No. S-243258
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, the 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: the Intervenor, the Society of Notaries Public of British Columbia ("SNPBC")

THIS IS A RESPONSE TO the notice of application in filed by the plaintiff on April 4, 2025.

This matter is not within the jurisdiction of an Associate Judge.

The application respondent estimates that the application will take 14 days.

Part 1: ORDERS CONSENTED TO

The application respondents consent to the granting of the orders set out in none of the paragraphs of Part 1 of the notice of application on the following terms.

Part 2: ORDERS OPPOSED

The application respondents 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 application respondents takes no position on the granting of the orders set out in all of Part 1 of the notice of application.

Part 4: FACTUAL BASIS

1. British Columbia is a common law jurisdiction within a constitutional order which traces its legal roots to the English constitution and legal system. That legal system has, for a very long time, functioned under the premise of the rule of law.

2. Within the Anglo-Canadian legal order, learned professions have always played an important role in the maintenance of the rule of law. However there has never been a single legal profession within this structure. Barristers, searjents, solicitors, attorneys, and proctors have all, at one time or another, practice law within what were essentially limited spheres.

3. The profession of Notary Public has a long history in the Province. Notaries have been providing legal services to British Columbians since before confederation.[1] They are one of three learned professions who are presently authorized to engage in legal practice.[2]

4. Notaries are learned professionals and subject to significant educational requirements, training, and rigorous professional standards.[3]

5. Within the scope of their authorized practice, Notaries Public perform virtually all of the same services of lawyers undertaking the same work[4] and are held to precisely the same standard of care that lawyers are held to.[5]

6. Notaries Public play an essential role in ensuring the smooth operation of our legal order. They provide legal advice and assist clients in navigating all manner of legal issues, within the scope of their authorized practice areas.[6]

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[1] Aff #1 H. El Masri, paras. 36 to 37
[2] That term being used in the functional sense, rather than the term of art employed in the current *Legal Profession Act*
[3] Affidavit #1 H. El Masri, paras. 6, 7, 11 to 15
[4] Aff#1 H. El Masri, paras. 20 to 25
[5] *Normak Investments v. Belciug*, 2015 BCSC 700, at para. 69
[6] Aff #1 H. El Masri, paras. 20 to 25

7. Notaries Public, while not authorized to engage in litigation and contentious matters, do represent clients in transactions and assist them in resolving difficult legal issues, sometimes concerning government influence and interests.[7]

8. Notaries provide critical legal services and advice to a large segment of the population, playing in an important role in ensuring access to justice within the province. The services they provide often involve important and consequential decisions by clients which require informed legal advice and practiced representation to ensure the client's wishes are carried out and interests protected.[8]

9. The scope of a Notary Public's practice is defined by statute and the common law;[9] however the profession is self-regulating. SNPBC was privately incorporated by its members in 1926 for the purpose of representing, organizing, and regulating the notarial profession in the public interest. Since that time, the applicant has been the independent regulator of the profession.[10]

10. The applicant's status as regulator was formally recognized by statute in the 1950s and is currently recognized and enabled by the *Notaries Act,* R.S.B.C. 1996, c. 334.

11. On May 15th, 2024 the Legislature passed Bill 21, the *Legal Professions Act* (the "new *LPA*"). Bill 21 received Royal Assent the same day.

12. The new *LPA* represents a significant redesign of the state of regulation of legal professionals in the Province. All legal professions, including Notaries and subject to exceptions reserved by the government, are to be regulated by a single regulator which is governed by a mix of legal professionals, elected and appointed. All legal professionals, including Notaries and again subject to certain exceptions reserved to government, will also be subject to a consistent framework for discipline and certain incidents of practice, such as handling of trust funds.

13. Material provisions of the new *LPA* to this application provide that:

    a. A new regulator of legal professions is to be created;[11]

    b. That regulator is to be governed by a board of directors, made up of a mix of elected and appointed lawyers and notaries, as well as paralegals and members of the public;[12]

[7] Aff #1 H. El Masri, para. 26 to 29
[8] Aff #1 H. El Masri, paras. 30 to 34
[9] See *Reference re Society of Notaries Public of British Columbia*, (1969) 6 D.L.R. (3d) 447 (B.C.C.A.)
[10] Aff #1 H. El Masri, paras. 4, 8, 38 to 39
[11] *Legal Professions Act*, S.B.C. 2004, c. 26 ("Bill") 21, s. 5
[12] Bill 21, ss. 8 to 9

c. The majority board of directors is composed of lawyers and notaries;[13]

d. The government is granted the authority to create new legal professions by regulation;[14]

e. The government is granted the authority to create regulations in respect of any new legal professions it creates;[15] and

f. The government's regulations prevail over any rules or regulations of the new regulator.[16]

Part 5: LEGAL BASIS

Executive Summary

1. It is accepted law that Section 92 grants the province the power to regulate learned legal professions, including regulating which professions may engage in legal practice. That is not in dispute in this case.

2. What is in dispute is the extent to which the Province may intervene in the regulation of lawyers and legal professionals.

3. Central to the LSBC's case is an interpretation of the extent of the jurisdiction granted to the Provincial Legislature by Section 92 of the *Constitution Act (1867)* ("Section 92"), specifically the degree to which the legislature may regulate the practice and regulation of lawyers.

4. The LSBC's approach to this question is unduly narrow. The limitation on the Province's powers to regulate lawyers is derived from a broader handicap on its regulation of legal professionals and professions, generally.

5. This is because *all* learned professions authorized to practice law, including notaries public in British Columbia, play an essential role in upholding the rule of law.

6. It is submitted that regulation of legal professions is permissible only insofar as that such regulation does not interfere with the independence of such professions. SNPBC generally agrees that both individual practices and regulation should be independent from government control.

7. As a result of these propositions, it is submitted:

[13] Bill 21, ss. 8 to 9
[14] Bill 21, s. 4
[15] Bill 21, ss. 211 to 213
[16] Bill 21, s. 214

(a) The alleged erosion of independence caused by the new governance structure described by the LSBC does not arise because Bill 21 reserves control of the composition of the board to elected legal professionals;

(b) Sections 4, 7, 22, 68, and Part 17 do erode the independence of legal professions and professionals, and should be held to be of no force and effect.

8. These provisions are furthermore capable of being, and should be, severed from the legislation, leaving the overall structure in-tact.

Constitutional interpretation

9. Canada's *Constitution Acts* must be interpreted liberally and generously, in a way which permits their natural growth, in light of their objects.[17]

10. These objects, generally, flow from the preamble of the *Constitution Act (1867)*, which states that Canada's constitution ought to be "similar in principle" to that of the United Kingdom. This preamble is the "grand entrance hall" through which principles of English constitutional law are imported into our constitution, as the structure supporting the "castle of our Constitution."[18]

11. Such principles are essential to the functioning of our constitutional order and are "interpretive aids" which may assist a court in understanding the text of constitutional documents.[19]

12. It has been said that unwritten principles guide our understanding of the written text[20], making it a "living tree".[21] Thus, while these unwritten principles are not, on their own, the basis of enforceable obligations, they *can* restrict interpretations of the constitution which place limits on the range of acceptable government action. For example, the constitutional imperative of judicial independence has been extended to all levels of the judiciary not by *express* language, but by broadly interpreting the relevant language in the statute on the basis of the overall constitutional architecture.[22]

13. Our constitutional order is clearly premised on at least two essential principles: the Rule of Law and respect for parliamentary democracy.[23]

The Rule of Law Requires the Independence of all Learned Legal Professionals

[17] *Hunter v. Southam*, [1984] 2 S.C.R. 145, at 155 to 156
[18] *Re Remuneration of Judges of the Prov. Court (P.E.I.)*, [1997] 3 S.C.R. 3, at paras. 82 to 109
[19] *Toronto (City) v. Ontario (Attorney General)*, [2021] 2 S.C.R. 845, at paras. 64 to 65
[20] *British Columbia v. Imperial Tobacco*, [2005] 2 S.C.R. 473 at para. 66; and *Switzman v. Elbling*, [1957] S.C.R. 285, at p. 306
[21] *Edwards v. Canada (Attorney General)*, [1930] 1 D.L.R. 98, (P.C.) *per* Sankey L.C. at pp. 106 to 107
[22] *Re Remuneration of Judges of the Prov. Court (P.E.I.)*, [1997] 3 S.C.R. 3
[23] *Re Remuneration of Judges of the Prov. Court (P.E.I.)*, [1997] 3 S.C.R. 3, at paras. 99 to 104; and see *B.C. (A.G.) v. Christie* [2007] 1 S.C.R. 873, at paras. 19 to 21; *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 142

14. It is submitted that a purposive and functional interpretation of the *Constitution Act (1867)* must focus on what is required to uphold the rule of law while respecting parliamentary democracy. The focus of any analysis must be on results, rather than inputs. On this basis, it is submitted that:

    (a) the heads of power under Section 92 cannot be interpreted as authorizing legislation which would erode or destroy the rule of law; and

    (b) legislation which compromises the independence of all learned legal professionals, as opposed to only specific classes, both in their regulation and actual practice, constitutes such an erosion.

15. In its analysis, the Law Society conflates the need for access to our courts with the rule of law. The rule of law *is not* a synonym for access to the courts: it is a necessary, but not sufficient precondition.

16. The rule of law requires the creation and maintenance of an actual order of positive laws to govern society, which laws are an indispensable element of civilized life. It implies "public order" and ensures community over anarchy and strife.[24]

17. On this definition, maintaining the rule of law requires more than impartial and independent adjudicative structures. It requires a system of laws to be accepted by and actually function in ordering society.[25] This can only occur in an environment where the public understands the laws which govern them, and all members of society, including the King, faithfully observe them.

18. Observance of laws, however, requires citizens to understand their rights and obligations so that they are able to observe the laws of the land. Otherwise, the positive legal order and judicial system are nothing more than performative dance providing cover for arbitrariness and, potentially, authoritarianism. In such situations, the resourced and powerful, particularly the government, disingenuously use law to justify their actions, rather than find themselves subject to it.

19. The importance of independent legal professionals is thus self-evident. Our legal order is, and always has been, complex and nuanced. It is made up of a mix of common law, equity, and a regulatory ecosystem which is increasingly complex. It is subject to interests of varying degrees of power and resources. The system has always been dependent on independent legal professionals who translate laws, advise subjects, and represent, and advocate for clients *in all contexts* provide important stability and equalizing effects, ensuring that our legal order is followed consistently, rather than used as a tool by the powerful.

20. In this way, learned legal professionals, broadly understood, are the essential foundation and precondition to the rule of law.

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[24] *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at para. 60

[25] See V. Carmichael & G. Webber, "The Rule of Law in a Pandemic," (2021), 46:2, Queen's L.J. 317, at 320 to 321

21. Any understanding of Section 92 of the *Constitution Act (1867)* and the restriction on the Legislature's ability to infringe the independence of professionals should thus be function, understood as aimed not at protecting specific professions, but at ensuring those learned professionals authorized to practice law are free from government interference, so as to ensure the rule of law is not diminished.

22. This is also consistent with the history of legal professionals, which has never been static. Concentration of legal advice and representation is relatively recent historical phenomenon, brought about by fusion of the courts in the Judicature Acts of the 19th century.

Independence Does not Mean Self-Regulation

23. As has been described, the constitutional imperative of independence of legal professionals exists at the functional level of "authorized legal professionals". Independence protects legal professionals as a collective, rather than individual professions.

24. Self-regulation is *an* effective way to preserve the independence of legal professionals – but it is not in and of itself independence. Independence, rather, is freedom of the profession from the influence of public authorities or other external influences. The mode of guarding against interference has been described as a choice of the Provincial Legislature. [26]

25. There thus remains space for other regulatory models for legal professionals, so long as the professionals and their regulator are free from public influence.

Analysis – Bill 21

26. The Law Society attacks Bill 21 on two bases:

    (a) The governance structure deprives lawyers of their independence by forcing them into a regulatory structure where the majority of the board is not composed of elected lawyers; and

    (b) Various provisions of Bill 21 impermissibly insert government influence and control over regulation of legal professions.

<u>The new Governance Structure does not Erode Independence</u>

27. The new board of directors for this new regulator does not infringe on the independence of legal professions or professionals because the board remains in control of members B.C.'s legal professions.

[26] *Finney v. Barreau du Quebec*, [2004] 2 S.C.R. 17, at para. 1; *A.G. Canada v. Law Society of B.C.*, [1982] 2 S.C.R. 307, at 335 to 336

28. The constitution's mandate is only that those learned professions engaged in the practice of law are free from government (and external) influence. This is not infringed by collective regulation *per se*. The question is whether the regulator is structured to resist external pressures and influence.

29. The board of directors of the new regulator is composed of 5 elected lawyers, 2 elected notaries, potentially 2 elected paralegals, and between 5 to 7 other legal professionals appointed by the existing board members. Only three board members will be appointed by the government.

30. While lawyers themselves have less control over this board than they do of the Law Society, the constitution requires learned legal professions *generally* to be independent. Together with Notaries Public, B.C.'s learned legal professionals collectively remain firmly in control of the regulator and are thus capable of resisting undue influence by government and other external forces over the practice of law.[27]

31. Individual independence of lawyers or notaries is not, moreover, infringed to any degree beyond the current regulatory structure by this arrangement. The new model of regulation does not provide the government any window to interfere with the individual practices of lawyers or notaries.

Certain Provisions Do Erode Independence, but are Severable

32. SNPBC agrees with the Law Society that the following provisions do intrude on the independence of legal professionals: Sections 4, 7, 68 and Part 17.

33. Sections 4 and Part 17, combined, read together, permit the government to create new classes of legal professionals which the government may regulate directly. While SNPBC concedes the Province may authorize other learned professions to practice law, it cannot exercise regulatory control over them, for the reasons expressed.

34. Creating parallel professions not captured by the new regulator, moreover, creates opportunities for indirect influence over existing legal professions, setting up potential competitive advantages which incentivize regulatory changes which may not have been otherwise contemplated by the independent regulator.

35. Sections 7 and 68 also define the essential framework and objectives which will guide the new regulator. This is a direct assault on the independence of legal professions, shaping regulation of legal professions in the province.

36. All of these provisions are severable, in that it is fair to assume that the legislature nonetheless would have enacted the legislation without these provisions which are *ultra vires*.[28] None of these provisions are integral with and necessary to achieve the overall statutory objective of consolidating and reforming the regulation of legal professions within the province.

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[27] As before, used in a general sense

[28] *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503, at 518 (P.C.)

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Hassan El-Masri, sworn April 25, 2025; and

2. The pleadings and other materials filed in these proceedings.

☒ The application respondent has not filed in this proceeding a document that contains an address for service. The application respondent's ADDRESS FOR SERVICE is:

Mackenzie Fujisawa LLP
1600 – 1095 West Pender St.
Vancouver, B.C., V6E 2M6
Attention: Ian M. Knapp

(e) quduong@macfuj.com, iknapp@macfuj.com & txu@macfuj.com

Date: April 25, 2025

Signature of Lawyer for the application respondent
Ian M. Knapp