NO. S-243325
VANCOUVER
REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA
And KEVIN WESTELL

PLAINTIFFS

AND:

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

DEFENDANTS

AND:

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

INTERVENORS

APPLICATION RESPONSE

Application Response of: Law Society of Manitoba (the "LSM"), intervenor

THIS IS A RESPONSE TO the notice of application of the Trial Lawyers Association of British Columbia and Kevin Westell (the "Applicants"), filed on April 4, 2025.

This application is set to be heard for 14 days, commencing October 14, 2025 pursuant to the Case Management Order of Chief Justice Skolrood, dated November 27, 2024.

Part 1: ORDERS CONSENTED TO

The application respondent consents to the granting of the orders sought at paragraphs 1, 2, and 3 of Part 1 of the notice of application, which are as follows:

1. Declarations that the *Legal Professions Act*, S.B.C. 2024, c. C26 ("Bill 21"), or alternatively, portions of Bill 21, are ultra vires provincial authority in ss 92(13) and (14) of the *Constitution Act*, 1867.

2. Declarations that Bill 21, or alternatively certain provisions in Part 6 of Bill 21, violate ss. 2(d), 7, 8, 10(b), and 11(d) of the Charter of Rights and Freedoms in a manner that cannot be justified in a free and democratic society under s. 1 of the Charter.

3. A declaration under s. 52 of the *Constitution Act*, 1982 that Bill 21, or alternatively portions of Bill 21 are of no force and effect to the extent of any inconsistency with the Constitution of Canada.

Part 2: ORDERS OPPOSED

The application respondent opposes the granting of orders set out in none of the paragraphs of Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondent takes no position on the granting of the order set out in paragraphs 4 of the notice of application.

Part 4: FACTUAL BASIS

4. The application respondent does not contest the factual basis of this application as set out by the plaintiff.

5. The LSM is the governing body of 2376 practicing lawyers called to the Bar in Manitoba[1].

6. The mandate of the LSM, as established under *The Legal Profession Act*, C.C.S.M., c. L107 ("L.P.A.), is to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence[2].

7. As the regulator of the practice of law in Manitoba, the LSM's role is central to the operation of the legal and justice system in the province. Like the other essential elements of that system, it exists by virtue of statute. The LSM was incorporated by *The Law Society Act*, as first enacted in 1877 which Act was amended from time to time over the years. In 2002 *The Law Society Act* was repealed and replaced by the L.P.A[3].

8. The history of the LSM, its governing legislation as amended over time, and its interaction with government demonstrates an acknowledgement of the requirement for an independent bar.

9. In carrying out its purpose and discharging its duties, the LSM regulates the practice of law in the public interest through admission requirements, continuing education requirements and programs, an insurance program, a trust safety

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1 Affidavit of L. Kosokowsky made on November 22, 2024 ("Kosokowsky Aff. 1"), para 7
2 Kosokowsky Aff. 1, para 3
3 Affidavit of L. Kosokowsky, made March 31, 2025 ("Kosokowsky Aff. 2"), para. 15

program, a reimbursement claims fund, a complaints resolution process and a disciplinary process[4].

10. Law societies are to be left to govern the profession independently. A very limited role is preserved for government. This independence is exemplified within the L.P.A[5]., examples of which include:

a. the Benchers are given broad powers to make Rules and to adopt a *Code of Professional Conduct* without approval of, consultation with or review by Government;

b. the Rules and Code are not instruments of government policy but of the Benchers' determination of what is required to fulfill the LSM's statutory purpose and discharge its duties;

c. there is no definition of professional misconduct, conduct unbecoming or incompetence imposed by legislation, leaving it instead to the Discipline Committee of the LSM to make that determination in each case, guided by the LSM's independently created Rules and *Code of Professional Conduct*;

d. there is no definition of competence and no standards of competence are imposed, leaving those to be determined by the LSM.

11. Currently, lawyers called to the bar in British Columbia and lawyers called to the bar in Manitoba have the ability to practice within the opposite jurisdiction without the need for a formal call in that jurisdiction, subject to certain agreed upon conditions. That ability arises from general parity that currently exists with the provinces' current legislation governing lawyers and the respective codes of conduct governing lawyers in British Columbia and Manitoba. Critical similarities

4 Kosokowsky Aff. 2, para 11
5 Kosokowsky Aff. 2, para. 18

being that each currently enjoys an independent bar governed by a regulator independent of government[6].

12. Through instruments such as the National Mobility Agreement and the legislation and rules enacted to accommodate it, the regulatory regime prescribed by Bill 21 will affect both the practice of law in Manitoba and the practice of LSM members in B.C. This is a concern as to both access to justice and interprovincial trade. It will alter the dynamics that have led to collaboration with the B.C. regulator in other matters of common interest such as the development of the Western Canada Competency Profile[7].

13. While there are differences in legislation for regulation of the practice of law among Canadian jurisdictions, none go as far as Bill 21 in their effect on the independence of critical participants in the justice and legal systems which, in the LSM's view, is necessary for the effective working of those systems[8].

14. The effect, if not the present intent, of the new *Legal Professions Act* is to allow the regulator of the legal profession to be used as an instrument of the government of the day. This is so because of the way in which the board of the new regulator is to be structured and populated and because of the availability of direct regulation by government of the profession without consultation with the regulator or practitioners and even without the necessity of legislative process[9].

15. Lawyers are involved every day in cases in which the immediate opposing party is government. This is most apparent in the defence of criminal cases, but also in challenges to legislation, in civil cases seeking to stop projects undertaken by

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6 Kosokowsky Aff. 1
7 Kosokowsky Aff. 2, para. 35
8 Kosokowsky Aff. 2, para. 36
9 Kosokowsky Aff. 2, para. 37

government or its supporters, issues of access to information and of freedom to express views not approved by government or to report on such views in public forums. Lawyers represent parties in seemingly private transactions that may be unpopular with the government of the day, or its perceived supporters. These are not academic concerns[10].

16. The overall concern is that a legal profession controlled in the way now set to be structured in B.C. is one in which practitioners may be intimidated, or even prevented from, assisting persons needing and otherwise entitled to their services[11].

Part 5: LEGAL BASIS

17. The application respondent does not contest the legal basis upon which the application is sought by the plaintiff.

18. An independent bar is a critical component to maintaining the *Rule of Law* and preserving a free and democratic society, a concept expressly recognized by the Supreme Court of Canada in *AG Can. v. Law Society of BC.*, [1982] 2 S.C.R. 307:

> The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally.

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10 Kosokowsky Aff. 2, para. 38
11 Kosokowsky Aff. 2, para. 3

19. In reiterating its findings in *AG Can*, the Supreme Court of Canada in *Pearlman v. Law Society of Manitoba*, [1991] 2 S.C.R. 869 also confirmed that where the legislature has seen fit to create a self-governing body, it must permit that body to govern without direction or influence from government:

> 41 It is appropriate at this juncture to mention the legislative rationale behind making a profession self-governing. The Ministry of the Attorney General of Ontario produced a study paper entitled *The Report of the Professional Organizations Committee* (1980) which, I believe, provides a helpful analysis of this rationale. The following extract from p. 25 is apposite:
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> > On the other hand, where the legislature sees fit to delegate some of its authority in these matters of public policy to professional bodies themselves, it must respect the self-governing status to these bodies. *Government ought not to prescribe in detail the structures, processes, and policies of professional bodies. The initiative in such matters must rest with the professions themselves, recognizing their particular expertise and sensitivity to the conditions of practice.* In brief, professional self-governing bodies must be ultimately accountable to the legislature; but they must have the authority to make, in the first place, the decisions for which they are to be accountable. [emphasis original]
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> The authors noted the particular importance of an autonomous legal profession to a free and democratic society. They said at p. 26:
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> > **Stress was rightly laid on the high value that free societies have placed historically on an independent judiciary, free of political interference and influence on its decisions, and an independent bar, free to represent citizens without fear or favour in the protection of individual rights and civil liberties against incursions from any source, including the state**. [emphasis added]

> On this view, the self-governing status of the professions, and of the legal profession in particular, was created in the public interest. [12]

20. While law societies derive their authority from statute, they are independent policy makers in specific areas with broad mandates to determine public interest. The essential government policy reflected in their home statutes is just that – it is the law societies who are to determine the requirements of the public interest within their sphere of regulation.

21. The fact that law societies are necessarily a creature of statute does not mean a right to an independent bar does not otherwise exist. For example, the *Judges Act*, R.S.C., 1985, c. J-1, is a statute of parliament, governing such things as the salary to be paid to a federal judge and the mandatory retirement age of a federal judge. Yet, the work of a federally appointed judge, as is the case for provincially appointed judges, in deciding the cases that come before the Judge remains at all times independent from government in accordance with the Rule of Law.

22. Self-Regulating bodies, such as the LSM and the LSBC, are created not to preserve a monopoly but to provide protection for the general public that seeks the services of lawyers.[13] The general public cannot be properly served unless the bar is independent, representing that public without fear or favour.

23. It is the governing body that is in not only in the best position to determine issues such as misconduct and incompetence[14], but they ought to be in that position in

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12 See also, *Law Society of British Columbia v. Trinity Western*, 2018 SCC 32, wherein the Court at para 38 concluded "In sum, where legislatures delegate regulation of the legal profession to a law society, the law society's interpretation of the public interest is owed deference. This deference properly reflects legislative intent, acknowledges the law society's institutional expertise, follows from the breadth of the "public interest", and promotes the independence of the bar.

13 *Green v. Law Society of Manitoba*, 2015 MBCA 67, affirmed 2017 SCC 20, at para 12

14 See *Pearlman*, at para. 25

order to maintain the high standards of the legal profession and therefore the integrity of our system of justice[15].

24. A review of the statutory regimes of the law societies in Canada, apart from Bill 21, demonstrate the independence of lawyers has been assured by two fundamental things:

(a) The devolution of regulatory powers to a regulator that is itself independent, has broad power to determine and act in the public interest, and is within the control of the lawyers themselves; and

(b) Restraint on the part of government from interfering in that regulation.

25. Bill 21 fundamentally departs from this having regard to the board composition. A board not within the control of lawyers themselves is not a independent/self-regulating body. Without this critical component, the independence recognized time and time again by the Courts in Canada simply does not exist.

26. The proposed board composition will run contrary to a consistent finding of the Courts that lawyers are best positioned to determine the appropriate standards lawyers are to meet, thereby impacting not only the independence of the bar but the integrity of the justice system as a whole.

27. Contrary to the restraint consistently shown on the part of governments in Canada to refrain from interfering in the regulation of lawyers, Bill 21 gives broad rule making power that can be enforced regardless of what the regulator considers to be

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15 *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, paras. 16 and 19

in the best interests of the public. This cannot be seen as anything other than impacting the independence of the regulator and the profession as a whole.

Part 6: MATERIAL TO BE RELIED UPON

1. Affidavit of Leah Kosokowsky made November 22, 2024 (Law Society Action);

2. Affidavit of Leah Kosokowsky made March 31, 2025 (Law Society Action);

3. Affidavit of Leah Kosokowsky made April 2, 2025 (Law Society Action);

4. Such other material already filed in the application;

5. Such further and other material as counsel for the applicant may advise and as this Honourable Court may permit in the circumstances of this case.

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

Date: April 22, 2025

Signature of lawyer for the application respondent
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