



No. S-243325
Vancouver Registry

In the Supreme Court of British Columbia

Between

Trial Lawyers Association of British Columbia and Kevin Westell

Plaintiffs

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 19-21, 30, 33-35, and 40 of part 1 of the notice of civil claim.
2. The defendants deny the facts alleged in paragraphs 1-13, 22-29, 31, 32, 36-39, 41, and 42 of part 1 of the notice of civil claim.
3. The facts alleged in paragraphs 14-18 of part 1 of the notice of civil claim that are outside the knowledge of the defendants.

Division 2 – Defendants’ Version of Facts

1. Paragraphs 1 to 13 of part 1 of the notice of civil claim plead argument and evidence rather than material facts.

2. In response to paragraph 22 of part 1 of the notice of civil claim, the Attorney General is appointed to the Executive Council, and designated Attorney General, by the Lieutenant Governor. By convention, the Lieutenant Governor acts on the advice of the Premier. By further convention, the Premier usually selects the members of their Executive Council from among the members of the Legislative Assembly. When acting in their capacity as Attorney General as opposed to their capacity as a Member of the Legislative Assembly, the Attorney General must act in accordance with the *Attorney General Act*, R.S.B.C. 1996, c. 22 and various constitutional conventions.
3. Paragraphs 23 to 26 of part 1 of the notice of civil claim plead evidence and argument rather than material facts.
4. In response to paragraph 27 of part 1 of the notice of civil claim, in the 1850s and 1860s, the legal professions (barristers, solicitors, advocates, attorneys, and proctors) were regulated by orders and ordinances of the governor of the Colony of Vancouver Island, the governor of the Colony of British Columbia, and the judge of the Supreme Court of Civil Justice in Vancouver Island.
5. In response to paragraphs 28-29 of part 1 of the notice of civil claim, the Law Society was founded on July 15, 1869, by the 22 barristers and solicitors then practising in the Colony of British Columbia, including Attorney General Crease, at a meeting that had been called by the Attorney General. The primary purpose of the Law Society was to establish a law library.
6. In response to paragraph 31 of part 1 of the notice of civil claim, in 1874, the Legislature enacted *An Act respecting the Legal Professions*, S.B.C. 1874, c. 18, which incorporated all barristers and attorneys as a body corporate under the name of "The Incorporated Law Society of British Columbia".
7. In response to paragraph 32 of part 1 of the notice of civil claim, in 1895, the Legislature enacted *An Act to Amend and Consolidate the Acts Relating to the Legal Professions*, S.B.C. 1895, c. 29, which continued the Law Society and provided that its members would be all persons called to the bar and all persons admitted as solicitors of the Supreme Court of British Columbia.
8. In response to paragraph 36 of part 1 of the notice of civil claim, the defendants agree that the benchers make rules governing the society, lawyers, law firms, articulated students, and applicants; carry out the duties and powers under the *Legal Profession Act*, S.B.C. 1998, c. 9 (the "**Old Act**"); and currently maintain the *Code of Professional Conduct for British Columbia*. The balance of paragraph 36 pleads argument rather than material facts.
9. In response to paragraph 37 of part 1 of the notice of civil claim, the defendants agree that the Old Act requires the approval of the membership of the Law

Society for certain rules, that the Law Society does not receive government funding, and that a majority of benchers are currently elected from within nine regions. However, benchers do not represent the lawyers within those regions. Benchers have a statutory duty to govern the Law Society in the public interest.

10. Paragraphs 38 and 39 of part 1 of the notice of civil claim plead argument and evidence rather than material facts.
11. In response to subparagraphs 41(a) and (d) 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), and only three directors will be government appointed.
12. Subparagraph 41(b) of part 1 of the notice of civil claim pleads argument rather than material facts.
13. In response to subparagraph 41(c) of part 1 of the notice of civil claim, the duties of the Law Society are prescribed by 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.
14. In response to subparagraph 41(e) of part 1 of the notice of civil claim:
 - a. The members of the transitional Indigenous council and Indigenous council are not representatives of the organizations that appoint them to the council.
 - b. The transitional board and the transitional Indigenous council are required to collaborate in developing the first rules of the board. The first rules cannot be made without the agreement of the transitional board, which can have a majority of lawyers if the benchers wish.
 - c. After the amalgamation, the board has broad authority to make any rules it considers advisable for the performance of its duties and may amend the first rules.
 - d. Before making a rule, the board must consult with the Indigenous council regarding the extent to which the rule accords with the principles of:
 - i. supporting reconciliation with Indigenous peoples and the implementation of the United Nations Declaration on the Rights of Indigenous Peoples; and
 - ii. 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.

15. In response to subparagraph 41(f) 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.
16. In response to subparagraph 41(g) 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.
17. In response to subparagraph 41(h) of part 1 of the notice of civil claim, the Act does not provide the Lieutenant Governor in Council with any power to govern or regulate any legal professionals.
18. In response to subparagraph 41(i) of part 1 of the notice of civil claim, the defendants agree that the chair of the board will replace the position held by the president of the Law Society. The balance of subparagraph 41(i) pleads argument rather than material facts.
19. In response to subparagraphs 42(a) and (b) of part 1 of the notice of civil claim, the Act empowers the regulator to regulate the conduct of legal professionals. 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 subparagraphs 42(c) and (d) 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 subparagraph 42(e) 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 subparagraph 42(e) 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, with 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.

Plaintiffs' conception of independence of the bar is too broad

7. The plaintiffs advance 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.

Act does not engage individuals' rights under ss. 7, 10(b), or 11(d) of the Charter

8. The plaintiffs' position that the Act infringes individuals' rights under ss. 7, 10(b), or 11(d) of the *Charter* depends on the premise that the Act eliminates the independence of the bar. As set out above, the Act does not diminish the independence of the bar.

Act does not engage lawyers' rights under s. 2(d) of the Charter

9. The Law Society is not an association of lawyers. It is a statutory regulator. Section 2(d) of the *Charter* does not confer on regulated persons a constitutional right to control their statutory regulator. The Act does not restrict lawyers from associating, including through organizations like the plaintiff, Trial Lawyers Association of British Columbia.

Section 78 of the Act does not infringe Mr. Westell's rights under s. 8 of the Charter

10. Section 78 does not infringe Mr. Westell's rights under s. 8 of the *Charter*. Considering the nature and public protection purpose of the Act, regulated professionals' diminished expectation of privacy with respect to a search by their regulator of their place of business, and the availability of judicial supervision, s. 78 is reasonable.

Section 88 of the Act does not engage Mr. Westell's rights under s. 7 of the Charter

11. Section 88 of the Act does not engage Mr. Westell's rights under s. 7 of the *Charter*. It is settled law that s. 7 does not create a right to be licensed to work in any particular profession. An order requiring that a person obtain certain medical treatment, failing which their licence may be suspended or made subject to conditions, does not engage s. 7. Non-compliance with a competence order under section 88 of the Act is not an offence under the Act and cannot result in imprisonment.

Any limits on Charter rights justified under s. 1

12. If any provisions of the Act limit any rights under the *Charter* (which is denied), such limits are justified under s. 1 of the *Charter*.

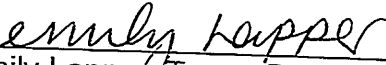
HMTK should be removed

13. 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
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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.