No. S243258
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

LAW SOCIETY OF BRITISH COLUMBIA

PLAINTIFF

AND:

HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, ATTORNEY GENERAL OF BRITISH COLUMBIA, and LIEUTENANT GOVERNOR IN COUNCIL OF BRITISH COLUMBIA

DEFENDANTS

AND:

CANADIAN BAR ASSOCIATION, INDIGENOUS BAR ASSOCIATION IN CANADA, SOCIETY OF NOTARIES PUBLIC OF BRITISH COLUMBIA, LAW FOUNDATION OF BRITISH COLUMBIA, and LAW SOCIETY OF MANITOBA

INTERVENORS

APPLICATION RESPONSE

Application Response of: The Indigenous Bar Association in Canada (the "**IBA**")

THIS IS A RESPONSE TO the notice of application of the Law Society of British Columbia, filed April 4, 2025.

The application has been set for 14 hearing days beginning October 14, 2025, pursuant to the Judicial Case Management Order made by Chief Justice Skolrood on November 27, 2024.

Part 1: ORDERS CONSENTED TO

The IBA consents to the granting of **NONE** of the orders set out in Part 1 of the notice of application.

Part 2: ORDERS OPPOSED

The IBA opposes the granting of **NONE** of the orders set out in Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The IBA takes no position on the granting of **ALL** of the orders set out in Part 1 of the notice of application.

Part 4: FACTUAL BASIS

Overview:

1. The IBA supports the creation of the Indigenous council mandated by Bill 21, and the inclusion of specific guiding principles in subsections 7(b) and (c) of Bill 21 that require the new legal regulator to support reconciliation and to identify, remove, and prevent barriers to the practice of law faced by Indigenous persons. These measures further the constitutionally mandated goal of reconciliation, without sacrificing the independence of the bar.

2. The IBA intervenes to make four main submissions.

3. First, a general notion of the independence of the bar is not a constitutional principle that is capable of being enforced in the abstract or used to invalidate legislation. The principle of the independence of the bar manifests in discrete ways, such as in the principles of fundamental justice analysis. These established principles relate to a lawyers' vital role in the administration of justice, such as solicitor-client privilege, or the duty of loyalty.

4. Second, even if the independence of the bar can be used to invalidate legislation, Bill 21 does not, through its 'guiding principles' or the creation of the Indigenous council, undermine the principle when properly understood and construed. The principle of independence of the bar is distinct from the tradition of self-regulation of the legal profession. Self-regulation in the sense asserted by the Law Society – which is to say self-governance free from any non-lawyer influence – is overly broad, and not necessary for the independence of the bar. Bill 21's guiding principles and the Indigenous council do not intrude on the ability of lawyers to discharge their fundamental fiduciary and ethical obligations, through which the independence of the bar finds expression.

5. Third, to the extent that the principle of the independence of the bar is used as a tool to interpret the parameters of s. 92 of the *Constitution Act, 1987*, there are other important principles

that must also be considered. These include the principles of reconciliation, the Honour of the Crown, and the UN Declaration on the Rights of Indigenous People ("**UNDRIP**").

6. Fourth, even if there was a risk that the Indigenous council could - through its participatory and consulting role - undermine the independence of the bar, that would be solely due to the improper exercise of the statutory powers created by Bill 21. There are other appropriate mechanisms to ensure this does not occur, for example judicial review, and the mere existence of the statutory power does not in and of itself invalidate the legislation.

A. Bill 21

7. The Province enacted Bill 21[1], creating a new single regulator with the broad authority to regulate the practice of law in British Columbia, including by establishing standards and programs for the education, training, competence, practice and conduct of lawyers in the Province[2].

8. Subsections 7 (b) and (c) of Bill 21 require the new regulator to exercise its mandate to regulate the legal practice in British Columbia with regard to, *inter alia*, the following guiding principles[3]:

a. Subsection 7(b): by supporting reconciliation with Indigenous peoples and the implementation of the United Nations Declaration on the Rights of Indigenous Peoples; and,

b. Subsection 7(c): by 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;

9. The new regulator will be governed by a board of directors[4], with the broad authority to make rules necessary or advisable for the performance of the duties of the regulator[5].

10. Bill 21 contemplates the establishment of an Indigenous council, whose role is to advise, and work in collaboration with, the board of the new regulator[6]. The Indigenous council has several important roles, including among other things:

a. advising the board, the chief executive officer, and the person appointed in connection with reconciliation initiatives on any matter relating to the

1 *Legal Professions Act,* S.B.C. 2024 c. 26
2 Bill 21, s. 6
3 Bill 21, s. 7
4 Bill 21, s. 8
5 Bill 21, s. 27
6 Bill 21, s. 30

implementation of the United Nations Declaration on the Rights of Indigenous Peoples in the context of the regulation of the practice of law in B.C.;

b. participating in the regulator's strategic planning processes; and,

c. the appointment of Indigenous members of the licensing committee, the discipline committee and the tribunal.

11. The board of the new regulator is required to consult with the Indigenous council before making any rules, respecting the extent to which the proposed rule accords with the principles set out above.

B. The Law Society opposes the Indigenous council and the inclusion of 'guiding' principles in Bill 21

12. The Law Society objects to the inclusion of the guiding principles found in section 7 of Bill 21, and to the creation of the Indigenous council, as a "unilateral imposition of government policy" that constitutes direct government interference in the governance of lawyers, thus undermining the independence of the bar[7].

13. The IBA supports the creation of the Indigenous council and the inclusion of the 'guiding' principles in section 7 of Bill 21.

14. The creation of the Indigenous council, and the requirement that the board consult with the Indigenous council before making rules, do not create a 'co-governance' model of regulation.

15. Requiring consultation with the Indigenous council is not the same as granting 'co-governance' authority, nor does a requirement to consult represent direct government intrusion in the governance of the legal profession.

16. Requiring the new regulator to discharge its mandate in a manner that furthers the goal of reconciliation is consistent with substantive principles of law, and is not merely a matter of government "policy".

17. Reconciliation is a fundamental purpose of section 35 of the *Constitution Act, 1982*. The Province, through the *Declaration on the Rights of Indigenous Peoples Act* (the "*Declaration Act*"), has affirmed the application of UNDRIP to the laws of BC[8], and requires the government to take "all measures necessary" to ensure the laws of BC are consistent with UNDRIP[9].

[7] Notice of application, para. 27
[8] Declaration Act, s. 2(a)
[9] Declaration Act, s. 3

18. Neither the creation of the Indigenous council nor the inclusion of guiding principles in section 7 of Bill 21 constitute governmental interference, either in fact or in the perception of a reasonable person, with the discharge of a lawyer's duty of commitment to the client's cause, or any other principles of fundamental justice such that they would undermine the independence of the bar.

19. The IBA takes no position on the balance of the Law Society of British Columbia's (the "**Law Society**") and the Trial Lawyers Association of British Columbia's (the "**TLABC**") challenges to the constitutionality of Bill 21.

Part 5: LEGAL BASIS

A. The importance of the independence of the bar

20. Lawyers act as 'gatekeepers' of the justice system[10], playing a key role in the administration of justice and the upholding of the rule of law in Canadian society[11]. As officers of the court, lawyers play a fundamentally important role in upholding the integrity of the legal system[12].

21. The independence of the bar is one of the hallmarks of a free society, and to that end lawyers must be free, and be perceived to be free, from government interference in discharging their duties to their clients[13]. The value of an independent bar is diminished unless a litigant is assured of the undivided loyalty of their lawyer, free from conflicting interests[14].

22. However, it is questionable whether the broad notion of independence of the bar, as articulated by the Law Society, is an unwritten a constitutional principle. Previous decisions of the Supreme Court of Canada have held that it is not a principle of fundamental justice[15].

23. In *Canada (Attorney General) v. Federation of Law Societies of Canada*, the court questioned whether the broad articulation of 'independence of the bar', advanced by the Federation of Law Societies of Canada, was a fundamental principle of justice[16]. The court drew a distinction between the general proposition that independence of the bar means that lawyers "are free from incursions from any source, including from public authorities", and the narrower proposition –

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[10] *Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*, 2002 SCC 61 (CanLII), [2002] 3 SCR 209, at para. 62
[11] *Lavallee*, at paras. 64 - 66
[12] *Fortin v. Chrétien*, 2001 SCC 45, at para. 49; *Law Society of British Columbia v. Mangat*, 2001 SCC 67, at paras. 44 and 45
[13] *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, paras. 97-103
[14] *R. v. Neil,* 2002 SCC 70, at paras. 12 and 13
[15] *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, see para. 87
[16] *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, paras. 77-80

which was accepted - concerning state interference with the lawyer's commitment to the client's cause[17].

24. The court found there to be 'considerable merit' in the proposition that there is no principle of fundamental justice in relation to the broad, abstract notion of the independence of the bar[18].

25. The principle of independence of the bar manifests in a number of concrete legal principles that are protected as fundamental to the proper administration of justice. These legal principles relate to the discharge of a lawyer's fiduciary and ethical obligations that have both a private and public dimension. In *Federation of Law Societies*, the court agreed that the legislative scheme at issue in that case unreasonably interfered with a lawyer's duty of commitment to the client's cause, which the court found was a principle of fundamental justice that deserved protection[19].

26. To the extent that the independence of the bar is an unwritten constitutional principle at all, which is questionable,[20] it clearly cannot be used to invalidate legislation on its own. At most, in this case, it can be used as an interprative aid to the constituitonal provisions at issue.[21] Moreover, the IBA says that it is the narrow conception of independence of the bar, consistent with *Federation of Law Societies*, that could be used as an interprative aid.

B. The relationship between the independence of the bar, and the self-regulation of the legal profession

27. The self-regulation of the legal professional is considered an important accompaniment of the independence of the bar in Canada, and there is a long tradition of provincial legislatures delegating the regulation of lawyers to provincial law societies[22]. This tradition of delegating the regulation of lawyers to provincial law societies assists with maintaining the independence of the bar[23].

28. While the delegation of regulatory authority is part of maintaining the independence of the bar, the purpose of the regulatory body is not principally to protect the independence of the bar.

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[17] *Canada (Attorney General) v. Federation of Law Societies of Canada*, para. 77
[18] *Canada (Attorney General) v. Federation of Law Societies of Canada*, at paras. 78-80
[19] *Ibid.* at para. 97; see also *Groia v. Law Society of Upper Canada*, 2018 SCC 27, para. 72
[20] *Law Society of Upper Canada v. Canada (Minister of Citizenship and Immigration)* (F.C.A.), 2008 FCA 243 [*LSUC*], para. 47
[21] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, paras. 49-63
[22] *The Independence of the Bar: An Unwritten Constitutional Principle, by Roy Millen,* 2005 CanLIIDocs 130, p. 111, footnote 29
[23] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, at para. 37; *Finney v. Barreau du Québec*, 2004 SCC 36 (CanLII), at para. 1; *A.G. Can. v. Law Society of B.C.*, 1982 CanLII 29 (SCC), at 336

29. The 'privilege' of self-governance requires that the Law Society perform its paramount role of protecting the interests of the public[24], including by articulating and enforcing professional standards among its members[25].

30. Further, self-governance in the sense of delegated legislative authority to govern the legal profession, is not the same as self-governance in the broad sense of the right to govern 'free from incursions from any source'. It is worth emphasizing that there is a distinction between a right of participation, or consultation, and 'co-governance' as asserted by the Law Society. The role of the Indigenous council is largely participatory, with only very limited approval powers.

31. The 'incursion' of a duty to consult with the Indigenous council is not the same as direct government incursion into the governance of the legal profession in a manner that interferes with the independence of the bar, in the narrower sense accepted by the court in *Canada (Attorney General) v. Federation of Law Societies of Canada*. The formation of an Indigenous council does not impinge on lawyers' ability to advise and represent their clients to the best of their ability.[26]

C. Furthering reconciliation is not government 'policy'

32. Even assuming the independence of the bar is an unwritten constitutional principle that bears on the interpretation of the constitutional provisions at issue, there are other important principles which must factor into the analysis.

33. Reconciliation is not a matter of government 'policy'; it is the "grand" purpose of section 35 of the *Constitution Act, 1982*.[27] Relatedly, the Honour of the Crown is a *sui generis* unwritten constitutional principle.[28] The Province, through the *Declaration Act*, has affirmed the application of the UNDRIP to the laws of BC[29], which requires the government to take "all measures necessary" to ensure the laws of BC are consistent with UNDRIP[30]. UNDRIP itself must be used as an interpretive overlay for any BC statute.[31]

34. The creation of the Indigenous council, and the mandated guiding principles in Bill 21, are consistent with the goal of reconciliation, UNDRIP, and the Truth and Reconciliation Commission's ("**TRC**") calls to action, in particular call to action number 27, and the National Inquiry into Missing and Murdered Indigenous Women and Girls ("**MMIWG**") calls for justice.

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[24] *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, at para. 36
[25] *Green v. Law Society of Manitoba*, 2017 SCC 20, at para. 31; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 3, at paras. 33-36
[26] *LSUC*, para. 50
[27] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 10
[28] *Toronto*, para. 62
[29] Declaration Act, s. 2(a)
[30] Declaration Act, s. 3
[31] *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 8.1, *Gitxaala v British Columbia (Chief Gold Commissioner)*, 2023 BCSC 1680, para. 418

35. There is no doubt that Indigenous people are porportionally underrepresented in the legal profession, and this underrpresentation has a broad impact, on *inter alia*, the development of Aboriginal law, and the ability of the courts to fuflill their obligation to take into account the Indigenous legal perspectives and make space for Indigenous legal orders[32]. It also affects the confidence and trust in the legal system, especially by Indigenous persons.

36. Historically, the Canadian legal system has been used as a means to colonize Indigenous lands, peoples, and communities[33], as a tool of colonial policy against Indigenous people. One does not need to look far back into history to find examples of government intrusion into the independence of the bar is it relates to the rights and interests of Indigenous people[34].

37. A number of learned authors, including former Chief Justice Lance Finch, have written about the lack of Indigenous representation in the practice of law. In "The Duty to Learn", Chief Justice Finch makes the point that "…most legal practitioners are neither Aboriginal nor academically trained in the investigation of Aboriginal cultures— [which] has significant implications for the development of Aboriginal law, whether in terms of rights and title recognition, or with regard to the project of incorporating Indigenous legal principles into the common law"[35].

38. Viewed in this context, the creation of the Indigenous council and the inclusion of the guiding principles in section 7 of Bill 21 are laudable measures in the ongoing effort towards reconciliation, and ought to be seen as increasing public confidence in the legal profession, and furthering the administration of justice. Sections 92(13) and (14) must be interpreted broad enough to include such measures.

D. The regulatory framework may create the potential for governmental intrusion into the independence of the bar, but that does not ground a constitutional challenge

39. The Law Society takes issue with the inclusion of the Indigenous council and mandated principles of reconciliation being included in the structural framework of the new regulatory framework. However, the Law Society does not object to following policies and laws that further reconciliation[36].

40. In the IBA's view there is no material distinction between a substantive requirement to comply with UNDRIP and to further reconciliation that is 'baked in' to the regulatory framework, or one that exists outside of the framework but applies to the conduct of the regulator. Regardless

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[32]See for example *The Duty to Learn,* by The Honourable Chief Justice Lance S.G. Finch

[33] Guide for Working with Indigenous People, Law Society of Ontario, at page 42; https://lawsocietyontario-dwd0dscmayfwh7bj.a01.azurefd.net/media/lso/media/legacy/pdf/g/guide_for_lawyers_working_with_indigenous_peoples_may16.pdf

[34] For example, section 141 of the *Indian Act* that prohibited the hiring of legal counsel

[35] *The Duty to Learn,* p. 2.1.1

[36] Notice of application, para. 28

of its source, furthering reconciliation is a substantive legal principle that the new regulator ought to follow, and the new regulator may do so without compromising the independence of the bar.

41. Further, at most, the Law Society is objecting to the potential for the obligation to consult with the Indigenous council to result in an erosion of the independence of the bar. With respect, the fact that the structure of the regulatory framework itself creates a potential risk of action that could undermine the independence of the bar is distinct from that framework being utlized in a manner that actually undermines the independence of the bar. In other words, the potential for a problematic exercise of statutory power is distinct from an actual, purported, or proposed exercise of that power. Judicial review is the proper mechanism to ensure the appropriate use of statutory power.[37]

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Drew Lafond, filed December 30, 2024;

2. Affidavit #1 of Tiffany Webb, affirmed on April 25, 2025;

3. The pleadings and affidavits filed in this proceeding; and,

4. Such further materials as counsel may advise and this Court may permit

[*Check whichever one of the following is correct and complete any required information.*]

☒ The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

Dated: April 25, 2025

Signature of lawyers for the application respondent
Declan C. Redman and David W. Wu

This application response is prepared by solicitors for the Indigenous Barr Association, Arvay Finlay LLP, Barristers and Solicitors, whose place of business and address for service is 360-1070 Douglas Street, Victoria, British Columbia, V8W 2C4. Telephone: 250.380.2788.

[37] See e.g. *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, paras. 87-88