However, this is done transparently, as LIF “pays” a proportion of these operating costs (based on percent of use or # of employees). Indemnity fees are calculated with these costs included in LIF’s operating budget, which is separate from the general fund’s budget.
- Consideration for completely separating the indemnity function from the main regulatory body with separate premises and operations was made, but it was determined that the program would be considerably more costly as it would not benefit from the economies of scale and operational synergies associated with being part of LSBC. Moreover, because the LSBC would be the parent and would control LIF’s board appointment process, the legal separation might never be separate enough in the minds of some and perhaps heighten cynicism.
- Annual fees are collected by LSBC with separate line items for regulatory, indemnity, and other third party mandatory fees (e.g. *pro-bono* through the Law Foundation, courthouse library, and The Advocate) are clearly shown.

- Since legal advice indicated that all funds paid by insured lawyers for the purpose of indemnity must be kept and used for this purpose, the portion of fees identified for LIF is kept in a separate fund, from the rest of the organization. This fund also includes the mental health and group member assistance program that is offered to all lawyers.
- BCLIA is unregulated and so is not required to follow the same protocols as an insurance company, but LIF continues to conduct an annual MCT analysis to gauge the appropriate level for the fund’s capital and net reserves.

Confidentiality and separation

- Since the inception of the current insurance program in 1986, claims information has always been kept confidential from the discipline or complaint processes and staff of the LSBC. The integrated database of claims and complaints restricts access to staff accordingly. Of course, LIF uses no-name fact scenarios in its loss prevention and risk management advice to lawyers, and will sometimes tweak the facts to make them unrecognizable to the parties involved.
- A rebranding - including distinct new logo, tagline, website, email and signature block, domain, phone display, twitter handle, stationary, office floor, and signage - was done in 2020 to enhance the sense of separation the Task force felt was appropriate. LIF already had separate phone and fax lines.
- Published LSBC protocols exist for holding disciplinary matters in abeyance where there is a civil claim (or indeed a criminal investigation) involving the same facts, and there is complete separation and independence between the discipline and indemnity functions for those matters.
- Complainants and claimants alike occasionally assert that the LSBC’s duty is to protect the public interest and that “You LIF are not doing that when you deny me compensation for my civil claim”. LIF invariably responds to this by indicating, “We are acting in the public interest by having a mandatory indemnity program that pays compensation for meritorious civil claims pursuant to the civil justice processes that govern all civil matters in the province. If you do not agree with our assessment that your claim lacks merit, you have the right to pursue your claim in court.” A determination will ultimately be made by a wholly independent judge of the court. The LSBC was of the view that those comments, while rare, would not cease if the indemnity function was completely separated operationally as long as LIF was a wholly-owned subsidiary of the LSBC. It was a question of degrees of separation, and any benefit from a greater degree of separation would be *more than offset* by the disadvantage in efficiency, well-informed operations, and cost. While no possible structure was “perfect”, maintaining control over the indemnity function with greater indicators of separation was viewed as the next best thing. See the LIF webpage “[for the public](#)” for how they communicate these issues to the public.

The LIF Annual Report is available [here](#).

Appendix 6

LAWPRO's contribution to the public protection mandate
Excerpt from LAWPRO's [Report to Convocation](#), September 2022

11. LAWPRO is integral to the Law Society's public protection mandate as it stands behind lawyers and sets clients right in the event they suffer a loss due to the negligence of their lawyer. It operates as a captive insurance company that is not profit-driven. In fact, for each \$1.00 LAWPRO gets by way of premiums, it pays out \$1.10 in costs. The decision to keep premiums this low compared to the amounts paid for claims and expenses is not typical for a commercial insurance company. Although LAWPRO does not price its product for profit, it maintains its solvency through return-on-investment income. Operating in this manner provides a substantial benefit to the profession. This is discussed further in paragraphs 32 to 38 below.

12. Contrast the benefits that LAWPRO offers with the circumstances Ontario lawyers would likely face if one or more commercial insurers were providing insurance to the profession:

- To continue to offer as comprehensive coverage as is currently provided, the high loss ratio would require higher premiums as commercial insurers would underwrite to make a profit;
- Lawyers would have to pay insurance broker fees, adding 15% or more to the cost of insurance;
- Premiums would vary widely by firm size and area of practice, and for individuals with a history of reported claims;
- Carriers could simply refuse to insure individual lawyers they felt were too great a claims risk, making it impossible for some lawyers to maintain their practice status;
- Coverage terms and conditions would vary widely;
- The public would be at risk as it would be more difficult to know if a lawyer's coverage had been cancelled;
- A premium would likely be charged for Run-off coverage, and there would likely be separate premiums if the lawyer was at different firms; and
- There would be the potential for gaps in coverage as a new policy would be required if a lawyer changed firms, and the lawyer would have to obtain a separate policy to cover claims from work done at a previous firm.

13. The financial viability of an independent malpractice insurer, particularly in a hardening market when insurance can be more difficult to obtain at an affordable rate, is paramount to meeting the Law Society's public protection mandate. If LAWPRO's financial health is compromised, we run the chance of another insurance crisis, less protection for the public and no backstop for Ontario lawyers. This is the nightmare

scenario the Law Society of England and Wales continues to struggle with more than a decade after several commercial insurers pulled out of its mandatory program.⁴

The London Free Press

Its dual role both a regulator and insurer of dentists is almost unheard of in Canada

Jonathan Sher

Published Sep 29, 2013

The prospect of needles and drills leaves you sweating in the chair at your dentist's office.

You're too worried to consider who will look after your interest if something goes terribly wrong.

But legal and ethical experts say you may have cause for concern.

The same self-regulating college that disciplines bad dentists in Ontario also insures them against liability claims — dual roles nearly unheard of in Canada.

That dual role gives the Royal College of Dental Surgeons of Ontario an incentive to go light on dentists who commit misconduct, say experts and even some critical dentists.

"It's a conflict of interest even if (the college is) perfectly honest. The setup itself is a conflict of interest," said Margaret Somerville, founding director of McGill University's Centre for Medicine, Ethics and Law.

In Ontario, 26 health professions regulate themselves through organizations called colleges, protecting the public by disciplining members who commit misconduct. Only the dental college also provides liability insurance to its members.

Is the College more concerned about protecting the wallets of dentists than the health of patients?

The College says no, but some dentists point to remarks by the College's registrar, Irwin Fefergrad, who was secretly taped speaking about insurance to the Toronto Academy of Dentists about why the dues Ontario dentists pay to the College are lower than in other provinces.

"There's no outside adjuster . . . We have inside people. We don't pay money for that kind of stuff. And we're brutal on payments on damages. We don't pay money to get rid of something. We pay because maybe there's a liability. If there's liability, we'll pay. And we're not generous," Fefergrad said May 8, 2012 on a tape obtained by *The Free Press*.

Asked this month by *The Free Press* why he said the College was "brutal" about paying damages, Fefergrad said he meant to say the regulator is fair but not generous in paying claims.

The college's chief executive for more than a decade, Fefergrad, a lawyer, defends the regulator and says there's a wall between those who investigate dentists and those who pay out liability claims.

But critics say Fefergrad himself breaches that wall: He hires someone to run the insurance program and advises the college's complaints committees if there's a legal basis to send a dentist before a discipline panel.

"One of the functions that I do perform to the complaints committee is to let them know whether or not a case is provable or not," Fefergrad told *The Free Press*.

Critics include Dr. Natalie Archer, a Toronto dentist who last year resigned as the College vice-president; Dr. Tom McKean, who served as the College president more than a decade ago, and Dr. Dick Jones, who worries the regulator's insurance program has become a cash cow — a reserve of \$24.4 million has been accumulated.

They may have a real gripe, said Greg Levine, an expert in conflict of interest who serves as ethics commissioner for three Ontario cities. "There seems to be a mixing up of roles," he said. "It implies the disciplinary part will not be exercised strongly."

Jones wrote his concerns in letters to Health Minister Deb Matthews: "Does the Ministry believe that it is in the best interest of the public for a College that not only sets professional standards but investigates, prosecutes and punishes members . . . To operate a profitable group insurance program that gives protection against professional liability?"

In those letters, Jones questioned how the College accumulated a reserve for the insurance fund without anyone paying a dime of taxes.

Fefergrad says the tax claim has no basis because the College is a not-for-profit and auditors said to create a \$25-million reserve to keep the insurance program sound and allow it to become self-funded if necessary.

Jones received a surprising reply in July: Matthews hadn't put into place provisions passed in 2009 requiring health professionals to get personal insurance against liability claims.

"Each (health) college is free to determine the specific liability protection requirements that are appropriate," wrote John Amodio, who oversees Ontario's health-care providers for HealthForce Ontario.

Asked about Fefergrad's comments on the tape, Matthews said she'd want to listen herself and have her staff do research before making a comment.

Matthews said she'd been told by her staff the dental college separates its roles as disciplinarian and insurer and the two functions are funded, managed and governed separately.

Her understanding seems at odds with College practices:

- It funds insurance and its role as regulator with a single fee it collects from dentists.
- Fefergrad plays a role in both insurance and regulation.

— The insurance fund is governed and payouts are approved by a committee whose chair sits on the College’s council and whose members are selected by that council.

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ROYAL COLLEGE OF DENTAL SURGEONS OF ONTARIO

- One of 26 colleges in Ontario in which health professionals regulate themselves to protect the public
- Regulates 9,000 dentists; investigates complaints against them.
- Pays up to \$250,000 per liability claim; refers claims up to \$2 million to private insurers.

THE TAPE

The head of Ontario’s dentistry college was secretly taped last year speaking to Toronto dentists about how it investigates patient complaints. Excerpts from College registrar Irwin Fefergrad:

- “Dentists aren’t any worse than they were in 2000 or 1990. The public is a little more entitled . . . They want more. They demand more. And let me tell you, the legislation sucks because I am required to investigate each entitlement myself. Each and every complaint. I can’t say this is not good. This is crap.”
- “There comes a point and time when you just say, how much more can you put into this? The legislation requires all this stuff and so you know, uh, we’ve been meeting and we’re trying to figure out a constructive way where we’re able to say not every complaint deserves the full monty, you know . . . Absolutely we’re always looking for ways to save money.”

KEY ISSUE:

Does the college keep a wall between how it disciplines dentists and pays liability claims?

- The registrar who hires the head of the insurance program advises college committees whether complaints are provable.
- The registrar says he can’t access specific insurance claims, but some dentists tell him they’ve been sued.
- Insurance payouts are signed off by a committee whose membership is the creation of the college council.

WHERE IS THE HEALTH MINISTRY ON THIS?

- The registrar says an assistant deputy minister is satisfied with how the college conducts its business.
- Ministry backed off a law requiring health professionals to get personally insured, leaving it to health colleges to decide insurance issues.
- Health Minister Deb Matthews says she’s unaware of many college practices and comments by the registrar that have drawn the ire of critics.

THE QUEBEC SITUATION

Only one other health regulator in Canada provides liability insurance, the Ordre des dentistes du Quebec, but it does more than the Ontario college to separate how it investigates dentists and how it insures them. The Quebec Ordre set up an insurance company that collects premiums from dentists that are separate from the dues paid to the Ordre. That separation is critical because the Ordre protects the public while the insurance company balances needs of patients and dentists, said Irene Beauchamp, the insurance company’s general manager.

Unlike in Ontario, dentists pay taxes on their insurance premiums: Quebec’s 4,250 dentists paid about \$350,000 in taxes this year.

The dental insurance company in Quebec is treated like any other insurance company, its activity and investments monitored by an insurance regulator in Quebec whose mandate it to protect the public. No comparable oversight exists in Ontario.

A TAXING QUESTION

Has the dental college used its insurance program to shield \$24.4 million from the reach of Revenue Canada?

Dentist Dick Jones says yes and had written of his concerns to Health Minister Deb Matthews and Finance Minister Charles Sousa.

“Does the Ministry know of any (other colleges) that use their tax-exempt, not-for-profit status to avoid paying taxes on profits?” he asked in a letter obtained by *The Free Press*.

College Registrar Irwin Fefergrad says the tax claim has no basis because auditors said to create a \$25-million reserve to keep the insurance program sound and allow it to become self-funded if necessary.

The way the College manages insurance has been signed off by an assistant deputy minister at the Health Ministry, Fefergrad said.

“We’ve been told there’s nothing to worry about,” he said.

But he seemed concerned when he spoke last year to Toronto dentists.

“I have not said we’re an insurance company. And please, when you do notes, I want to see them before they get generated. Because I don’t want to get strung up. If we are ever called an insurance company,

we're going to have huge problems," he said. "Revenue Canada, CRA, suddenly decided that not-for-profits, they got to find money . . . (Our auditor) said I don't know what CRA's going to be doing, but he said I can tell you that if you're sitting on a surplus you're going to have a problem. He said, get rid of the surpluses."

Toronto Star, July 2017

Ontario's dentist watchdog plagued by 'toxic culture,' lawsuit alleges

A \$1-million wrongful dismissal suit filed against the Royal College of Dental Surgeons of Ontario includes allegations of conflict of interest, ethical breaches, bullying and sexual harassment towards staff.

By [Robert Cribb](#) Staff Reporter

Wed., July 5, 2017

A former senior director with Ontario's dentist watchdog has filed a \$1-million wrongful dismissal suit against her former employer and its registrar alleging a "systemic culture of harassment and workplace bullying" that involves conflict of interest and sexual harassment toward staff.

Rene Brewer, a lawyer who oversaw the internal insurance arm of the Royal College of Dental Surgeons of Ontario between 2011 and January 2017, alleges in a statement of claim that college registrar Irwin Fefergrad created a "toxic culture" including "oppressive or problematic internal policies and ethical breaches by senior (college) staff."

The allegations have not been proven in court.

Fefergrad declined interview requests. A written statement from college lawyer Thomas Gorsky, who also declined to be interviewed, said the college takes its obligations to its employees, members and the public "extremely seriously."

"We and our client are satisfied that the allegations in the claim are wholly without merit, and the college will be vigorously defending the claim," the statement said.

Last year, the college ruled on 415 formal complaints against dentists, according to its 2016 annual report. Of those, 10 were referred to the disciplinary committee for action. The overwhelming majority resulted in "no action," "advice and recommendations," a caution or continuing education training.

The college has two branches intended to serve different constituencies, according to Brewer's claim. The insurance program, known as the Professional Liability Program (PLP), provides members "with protection and support when facing malpractice and negligence claims." It was designed, in the 1970s, "principally to serve and protect" dentists. The rest of the college, Brewer's claim states, "performs a regulatory role to protect the public."

In her claim, Brewer alleges conflict of interest within the college because staff investigating patient complaints of misconduct by dentists routinely shared information with staff in the college's professional insurance arm, which operates a \$24.4-million reserve for defending dentists facing malpractice suits.

Typically, medical professionals have liability insurance through an organization that is separate from their regulatory body's public interest investigations arm. Physicians in Canada, for example, are insured for malpractice through an independent organization called the Canadian Medical Protective Association.

The dentists college acknowledges on its website that “some dentists are still skeptical that their communications with PLP (the Professional Liability Program) are not somehow transmitted” to college staff who review public complaints and perform disciplinary action.

“PLP staff have a legal, professional and ethical duty to keep information received from members in the strictest confidence,” the college’s website reads.

Internal college documents, obtained by the Star, show the wall between the college’s investigative and insurance arms has been porous for more than a decade.

Meeting minutes from 2006 show that staff from the complaints, investigations and reports committee (which investigates allegations of misconduct) met weekly with PLP staff.

At a meeting on Jan. 2, 2006, Fefergrad told staff the meetings were to “share case-specific problems or approach problems and to take advantage of the wealth of staff talent we had to mutually problem solve.”

Individual cases are discussed in the minutes, including details of a patient who died four hours after a surgical extraction of several teeth.

In interviews with the Star, five current and former college staff members, who spoke on condition of anonymity, echoed the concerns raised in Brewer’s statement of claim.

One former college investigator confirmed what he called a “clear conflict” in the discussion of case files among both arms of the college.

“We tell any dentists that call in that their information will be kept confidential. But there were definitely meetings when the big boss, Irwin (Fefergrad), sat around discussing case files.”

Another former investigator said: “The impression out there today among dentists is that there is a wall between the two organizations. But the PLP is closely supported by Irwin and Irwin is telling (the director) what to do every step of the way.”

Toronto dentist Natalie Archer worked at the college for six years, including as vice-president of the board, before she resigned in 2012, saying a “lack of transparency and openness” prevented her from fulfilling her duties.

She said Fefergrad gave advice to both the college’s disciplinary and insurance arms.

“It’s terrible. There’s no Chinese wall in there. In my opinion, we need someone to get in there with an internal audit.”

In her claim, Brewer states that she became aware of a confidentiality breach shortly after her arrival in 2011.

“(Brewer) learned of serious ethical breaches at the (college) when a PLP staff member disclosed that Fefergrad had forced PLP staff to attend meetings with him in the past to discuss PLP files,” it reads. “In fact, Fefergrad required PLP staff to send unredacted expert reports from PLP cases to his office.”

In her claim, Brewer says she stopped sharing expert reports and proposed a code of conduct that stated breaches of confidentiality within the college would be a firing offence — a proposal that, the claim says, was rejected by Fefergrad.

In February, Brewer’s lawyer, Tanya Pagliaroli, wrote to the college council informing them that it is “common knowledge” within the college that Fefergrad discusses PLP files with staff.

“If members learned that the former director and especially the current interim manager of PLP attended meetings with the registrar to discuss files, there would likely be an immediate campaign to dismantle the program,” reads the letter, obtained by the Star.

“The presence of staff involved in regulatory processes at the meetings in violation of the (college’s) representations to members ... could call into question ... Fefergrad’s moral authority to govern the profession.”

Ultimately, the letter concludes, the perceived conflict between the college and PLP is “irresolvable.”

In an interview, Pagliaroli said the case raises questions about the role of whistleblowers in the private sector.

“Canadian courts have yet to expressly consider whether and how reprisals or threats of reprisals against a whistle-blowing employee in the private sector impacts on both the employer’s duty of good faith and honesty, the employee’s duty of loyalty to his or her employer and on the damages available to an employee who successfully proves he or she was terminated for whistle-blowing.”

Brewer also alleges her tenure at the college, where she earned \$215,000 a year plus benefits at the time she was fired, was doomed by a culture of “cronyism.”

“Employees who were unquestionably loyal to Fefergrad were rewarded, whereas employees who disagreed with him or expressed dissent were publicly castigated, undermined and humiliated,” the statement reads.

She claims she was informed of three separate allegations of harassment, including sexual harassment, by a part-time employee. Brewer reported the allegations to Fefergrad, who allowed the employee to retire after the third allegation, the statement claims.

“The allegations were not formally investigated or dealt with transparently,” the statement reads. “Shockingly, despite a history of sexual harassment ... no sexual harassment policy existed at the (college) until (Brewer), through persistent efforts, convinced Fefergrad to implement one in 2014.”

In an August 2003 email to staff, obtained by the Star, a former senior director of the college advised colleagues they could wear shorts and T-shirts to help reduce air conditioning costs in the summer.

“Unfortunately, bathing suits will have to be approved on a case by case basis following a private screening by the directors,” the email reads. “Please let me know if you wish to make such a request and note also that this option is not available to male staff.”

“In my opinion, there is inappropriate abuse of power. It’s like something from the ‘70s. It’s *Mad Men*,” said Archer, the former vice-president. “In my opinion, dentists and staff live and work in fear because of this kind of culture.”

Brewer was fired on Jan. 23.

“(Fefergrad) terminated (Brewer) to silence her and send a warning to other potential critics of him or the (college),” the statement reads. “His actions represent a wanton and outrageous disregard for (Brewer’s) rights.”

Appendix 8

Levels of risk associated with healthcare professions

Reputational risk is especially important for regulators of health professions. Health professions in Ontario have their own legislative framework, set out through the [Regulated Health Professions Act \(RHPA\)](#). The RHPA defines health regulatory colleges and their responsibilities for regulating the practice of the profession, and the Minister has the power to recommend that the Lieutenant Governor in Council appoint a College supervisor if there is any question regarding the ability of the College or its Committees to perform its duties.

When determining professional liability protection expectations for health professionals, the public protection focus needs to be considered as well. As conceptualized by the Professional Standards Authority (“PSA”), each occupation will carry with it an intrinsic risk of harm to individual clients/patients, the public and/or the environment. Assessing the level of intrinsic risk associated with a health profession (dentistry), compared to a non-health profession (such as law) demonstrates there are clear differences. Using this analysis, the Task Force was able to determine that when balancing the tension between the regulator and the indemnity program in the patient care context, the public interest should take a stronger role.

Intrinsic risk of harm	Lawyer	Dentist
The likelihood or potential for exposure to harm arising in the course of performing activities	Low	High
Scale of harm (magnitude of impact)	Low (financial)	High (catastrophic/irreversible)
Uses, directs, or approves the use of equipment that might cause harm	No	Yes
Uses, directs, or approves the use of materials or substances that might cause harm	No	Yes
Involved in (including evaluation of) a structure or process the failure of which could cause harm	Yes	Yes
Failure of worker to follow professional standards would result in increased risk of harm	Yes	Yes

Not surprisingly, the analysis above signals higher levels of risk associated with a profession involved in patient care compared to a non-health profession. Using this analysis, the Task Force was able to determine that when balancing the tension between the regulator and the indemnity program in the patient care context, the public interest should take a stronger role.

Appendix 9

CPMF Standards

Ontario Ministry of Health has also established a College Performance Measurement Framework (CPMF) which outlines expectations of regulators. Each year, Colleges are required to report to the ministry on their performance in seven areas, each with a set of standards and measures associated with it. The Standards that are most relevant to the topic of professional liability protection are noted below (underline added for emphasis):

Domain	Relevant Standards
Governance	Standard 2: Council decisions are made in the public interest (<u>All decisions related to a Council’s strategic objectives, regulatory processes, and activities are impartial, evidence-informed, and advance the public interest</u>). Standard 3: The College acts to foster public trust through transparency about decisions made and actions taken
Resources	Standard 4: The College is a <u>responsible steward</u> of its (financial and human) <u>resources</u> (includes expectation that the College have a reserve fund).
System partner	Standard 7: The College <u>responds in a timely and effective manner to changing public expectations</u>
Information management	Standard 8: Information collected by the College is protected from unauthorized disclosure (The College demonstrates how it protects against unauthorized disclosure of information).
Regulatory polices	Standard 9: Policies, standards of practice, and practice guidelines are based in the best available evidence, reflect current best practices, are aligned with changing public expectations, and where appropriate aligned with other Colleges
Suitability to practice	Standard 10: The College has processes and procedures in place to assess the competency, safety, and ethics of the people it registers (Registrants continuously demonstrate they are competent and practice safely and ethically). Standard 11: The College ensures the continued competence of all active registrants through its Quality Assurance processes. This includes an assessment of their competency, professionalism, ethical practice, and quality of care; The College effectively administers the assessment component(s) of its QA Program in a manner that is aligned with right touch regulation; <u>The College effectively remediates and monitors registrants who demonstrate unsatisfactory knowledge, skills, and judgment</u> . Standard 12: The complaints process is accessible and supportive (<u>The College enables and supports anyone who raises a concern about a registrant</u>). Standard 13: All complaints, reports, and investigations are <u>prioritized based on public risk</u> , and conducted in a timely manner with necessary actions to protect the public (The College addresses complaints in a right touch manner) Standard 14: The College demonstrates that it <u>shares concerns about a registrant with other relevant regulators and external system partners</u> (e.g. law enforcement, government, etc.)

Appendix 10

Board Governance Standards

Excerpt from Imagine Canada’s Standards Program [Gap Analysis Tool](#). The Standards Program includes additional categories, such as financial accountability and transparency, fundraising, etc.

A1: Mission statement	The organization has a mission statement. The mission statement is revisited and approved by the board at least every five years to ensure its continued relevance.
A2: Strategic plan	The board is responsible for approving a strategic plan. The organization has a process to evaluate progress in achieving the plan’s goals.
A3: Recruitment and orientation of most senior staff person	The board is accountable for the recruitment and orientation of the most senior staff person.
A4: Management of most senior staff person	The most senior staff person reports to the board and has a written job description or terms of reference.
A5: Compensation and expenses of most senior staff person	The total compensation package of the most senior staff person is approved by the board or a board committee once a year. The expenses of the most senior staff person are reviewed by the board or a board committee once a year.
A6: Succession planning - most senior staff person	The organization has a written emergency succession plan in place for the most senior staff person. The board or a board committee reviews and approves these plans every three years.
A7: Risk management	The organization has a process to identify its major strategic and operational risks. The organization also has a plan to minimize and mitigate those risks, and this plan is reviewed and approved by the board once a year.
A8: Insurance	The organization has a process to review its insurance coverages. A summary report is reviewed by the board once a year.
A9: Legal compliance	The board or a board committee oversees the organization's compliance with its own governing documents (e.g., letters patent, by-laws) and all applicable federal, provincial, territorial and municipal laws and regulations. Organizations conducting programs outside Canada also abide by applicable laws, regulations and conventions in that jurisdiction, unless these are in conflict with laws in Canada.
A10: Communication and consultation with stakeholders	The organization identifies its stakeholders and regularly communicates and consults with these stakeholders about the organization’s achievements and work.
A11: Code of ethics/conduct	The organization has code(s) of ethics/conduct that apply to the board, staff and volunteers. The organization has a process in place to ensure that the board, staff and volunteers are familiar with and adhere to the code(s). The code(s) are reviewed and approved every five years by the board or a board committee.* *If your organization has a separate code that applies only to staff members and/or non-board volunteers, this policy can be reviewed and approved by senior staff, rather than by the board or a board committee.

A12: Conflict of interest policy	The organization has conflict of interest policies that apply to the board, staff, and volunteers. The policies outline the procedure for disclosure, review and decision on actual or perceived conflicts of interest. These policies are reviewed and approved every five years by the board or a board committee.* *If your organization has a separate policy that applies only to staff members and/or non-board volunteers, this policy can be reviewed and approved by senior staff, rather than by the board or a board committee.
A13: Privacy policy	The organization has a privacy policy that is posted in a readily accessible location on its website. This policy is reviewed and approved by the board or a board committee every five years.
A14: Complaints policy	The organization has a complaints policy applicable to external stakeholders that is posted in a readily accessible location on its website. The organization responds promptly to complaints made by external stakeholders. The board is presented with a report on complaints once a year. The complaints policy is reviewed and approved by the board or a board committee every five years.
A15: Whistleblower policy	Not applicable
A16: Number of meetings	The board holds a sufficient number of meetings each year to ensure the appropriate direction and oversight of the organization’s activities. At minimum, the board holds two meetings a year at which the agenda is not restricted to a specific issue or issues (e.g., appointment of officers).
A17: Board terms of reference	The organization has written terms of reference for the board and board chair. These terms of reference have been approved by the board.
A18: Board composition	The board is comprised of no fewer than three (but preferably five or more) directors, a majority of whom are at arm’s length to each other, to the most senior staff person and/or to other management staff. No employee may be a director.
A19: Board compensation	No member of the board is entitled to receive, either directly or indirectly, any salary, wages, fees, commissions or other amount for services rendered to the organization in their capacity as a director.
A20: Board orientation	A process is in place to ensure the orientation of new board members. Board members must understand their legal and fiduciary responsibilities, exercise due diligence consistent with their duty of care, be familiar with the organization’s activities, and be fully informed of the financial status of the organization.
A21: Board records	Formal minutes of board meetings are recorded and retained. Policies approved by the board are filed appropriately.
A22: Board succession	The board has a process to review succession plans for the positions of board chair and committee chairs once a year.
A23: Board development	Not applicable
A24: Performance of the board	Not applicable

A25: Anti-harassment policy	<p>The organization has anti-harassment policies that apply to the board, staff and volunteers. These policies are made accessible to the board, staff and volunteers. These policies are reviewed and approved every five years by the board or a board committee*.</p> <p>*If your organization has a separate policy that applies only to staff members and/or non-board volunteers, this policy can be reviewed and approved by senior staff, rather than by the board or a board committee.</p>
A26: Board term limits	<p>The organization mandates specific term limits for directors with the effect that no more than one third of the directors shall exceed 9 consecutive years on the board.</p>
A27: Equity and inclusion policy	<p>The organization has a board-approved equity and inclusion policy. This policy is reviewed and approved by the board or a board committee every five years.</p>
A28: In camera sessions	<p>At least twice a year, the board holds a scheduled in camera session with only the board present. At least twice a year, the board holds a scheduled in camera session with only the board and the most senior staff person present.</p>

Appendix 11

Professional Standards Authority's Standards of Good Governance

The Standards below were developed by the Professional Standards Authority and included in “A report and recommendations on improving governance” prepared for the Ontario College of Social Workers and Social Service Workers by Harry Cayton and Deanna Williams, <https://www.ocswssw.org/wp-content/uploads/OCSWSSW-governance-report.pdf>.

- Standard 1: The regulator has an effective process for identifying, assessing, escalating and managing risk of harm, and this is communicated and reviewed on a regular basis by the executive and board
- Standard 2: The regulator has clear governance policies that provide a framework within which decisions can be made in line with its statutory responsibilities and in the interests of clients and the public
- Standard 3: The board sets strategic objectives for the organization. The regulator’s performance and outcomes for clients and the public are used by the board when reviewing the strategic plan
- Standard 4: The regulator demonstrates a commitment to transparency in the way it conducts and reports on its business.
- Standard 5: The regulator engages effectively with clients and the public.
- Standard 6: The regulator engages appropriately with the profession.
- Standard 7: The board takes account of equality and diversity in its decision making.
- Standard 8: The board has effective oversight of the work of the executive.
- Standard 9: The board works corporately, with an appropriate understanding of its role as a governing body and of members’ individual responsibilities.

Appendix 12

PLP Chargeback costs

Introduction

The College currently maintains the PLP as a department within the RCDSO organizational structure, reporting to the CFO. The Department consists of 19 staff. The PLP is funded through member fees. Since the 1970s, RCDSO has bundled the regulatory and PLP fees into one annual fee and the fees cover all College activities (including PLP). Recent analysis⁶⁶ indicates that PLP utilizes approximately 30% of the College’s annual budget. Of the \$2,995 2023 annual renewal fee, \$1,000 has been identified as the portion of the fee members pay for \$2M of malpractice liability (for the first time, RCDSO has started to indicate the breakdown of member fees between regulatory and malpractice).⁶⁷ The \$1,000 fee was calculated based on “direct” (PLP Department) costs only. The analysis below provides an overview of what PLP’s true cost may be, once other “indirect” costs (such as Finance, IT, Operations, Human Resources, and Communications) are factored in. These “Charge-backs” are described below.

Total PLP Costs

Due to the volatility of the PLP stop loss year over year, to best determine the impact of chargebacks, a 5-year average (2018-2022) of PLP department and RCDSO operating costs will be used to demonstrate calculations.

	2022	2021	2020	2019	2018
PLP Department Totals	7,028,004	11,250,872	8,609,667	8,041,331	10,517,238
RCDSO Operating Costs	32,054,546	36,437,563	31,501,759	31,425,755	31,914,193

- PLP Department Totals Average over last 5 years: \$9,089,422
- RCDSO Operating Costs Average over last 5 years: \$32,666,763
- PLP as a Percentage of RCDSO Operations = 28% [9,089,422/32,666,763]
- PLP as a Percentage of RCDSO Operations with Chargebacks = 32.5% [(9,089,422+1,540,000)/32,666,763]

PLP Chargeback Calculations:

Assumption 1:

Ratio used to determine chargeback percentage is based on staff FTEs. PLP department has a staff of 19 compared to total staff compliment of 135 people, or 14%. The 14% has been applied to RCDSO costs including shared services staffing including Finance, IT, Operations, Human Resources, Communications and Office of the Registrar. It will also be applied to operational costs attributable to PLP such as IT and operations/building and insurance costs.

⁶⁶ RCDSO has recently published an assessment of the breakdown of how fees are spent, *Your Fees At Work*: <https://az184419.vo.msecnd.net/rcdso/pdf/financial-statements/RCDSO%205221%20Your%20Fees%20At%20Work.pdf>. Accessed January 31, 2023.

⁶⁷ 2023 Fee Increase: <https://www.rcdso.org/permits-and-renewals/annual-license-renewal/2023-fee-increase>. Accessed February 2, 2023.

Assumption 2:

Costs that are 100% related solely to PLP have been included at the full rate, including expenses such as application support, domain name, licensing, etc.

Assumption 3:

Credit card processing fees on the portion of the 2023 membership fee of \$1,000 that was indicated would be allocated to PLP coverage for the dentists at an assumed membership of 10,800 at a rate of 2%.

Assumption 4:

Capital projects related solely to PLP have been included at 100% as they would not otherwise exist for the College.

Calculated Chargebacks based on Current State:

- Staff costs from shared service departments at 14% per assumption 1: \$710,000
- Operational costs attributable to PLP at 14% per assumption 1: \$339,000
- Operational costs specifically and solely related to PLP per assumption 2: \$169,000
- Credit card processing fees per assumption 3: \$216,000
- Capital spending on PLP per assumption 4: \$106,000
- Total Calculated Chargebacks: **\$1,540,000**

Implications:

- Based on the calculations above, the required “carve-out” for charge-backs is approximately 4.6% of RCDSO’s 5-year average of \$32.6M in Operating Costs. If RCDSO were to include these costs in the annual fee, this would cost approximately \$140 per dentist [$\$1,540,000/10,800$].

Other Expenses to Consider with Complete Separation:

It is important to note, the chargebacks above would not account for all the costs associated with a completely separate entity. The approximate chargebacks noted above only indicate costs that can reasonably be attributed to supporting the PLP to accomplish their work. Other than the items 100% attributable to PLP the remaining attributable costs/resources would stay with the RCDSO. In addition, if PLP were to be a fully separate organization, many costs would increase (for both PLP and RCDSO) due to loss of economies of scale and using a shared services model.

Although below is not an exhaustive list, we have attempted to provide anticipated items that would need to be carried out with cost to set up a completely separate organization.

- What will the reporting structure look like, how will we have oversight?
- Assumption: not an insurance company, just a subsidiary
- Migration of Data
- Start up and ongoing costs not included below
- Governance – Generate by-laws, legal costs, etc.
- Board governance structure & compensation model & recruitment of board members
- Committee Requirements
- Investment Committee
- Back office costs including, telecommunications, software licensing & support, etc.
- Accounting system
- Insurance outside of PLP

- Professional services
- Audit
- Legal
- Staffing requirements
- Payroll services
- Benefits & pension providers
- Facility/leasing costs
- Banking
- Corporate filings – is it for profit – tax requirements?
- Annual report compilation

Appendix 13

Mitigating Regulatory Risk

Various options are available to the College for mitigating regulatory risk. To address the problem associated with the perception that the College is “turning a blind eye” to high-risk dentists that the PLP becomes aware of, the College could consider:

- Establishing protocols for the exchange of information from PLP to the College, so that the College is aware of and can address high-risk issues/themes or dentists.
- Establishing mandatory reporting requirements for dentists to report directly to the College
- Putting stronger expectations on PLP to address risk internally, through building remediation/risk mitigation programs.
- Take no action

These options are explored below.

Reporting of information from PLP to the RCDSO

Establishing ways to share certain types of information, in a way that is fair to dentists and protects the public, is one way to minimize this tension. Except when special circumstances allow for it, it is expected that information a liability protection program obtains related to a claim involving a professional remains confidential (currently, PLP does not share any information with the Regulatory side of the organization). However, there are examples where an insurance provider makes exceptions to this. For example, the province of Quebec has established legislation that mandates information to be shared with the regulatory College.

Some would argue that reporting of information by a liability protection program to the College is not practical or necessary, as it could be assumed that the college is usually already informed of regulatory issues through its complaints process. However, it has been noted that the profession of dentistry is not supported by the same accountability/employment/reporting infrastructure as other health professions. Unlike professions who work in hospital settings, where there are structures and processes that provide information to regulatory bodies (for example, hospitals, chiefs of staff, employers, etc.), dentists often work in isolation as single owners. In addition, the public often does not understand the difference between malpractice claims and regulatory conduct and may (wrongly) expect that once an issue has been raised on the indemnity side, the college will be made aware. As a result, there may be regulatory issues the College is not aware of.

Aggregate reporting

It is important to differentiate between aggregate and individual-level reporting and the Task Force has discussed both. Individual reporting involves sharing information collected from a single individual. Aggregate reporting involves collecting and combining information obtained from numerous individuals, and de-identifying those individuals to retain confidentiality.

One of the guiding principles of the Task Force is to “Consider ways to address competency issues revealed from dentist’s contact with the existing liability protection program.” The nature of the business of PLP involves gathering information about problems patients have had with their dentists. This information, over time, could be analyzed to identify trends, issues, and competency issues.

Aggregate reporting information on types of claims, groups of professionals involved, and themes that have been uncovered is a good idea in principle, but needs to be actionable. In Quebec, there are legislative requirements that a health professional College's Board of Directors receive access (at least once a year) to information obtained in connection with the College's insurer. The information can include (but is not limited to) the types of professional activities associated with claims, risk and loss experiences, frequency and value of claims, and groups of professionals involved. This helps to provide transparency and provides Board members with the information needed to allow for evidence-based decision-making. It can also empower the College to identify and address competency issues it would not have been aware of otherwise (one of the Task Force's guiding principles).

Responding to data and using data to inform decisions is increasingly important for regulators, but finding the right balance is critical. How much do you spend to collect the data? Since the PLP does not currently have the ability to collect and report on information at this level, an investment in IT/IM infrastructure would be required to enable this. Regulatory expertise would also be required, to ensure that the information the PLP provides to the College is relevant and actionable, from a competency perspective.

Individual reporting

Except when special circumstances allow for it, it is expected that information a liability protection program obtains related to a claim involving a professional remains confidential. Currently, PLP does not share any information whatsoever with the Regulatory side of the organization.

However, when the PLP identifies high-risk competency issues through its investigation of a liability claim, the program, if enabled, could report dentists to the regulatory department, so that the RCDSO could adequately address, educate and monitor dentist competency. In Quebec, the dental regulator (Ordre des Dentistes du Quebec, or ODQ) is already taking this approach.⁶⁸

Mandatory reporting of information from the insurer to the College, based on pre-determined thresholds for reporting, could mitigate the risks associated with operating the malpractice program in-house, as it would allow the College to be aware of and address competency issues revealed in legal claims. However, in the absence of legislative mandates, the feasibility of establishing this structure in Ontario should be questioned. Sharing private information between the PLP and the RCDSO would need to be done carefully, with consideration of due process and fairness. It would need to have a distinct purpose and not be used outside that purpose. What is reported could have a direct effect on sustaining the livelihood of dentists. In addition, those on the liability side may not be qualified to identify professional misconduct. If the College were to inadvertently use data received from PLP to signal an investigation that is not connected to misconduct, this could be problematic. It is suggested that legal advice be obtained before moving forward with this.

Responding to information about a registrant's unsatisfactory knowledge, skills, or judgment is of critical importance to regulators, but finding the right balance is critical. How do you define the safeguards and justification for sharing? What would the College do with the information (publicize it or not?). The governance principles outlined above provide important guidance to influence these types of decisions, but further thought is required before implementing this approach.

⁶⁸ see [Appendix 4](#).

Mandatory reporting by professionals

Beyond reporting by the liability program, the Task Force also considered whether the RCDSO could employ alternative approaches to obtain the information it needs to overcome the risks associated with perceived inaction on PLP-related competency issues. Dentists in Ontario are obligated under section 85.6.2 of the Code to provide a mandatory report to the College if there has been a finding of professional negligence or malpractice against them. The Government of Quebec goes farther than this, requiring that professionals inform the College of any professional liability claim filed with their insurer, and of any notice of loss.⁶⁹ The Task Force discussed whether strengthening the College's mandatory reporting requirements (e.g. Claims against (when known), settlements and findings/awards) could be an option. Although sometimes, a settlement can be an indication of possible competence issues, it was flagged that they are not always an admission of guilt and can sometimes be a reflection of the practical reality to avoid long and costly court proceedings. It was also acknowledged that dentists operate as a business, and the College should proceed with caution before posting material such as this on their register, as it could threaten a dentists' livelihood.

Although mandatory reporting by professionals is a lever that could support some of the Task Force's recommendations, this element is not directly associated with the structure of the PLP and may be a lower priority for implementation.

Status quo

There is risk associated with the perception that the College is "turning a blind eye" to high-risk dentists that the PLP becomes aware of. However, because both the likelihood and scale of harm occurring to the College is low, maintaining the status quo (at least for now) may be advisable for the College. It is possible that by taking steps to avoid reputational and financial risk, the threat of regulatory risk described here may also be minimized.

Defending the monopoly

Mitigating against the risk associated with the College's monopoly is more challenging. The College and PLP can be proactive in their communications to demonstrate the public benefit associated with the program. There is the option to remove the monopoly and establish a voluntary program, but this involves losing the economies of scale of a group-based indemnity model, and PLP may end up with only the high-risk, "expensive" cases. As described above, ensuring strong reputation and finances may be the best guard against regulatory risk. As with everything it does, the College will need to be prepared to be nimble and adapt to changing societal expectations when necessary.

⁶⁹ Required under Section 62.2 of the [Professional Code](#).

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