

No. S-243258
Vancouver Registry

In the Supreme Court of British Columbia

Between

Law Society of British Columbia

Plaintiff

and

Attorney General of British Columbia and
His Majesty the King in right of the Province of British Columbia,

Defendants

RESPONSE TO CIVIL CLAIM

Filed by: Attorney General of British Columbia, His Majesty the King in right of the Province of British Columbia, and Lieutenant Governor in Council of British Columbia

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 – Defendants’ Response to Facts

1. The defendants admit the facts alleged in paragraphs 9-13, 15, 17, 18, 39, 43, 44, 47, 49-51, 53-55, 62-64, 67, 72, 73, 76, 78, 81, and 82 of part 1 of the notice of civil claim.
2. The defendants deny the facts alleged in paragraphs 1-8, 14, 16, 19-38, 40-42, 45, 46, 48, 52, 56-61, 65, 66, 68-71, 74, 75, 77, 79, and 80 of part 1 of the notice of civil claim.
3. There are no facts alleged in part 1 of the notice of civil claim that are outside the knowledge of the defendants.

NO FEE - CROWN

Division 2 – Defendants’ Version of Facts

4. Paragraphs 1 to 8 of part 1 of the notice of civil claim plead argument and evidence rather than material facts.
5. In response to paragraph 14 of part 1 of the notice of civil claim, the defendants agree that the benchers currently maintain the *Code of Professional Conduct for British Columbia* and that it is similar to the *Model Code of Professional Conduct* maintained by the Federation of Law Societies. The balance of paragraph 14 pleads argument rather than material facts.
6. In response to paragraph 16 of part 1 of the notice of civil claim, the defendants agree that benchers currently are elected from within nine regions, but benchers do not represent the lawyers within those regions. Benchers have a statutory duty to govern the Law Society in the public interest.
7. Paragraphs 19 to 38, and 40 of part 1 of the notice of civil claim plead argument and evidence rather than material facts.
8. In response to paragraphs 41, 42, 45, and 46 of part 1 of the notice of civil claim, the duties of the Law Society are prescribed by the *Legal Profession Act*, S.B.C. 1998, c. 9 (the “**Old Act**”) and the duties of the new regulator are prescribed by the *Legal Professions Act*, S.B.C. 2024, c. 26 (the “**Act**”). The primary duty of the new regulator is to regulate the practice of law in the public interest. The Act does not define the public interest. The guiding principles in s. 7 are not exhaustive. It is largely for the board to determine what constitutes the public interest.
9. In response to paragraph 48 of part 1 of the notice of civil claim, if the benchers do not appoint four persons to the transitional board within two months, the Attorney General may appoint members (not “will”).
10. In response to paragraph 52 of part 1 of the notice of civil claim, the directors of the BC First Nations Justice Council are appointed by the BC Assembly of First Nations, the First Nations Summit, and the Union of BC Indian Chiefs.
11. In response to paragraph 56 of part 1 of the notice of civil claim, the transitional board and transitional Indigenous council will have a combined total of 11 members (not 13). The transitional board is seven members, four of whom are appointed by the benchers of the Law Society. Whether the

Law Society's four appointees are lawyers is up to the benchers. The transitional Indigenous council includes one or two members who are also members of the transitional board, plus an additional four members. The transitional board and transitional Indigenous council must collaborate to develop the first rules of the board. No rules can be made without the agreement of the transitional board, which can have a majority of lawyers if the benchers wish.

12. In response to paragraphs 57 and 58 of part 1 of the notice of civil claim, the Act requires that all members of the transitional board, board, transitional Indigenous council, and Indigenous council be remunerated so that all eligible persons have equal opportunity to seek these positions, regardless of whether they can afford to do unpaid work.
13. In response to paragraphs 59 to 61 of part 1 of the notice of civil claim, the majority of the directors of the regulator will be lawyers (at least nine of 17).
14. In response to paragraphs 60 and 61 of part 1 of the notice of civil claim, the Act does not create a "first 12" set of directors and a "second five" set of directors. Directors' terms will not all start and end at the same time. Rather, the board may establish procedures for elections, set terms of office, and stagger terms of office, such that only a few directors' terms end in any given year. Lawyers will likely be the majority on the board whenever any board-appointed directors are chosen. The board can create a committee consisting solely of elected lawyer directors to screen and nominate candidates for the board-appointed director positions, if the board considers that to be in the public interest.
15. In response to paragraphs 65 and 66 of part 1 of the notice of civil claim, before making a rule, the board must consult with the Indigenous council regarding the extent to which the rule accords with the principles of:
 - a. supporting reconciliation with Indigenous peoples and the implementation of the United Nations Declaration on the Rights of Indigenous Peoples; and,
 - b. identifying, removing, or preventing barriers to the practice of law in British Columbia that have a disproportionate impact on Indigenous persons and other persons belonging to groups that are under-represented in the practice of law.
16. In response to paragraphs 68 and 69 of part 1 of the notice of civil claim, the Act empowers the government to designate new categories of legal

professionals and define their scope of practice and reserved titles (if any). The Act does not empower the government to regulate such professionals. They would be regulated by the regulator.

17. In response to paragraph 70 of part 1 of the notice of civil claim, the Act does not provide that all licensees are officers of the court. The Act provides that a licensee is an officer of any court in which their licence permits them to appear. The regulator will determine which courts, if any, different categories of legal professionals are permitted to appear in, subject to the courts' power to control their own processes.
18. In response to paragraph 71 of part 1 of the notice of civil claim, the Act does not change the eligibility requirements in the *Provincial Court Act*, R.S.B.C. 1996, c. 379. As before, to be eligible to be appointed as a judge of the Provincial Court, a person must have been a lawyer in British Columbia for at least five years or have other legal or judicial experience satisfactory to the Judicial Council.
19. In response to paragraphs 74 and 75 of part 1 of the notice of civil claim, the Act does not regulate the conduct of legal professionals; it empowers the regulator to do so. The definitions of "conduct unbecoming a professional", "incompetently", and "professional misconduct" in the Act do not change the status quo under the Old Act, *Law Society Rules*, *Code of Professional Conduct*, and applicable jurisprudence.
20. In response to paragraph 77 of part 1 of the notice of civil claim, s. 78 of the Act empowers the chief executive officer, subject to the rules, to compel certain information from licensees, trainees, and law firms. In this respect, the Act largely just transfers the current authority of the executive director of the Law Society under ss. 26, 27, and 36 of the Old Act and Rules 3-5 and 4-55 of the *Law Society Rules* to the chief executive officer of the new regulator.
21. In response to paragraphs 79 and 80 of part 1 of the notice of civil claim, s. 88 of the Act empowers the chief executive officer, if they determine that a licensee, trainee, or law firm has practised law incompetently, to make certain *competence* orders. Among other types of competence orders, the chief executive officer can require a licensee or trainee to receive counselling or medical treatment. This provision largely just transfers the current authority of the executive director of the Law Society under s. 26.02 of the Old Act and ss. 3-9.1 to 3-12 of the *Law Society Rules* to the chief executive officer of the new regulator.

22. In further response to paragraphs 79 and 80 of part 1 of the notice of civil claim, non-compliance with a competence order is not an offence under the Act and cannot result in imprisonment. If a licensee does not comply with a conduct order, s. 59(1) empowers the chief executive officer to impose limits or conditions on the licensee's licence, suspend the licensee's licence, or apply to the tribunal for an order cancelling the licensee's licence.

Division 3 – Additional Facts

23. The amounts that lawyers charge for legal services are more than most residents of British Columbia can afford.
24. The current governance structure of the Law Society creates the appearance, and has sometimes created the reality, that the benchers serve the interests of lawyers rather than the interests of the public.

Part 2: RESPONSE TO RELIEF SOUGHT

1. The defendants consent to the granting of the relief sought in **none** of the paragraphs of part 2 of the notice of civil claim.
2. The defendants oppose the granting of the relief sought in **all** of the paragraphs of part 2 of the notice of civil claim.
3. The defendants take no position on the granting of the relief sought in **none** of the paragraphs of part 2 of the notice of civil claim.

Part 3: LEGAL BASIS

Act within provincial legislative competence

1. The Act is within provincial legislative competence under ss. 92(13) and (14) of the *Constitution Act, 1867*. The Legislature can validly regulate the legal professions or entrust their regulation to a statutory body. The Law Society itself has regulatory authority only because the Legislature chose, as a matter of policy, to enact legislation conferring that authority on the Law Society. The Legislature has now enacted some reforms, but the Act is ultimately a limited exercise of the Legislature's legislative competence.
2. Unwritten constitutional principles cannot invalidate legislation and do not invite an inquiry into the policy wisdom of legislation. Principles of fundamental justice also are not a freestanding basis for invalidating legislation. Principles of fundamental justice are relevant only to the extent that there is some limitation of life, liberty, or the security of the person.

Act does not diminish the independence of the bar

3. It is unnecessary to determine whether the independence of the bar is an unwritten constitutional principle or principle of fundamental justice because, even if it is, the Act does not diminish the independence of the bar.
4. The traditional understanding of the independence of the bar is that lawyers must be free from state interference, in the political sense, in relation to matters affecting their advice or advocacy on behalf of clients. The Act does not constitute or enable state interference with lawyers on matters affecting their advice or advocacy on behalf of clients.
5. If the independence of the bar were an unwritten constitutional principle, the regulatory independence of lawyers, at its highest, would be defined in functional terms by analogy to the administrative independence of judges. Judicial independence means the state cannot interfere with administrative decisions that bear directly and immediately on the exercise of the judicial function. By analogy, lawyers' independence at its highest would mean the state cannot interfere with those aspects of the regulation of the bar that bear directly and immediately on lawyers' function of advising and advocating on behalf of clients. The Act does not constitute or enable state interference with any aspects of the regulation of the bar that bear directly and immediately on lawyers' function of advising and advocating on behalf of clients. If anything, the Act reduces the government's influence on the regulation of lawyers: the Attorney General is a bencher of the Law Society under the Old Act, but will not be a director of the new regulator under the Act.
6. Up to three of the 17 directors of the new regulator will be lay persons, which is the same percentage as there are currently lay benchers of the Law Society. Five directors will be legal professionals other than lawyers, which is new for British Columbia but has a two-decade history in Ontario. These arrangements do not pose any risk of state interference with regulatory matters affecting lawyers. Lay directors and other legal professionals are not conduits for state interference.

Law Society's conception of independence of the bar is too broad

7. The Law Society advances a maximalist conception of the independence of the bar according to which lawyers must be "free from influence or incursion by any source". This conception is too broad. Lawyers are not, have never been, and should not be entirely closed-off from any influence from any source except other lawyers.

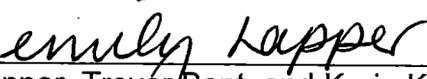
HMTK should be removed

8. His Majesty the King in right of the Province of British Columbia is not a necessary or proper party to this action and should be removed.

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Date: June 7, 2024



Emily Lapper, Trevor Bant, and Karin Kotliarsky
Counsel to Attorney General of British Columbia,
His Majesty the King in right of the Province of British Columbia, and
Lieutenant Governor in Council of British Columbia

Rule 7-1 (1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
- (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
 - (b) serve the list on all parties of record.