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,
His Majesty the King in right of the Province of British Columbia, and
Lieutenant Governor in Council of British Columbia

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

Interveners

- and -

No. S-243325
Vancouver Registry

Between

Trial Lawyers Association of British Columbia and Kevin Westell

Plaintiffs

and

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

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

Interveners

WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL
(Summary Trial)

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Attorney General of British Columbia

Emily Lapper, Trevor Bant, Sergio Ortega,
Karin Kotliarsky, and Solomon Kay-Reid

MINISTRY OF ATTORNEY GENERAL
Legal Services Branch
1301 - 865 Hornby Street
Vancouver, BC V6Z 2G3
Tel: 250-952-0122
emily.lapper@gov.bc.ca

Law Society of British Columbia

Craig Ferris, K.C., Laura L. Bevan,
Jonathan Andrews, and Nicole Welsh

LAWSON LUNDELL LLP
1600 - 925 West Georgia Street
Vancouver, BC V6C 3L2
Tel: 604-631-9197
Fax: 604-669-1620
cferris@lawsonlundell.com

Trial Lawyers' Association of British Columbia and Kevin Westell

Gavin Cameron, Tom Posyniak,
and Laura Abrioux

FASKEN MARTINEAU DUMOULIN LLP
2900 - 550 Burrard Street
Vancouver, BC V6C 0A3
Tel: 604-631-3131
gcameron@fasken.com

Society of Notaries Public of British Columbia

Ian M. Knapp and Alana Mackenzie

MACKENZIE FUJISAWA LLP
1600 - 1095 West Pender Street
Vancouver, BC V6E 2M6
Tel: 604-443-1203
iknapp@macfuj.com

Indigenous Bar Association

Declan C. Redman and David W. Wu

ARVAY FINLAY LLP
360 - 1070 Douglas Street
Victoria, BC V8W 2C4
Tel: 778-557-2399
dredman@arvayfinlay.ca

Canadian Bar Association

Michael A. Feder, K.C., Connor Bildfell,
Lindsay Frame, and Nico Rullmann

MCCARTHY TÉTRAULT LLP
2400 - 745 Thurlow Street
Vancouver, BC V6E 0C5
Tel: 604-643-7100
Fax: 604-643-7900
mfeder@mccarthy.ca

Law Foundation of British Columbia

Brent Olthuis, K.C., and Ramisha Farooq

OLTHUIS VAN ERT
1915 - 1030 West Georgia Street
Vancouver, BC V6E 2Y3
Tel: 236-330-2666
bolthuis@ovcounsel.com

Law Society of Manitoba

Lynda K. Troup

THOMPSON DORFMAN SWEATMAN LLP
1700 - 242 Hargrave Street
Winnipeg, MB R2V 0C1
Tel: 204-934-2337
lkt@tdslaw.com

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Overview

1. The issue in these actions is not whether independent lawyers play a crucial role in the administration of justice. It is incontestable that they do. The public needs access to independent legal advice and zealous advocacy from lawyers, especially in matters adverse to the state. To fulfil that important role, lawyers must be free from improper interference with their advice and advocacy.

2. Rather, the issue in these actions is whether lawyers enjoy complete and total immunity from any kind of democratic regulation, as the plaintiffs assert. The plaintiffs' position is indefensible in our representative democracy.

3. The Supreme Court of Canada has long affirmed that the powers and regulatory authority of lawyers' governing bodies are delegated to them by the legislature.[1] Without that delegated legislative authority, lawyers' governing bodies would not be legal persons and would have no powers to regulate or discipline their members beyond those available to voluntary associations. The Law Society of British Columbia ("**Law Society**"), as an entity, and all of its powers, exist only by virtue of powers delegated to, and privileges bestowed on it, by legislation.

4. To be sure, legislatures are not unconstrained in how they may regulate lawyers. The Supreme Court of Canada has recognized it is a principle of fundamental justice under s. 7 of the *Charter* that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes – that is, the duty to provide clients with independent advice and advocacy.[2] Thus, it is a principle of fundamental justice that the state cannot require lawyers to act in ways that undermine their duty of commitment to their client's cause when the state seeks to limit anyone's life, liberty or security of the person.[3]

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[1] *Finney v. Barreau du Québec*, 2004 SCC 36 at paras. 1, 14 and 22 [*Finney*] and *A.G. Can. v. Law Society of B.C.*, [1982] 2 S.C.R. 307 at p. 336 [*Jabour*].
[2] *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7 at para. 84 [*Federation*].
[3] *Federation* at para. 84.

5. The plaintiffs' claims in these actions, however, go well beyond protection from measures that undermine the lawyer's commitment to their client's cause. The plaintiffs' fundamental claim is that lawyers have a *constitutional right* to be regulated and governed *only* by a body consisting of a strong majority of lawyers who are elected by lawyers. As the Law Society puts it, "self-governance and self-regulation are essential conditions of independence of the bar … Self-governance means an independent legal regulator that is governed by a board composed of a strong majority of lawyers; and self-regulation means independent regulation guided by the board's determination of what is in the public interest in the administration of justice."[4] In short, the plaintiffs' claim is that lawyers must be "accountable only to the public interest"[5]—that is, to the public interest as defined exclusively by lawyers elected by lawyers, with no input from the public itself.

6. If the Law Society is correct, the only power left to the legislature in relation to governance and regulation of the legal profession would be to create such a scheme.

7. Whether this claim is viewed as one based on an unwritten constitutional principle, the necessary implication of the constitutional text, *a Charter* requirement, or a constitutional convention, there is no authority in Canada (or anywhere else in the democratic world) to support the plaintiffs' claim. If this were the law, it would follow that:

a. at least two of the legislative schemes regulating lawyers in Canada–those in Manitoba and Québec–would be unconstitutional;

b. judges from Manitoba and Québec (including the three Québec judges on the Supreme Court of Canada) would not have been appointed from an independent bar;

c. the legislature would have no meaningful role to play in deciding how the legal profession should be governed in the public interest;

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[4] Law Society written submissions heading C. and para. 93, emphasis added.
[5] Law Society written submissions at para. 294.

d. those with the monopoly (assuming that the legislature created such a monopoly) would have a constitutional right to regulate themselves, free of legislative interference with their own view of the public interest;

e. lawyers would have a degree of independence that judges – whose independence has a clear and long-standing constitutional basis – do not have. Unlike the claims made on behalf of lawyers in these actions, judges elected by judges do not decide who is appointed a judge or elect their "governing body" or select those who decide if they have engaged in misconduct or if they should be removed from office; and

f. the legislature would have a constitutional duty to legislate this specific form of governance, thus imposing an unprecedented positive duty for the legislature to delegate matters within provincial jurisdiction in a specific way.

8. The plaintiffs' position, if accepted, would erode the rule of law and upend our representative democracy. The public's need for independent lawyers means that lawyers must be free from improper interference with their advice or advocacy. It does *not* mean that lawyers must have an absolute monopoly in determining every aspect of how they are regulated, to the total exclusion of any and all other perspectives. The public is not required to give lawyers a blank cheque to regulate themselves however they choose. That is not the price the public must pay for access to independent lawyers.

9. The Court should reject the plaintiffs' unprecedented and unsupportable foundational claim.

10. In response to the plaintiffs' more detailed claims on lawyer independence, the Attorney General's position can be summarized as follows:

a. Legislative process and consultation are irrelevant to the constitutionality of the *Legal Professions Act* (the "**Act**").[6] These are political issues that are outside the purview of the courts.

[6] S.B.C. 2024, c. 26.

b. No constitutional convention regarding consultation or consensus exists (nor could the court enforce a constitutional convention, assuming the plaintiffs could establish one).

c. The plaintiffs' conception of absolute lawyer independence is not an unwritten constitutional principle – it finds no support in the evidence of legal regulation in Canada since Confederation and is contrary to the jurisprudence and academic literature.

d. Nor does the written text of the *Constitution Act, 1867* support the plaintiffs' conception of absolute lawyer independence.

e. Even if the plaintiffs could establish their absolute conception of lawyer independence is an unwritten constitutional principle (which is denied), unwritten constitutional principles may not be used to read down s. 92 of the *Constitution Act, 1867.*

11. The *Act* preserves lawyer independence, as that concept is defined and protected by the Constitution. Whether this court were to find lawyer independence finds expression in ss. 7 and 10(b) of the *Charter,* an unwritten constitutional principle, the judicature provisions of the *Constitution Act, 1867*, or other provisions of the *Charter,* the *Act* is constitutional. The *Act* does not interfere with lawyers' advice or advocacy, nor enable the state to do so. Electoral self-governance and self-regulation are not the only way to preserve lawyer independence. Under the new Act, members of the public will continue to have access to independent legal advice and zealous advocacy from lawyers, including in matters adverse to the state.

12. The plaintiff Trial Lawyers Association of British Columbia ("**Trial Lawyers**") makes further submissions with respect to ss. 2(d), 7, and 8 of the *Charter.* Each of these arguments are without merit. The s. 2(d) claim depends on recasting the Law Society as having a dual mandate that the Law Society itself has denied. The s. 7 argument misinterprets the *Act* and is inconsistent with settled authority. The s. 8 argument attempts

to re-litigate binding appellate authority and reveals fundamental misconceptions about the application of the *Charter.*

13. These actions should be dismissed.

PART 1: BACKGROUND

Constitutional Analysis

I. Overview

14. The plaintiffs have commenced constitutional challenges to the *Act*. The court's analysis in a constitutional challenge to legislation is guided by important interpretive rules and guardrails.

II. Modern approach to statutory interpretation applies

15. Like every enactment, the *Act* must be interpreted in accordance with the modern approach to statutory interpretation. The meaning of the *Act* is interpreted "by reference to its text, context and purpose".[7] The legislative text is the "anchor" of the interpretive exercise.[8] The primacy of the legislative text is a component of the rule of law, which requires that the law be transparent and accessible:

> The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it. Where those consequences are regulated by a statute the source of that knowledge is what the statute says.[9]

16. When interpreting legislation, the intention that matters is not the intention of the government, nor the intention of individual legislators, but "the corporate will of the

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[7] *Telus Communications Inc. v. Federation of Canadian Municipalities*, 2025 SCC 15 at para. 30.
[8] *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43 at paras. 24.
[9] *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.*, [1975] A.C. 591 (H.L.) at p. 638, [1975] U.K.H.L. 2.

legislature".[10] The corporate will of the legislature is "found in the text of provisions which are passed into law".[11] In other words, the intention of the legislature is "unknowable except by what it enacts".[12]

17. The Law Society correctly recognizes that constitutional analysis begins with statutory interpretation,[13] but adopts a flawed interpretive methodology. The Law Society does not follow, nor even refer to, the modern approach to statutory interpretation. Instead, drawing solely from extrinsic evidence, including its examination for discovery of a representative of the government, the Law Society focuses on the government's subjective thinking and policy goals in developing the bill that led to the *Act*.[14] The Law Society conflates the executive and legislative branches and ignores the different roles that each of them plays in our constitutional system. [15]

18. The meaning of the *Act* is not to be conflated with the government's subjective policy goals. No one from the government can give evidence about what the *Act* means, nor what the legislature intended. This proceeding is not a judicial review of a decision of the government. The Court is not assessing the reasonableness of the government's decision-making in developing that bill, nor evaluating the quality of debate on the bill in the legislative assembly, nor assessing the extent to which the *Act* reflects public opinion or the opinions of lawyers. The Court is assessing the constitutionality of the *Act*.

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[10] *R. v. Heywood*, [1994] 3 S.C.R. 761 at p. 788 [*Heywood*].
[11] *Heywood* at pp. 787-788.
[12] *Consortium Developments (Clearwater) Ltd. v. Sarnia (City),* [1998] 3 S.C.R. 3 at para. 45 (internal quotation marks deleted).
[13] Law Society written submissions at para. 14.
[14] Law Society written submissions at paras. 19-47.
[15] The Law Society's conflation of the legislative and executive branch is evident not just at a conceptual level, but in the language it uses in its submissions. See, for example, the use of inaccurate phrases like the "government's enactment of Bill 21" in the Law Society written submissions at para. 52 [emphasis added].

III. Relevant principles of constitutional analysis

(a) Necessity and policy wisdom of the *Act* is not at issue

19. Constitutional analysis proceeds from the assumption that, within the boundaries of the Constitution, legislatures can set the law as they see fit. This principle is foundational to our constitutional structure and the proper role of the court. As the Supreme Court of Canada has put it, "the wisdom and value of legislative decisions are subject only to review by the electorate".[16] Accordingly, the question before a court tasked with assessing the constitutionality of legislation is not whether the *Act* is necessary, wise, or effective, but whether it is *constitutional*.

20. Constitutional jurisprudence is rife with examples of courts rejecting litigants' invitations to opine on the policy wisdom of legislative enactments. For present purposes, two examples of binding precedent will suffice.

21. In *R. v. Edwards,* the Supreme Court of Canada found the requirement that military judges also be military officers did not violate judicial independence as protected by s. 11(d) of the *Charter*.[17] Although the majority acknowledged there are different and perhaps even better ways to design a system of military justice, the court held that such a design choice fell to Parliament. The court's role is to assess whether particular state action is unconstitutional, not whether other state action would be preferable. Writing for the majority, Justice Kasirer held:

> [14] Within the bounds of the Constitution, Parliament is of course free to enact another system for military justice, but that policy choice does not fall to the courts. There may indeed be different or even better models for judging offences in the military than what is currently set forth in the *NDA* that also rest on a proper disciplinary rationale and also meet the strictures of s. 11(d). That is not the question before us and, it is fair to say, is not a question that this Court is institutionally designed to answer... Courts are not equipped to do that work, nor is it their proper constitutional role. Instead, this Court is called upon to decide whether the regime that existed at the relevant times is constitutionally compliant. I conclude that it is.

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[16] *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 at para. 59.
[17] *R. v. Edwards,* 2024 SCC 15 [*Edwards*].

> […]
>
> [75] […] As Rowe J. recalled recently in his concurring reasons in *R. v. Chouhan*, courts cannot declare a statute unconstitutional simply because they disagree with legislative policy, or think a better policy may be available; courts are "not fitted" to undertake the inquiries that a proper policy review entails.[18] (citations omitted).

22. To similar effect is our Court of Appeal's decision in *Trial Lawyers*, a challenge to legislation granting jurisdiction over certain personal injury claims to the Civil Resolution Tribunal.[19] In his majority opinion, Chief Justice Bauman was careful to distinguish between the constitutional inquiry before him under s. 96 of the *Constitution Act, 1867*, which required him to consider the existence of an "important societal objective", and the question of whether the legislature "got it right" with its proposed legislation:

> [150] If my tone suggests that I have concluded that the concerns identified by the EY Report and the executive branch are well-founded, I hasten to say that this judgment is not the remit of this Court. It is for the legislative branch to so conclude. I am concerned only with determining if there is a rational basis for the concern—a rational basis for the societal objectives evidenced in the legislative reforms before the Court. On the basis of the evidentiary record, and in particular the EY Report, there most certainly is. It is not for the Court to pass on whether the legislature "got it right" with its reforms. It is not for this Court to say whether the Civil Resolution Tribunal will actually perform as promised. In this regard the evidence of Professors Daly and Susskind provides a rational basis for the legislature believing it to be so. With respect to the judge below, it is not for us to require the appellants to prove the efficacy of the "solutions" the legislature is applying to the problems it has identified.[20]

23. Many of the arguments advanced by the Law Society and allied interveners transgress these principles and stray well outside the bounds of constitutional analysis into matters of policy that are properly the purview of the legislature.

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[18] *Edwards* at paras. 14, 75.
[19] *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General),* 2022 BCCA 163 [*Trial Lawyers 2022*].
[20] *Trial Lawyers 2022* at para. 150 (emphasis added).

24. The Law Society begins its written submissions with "evidence of the political theory underpinning Bill 21".[21] Later in its submission, the Law Society devotes over 15 pages to a description and defence of the current *Legal Profession Act* (the "**Current Act**")[22] and the work of the benchers on various committees and task forces.[23] None of this is relevant to the questions before this Court. Contrary to the Law Society's submission, to be constitutionally valid the *Act* does not need to "best" ensure lawyer independence.[24] Nor does the legislature need to first find that the Law Society has failed to regulate in the public interest (in the areas of reconciliation and access to justice or otherwise) before it can enact legislative reform.[25] This court must determine whether the *Act* is *ultra vires* the authority of the provincial legislature under ss. 92(13) and 92(14) of the *Constitution Act, 1867.* The conduct of the executive in preparing the bill that ultimately became the *Act*, the Law Society's various task forces and committees, and the ways in which the *Act* differs from the current legislative scheme are irrelevant to this inquiry.

25. The intervener, Canadian Bar Association ("**CBA**"), is explicit in its policy criticisms, calling the governance provisions of the *Act* "bad policy".[26] It remarks that the record contains "no compelling evidence –beyond mere speculation and raw hope – that [the *Act*] will actually promote access to justice".[27] These claims are squarely matters of policy.

26. Finally, although not strictly matters of "policy", the comments of the intervener, Law Society of Manitoba ("**LSM**") about positions it might consider taking within the context of the National Mobility Agreement are irrelevant to the constitutionality of the *Act*.[28] At most, the LSM's contemplated actions engage the economic interests of lawyers who are licensed in BC but wish to practise temporarily in Manitoba without needing any kind of permit from the LSM.

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[21] Law Society written submissions at para. 14.
[22] S.B.C. 1998, c. 9.
[23] Law Society written submissions at paras. 296-366.
[24] Law Society written submissions at para. 92.
[25] Law Society written submissions at para. 343.
[26] CBA written submissions at para. 76.
[27] CBA written submissions at para. 90.
[28] Law Society of Manitoba written submissions at para. 24.

(b) Constitutionality of the *Act* is not assessed on the basis of speculative worst-case scenarios

27. Many of the plaintiffs' submissions (and those of the CBA) invoke speculative worst-case scenarios about things that could hypothetically occur under the *Act*. Courts do not assess the constitutionality of legislation on the basis of speculative worst-case scenarios. Courts assess the constitutionality of legislation on the presumption that any discretion created by the statute will be exercised reasonably (in an administrative law sense) and constitutionally.[29]

28. As the Federal Court of Appeal has held in thorough and persuasive reasons synthesizing Supreme Court of Canada jurisprudence, there is "no proposition of law that legislation, to pass constitutional muster, must exclude all possibility of unconstitutional exercises of discretion".[30] When discretion-conferring legislation is challenged, the effects of the legislation must be isolated from the kinds of maladministration of the legislation that will be curable on judicial review.[31]

29. *Little Sisters* is the most commonly given example. A Vancouver bookstore catering to the LGBTQIA2S+ community imported various erotica, but much of it was seized at the border by customs inspectors misapplying the obscenity provision of the *Criminal Code*. The bookstore challenged the customs legislation, including on the ground that it did not provide sufficient protection against border officials applying it unconstitutionally. The Court framed the issue as "whether the Customs legislation itself contains procedures that infringe *Charter* rights […] or whether the problem here is implementation".[32] The Court indicated that "Parliament is entitled to proceed on the basis that its enactments will be

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[29] *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (S.C.C.) at p. 1073 [*Slaight Communications*], see also, *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 [*Little Sisters*]; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 7th ed. (Toronto: LexisNexis, 2022) at §16.01[3] [*Sullivan on the Construction of Statutes*].
[30] *Brown v. Canada (Citizenship and Immigration)*, 2020 FCA 130 at paras. 61-88 [*Brown*].
[31] *Brown* at para. 65, citing *R. v. Ferguson*, 2008 SCC 6 at paras. 59-60; *Schachter v. Canada*, [1992] 2 S.C.R. 679 at pp. 719-720 [*Schachter*].
[32] *Little Sisters* at para. 73.

applied constitutionally",[33] meaning that defects in administration do not impugn the legislation itself. The Court concluded that the problem was with the administration:

> That having been said, there is nothing on the face of the Customs legislation, or in its necessary effects, which contemplates or encourages differential treatment based on sexual orientation. The definition of obscenity, as already discussed, operates without distinction between homosexual and heterosexual erotica. The differentiation was made here at the administrative level in the implementation of the Customs legislation.[34]

30. Requiring legislation to exclude all possibility of misuse would set an impossible standard: when legislation confers discretion, it is always possible that the discretion will be misused. Under the Current Act, for example, it is hypothetically possible that the Law Society may exercise its discretion in ways that are contrary to s. 15 of the *Charter*. The Attorney General does not suggest this is happening, but the Current Act does not make it impossible. If the mere possibility that discretion may be exercised unconstitutionally were enough to render legislation unconstitutional, the Current Act (and virtually all other discretion-conferring legislation) would be unconstitutional. That is not the standard.

31. Rather, courts assess the constitutionality of legislation on the presumption that any discretion created by the statute will be exercised reasonably (in an administrative law sense) and constitutionally. The point is not that the court should trust that the administration of the *Act* will be perfect. It will not be. The regulator will sometimes get things wrong, just as the Law Society and government decision-makers sometimes get things wrong: this is why judicial review exists. The point is that the Court is evaluating the constitutionality of the *Act*, not speculative scenarios of things that could hypothetically go wrong in the administration of the *Act*. When there are defects in administration, as there are with every enactment including the Current Act, those defects do not impugn the legislation itself; they are remediable on judicial review on a case-by-case basis.[35]

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[33] *Little Sisters* at para. 71 (internal quotation marks omitted).
[34] *Little Sisters* at para. 125.
[35] *Brown* at paras. 65-77, 80; see also *Reference re Impact Assessment Act,* 2023 SCC 23 at para. 74 [*Reference re Impact Assessment Act*]; *Little Sisters* at para. 71.

32. The Attorney General of course agrees with the Law Society's submission that the constitutionality of the *Act* is a justiciable question.[36] But, paraphrasing *Little Sisters*, the constitutionality of the *Act* depends on whether there is anything on the face of the *Act*, or in its necessary effects, that make the *Act* unconstitutional.[37] The constitutionality of the *Act* does not depend on speculation about worst case scenarios nor the likelihood of problems in administration from time to time. Every discretion-conferring enactment carries the same possibility, which is why judicial review exists.

33. The jurisprudence on prosecutorial discretion is a good example of these principles in a broadly analogous context. Many of the plaintiffs' submissions are variations on the theme that lawyer regulation must be structurally insulated from the government because, if the government had a role in lawyer regulation, it might misuse that role for partisan or other improper purposes. Prosecutorial discretion raises the same hypothetical possibility that the government might use the criminal justice system to pursue partisan or other improper objectives. Importantly, however, the existence of this risk does not mean that prosecutorial discretion must be structurally insulated from the government to exclude all possibility of unconstitutional administration.

34. To the contrary, the Crown's prosecutorial discretion is vested in attorneys general. It is a principle of fundamental justice that "partisan or other improper considerations must not influence prosecutorial decisions",[38] but that does not mean that prosecutorial discretion must be removed from attorneys general; it means that attorneys general must exercise their prosecutorial discretion in accordance with that principle.

35. The plaintiffs' position is fundamentally inconsistent with this jurisprudence on prosecutorial discretion. For the plaintiffs, the risk that the government might act for partisan or other improper purposes means the government must be structurally insulated from lawyer regulation. In the jurisprudence on prosecutorial discretion, the risk that the government might act for partisan or other improper purposes does not mean the government must be structurally insulated from prosecutorial decisions; it means the

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[36] Law Society written submissions at para. 451.
[37] See *Little Sisters* at para. 125.
[38] *R. v. Cawthorne*, 2016 SCC 32 at para. 22 [*Cawthorne*].

government cannot make prosecutorial decisions for partisan or other improper reasons.[39] When it is alleged that the government is acting for partisan or other improper reasons, the courts adjudicate the allegation and, if appropriate, grant relief.

(c) Presumption of constitutional validity

36. Finally, courts approach constitutional challenges to legislation on the presumption that the impugned statute was validly enacted. The plaintiffs have the burden of displacing this presumption.[40] When faced with "competing, plausible characterizations" courts should prefer constitutionally conforming interpretations.[41]

Introduction to the *Act*

I. The *Act*'s key components

(a) Regulator

37. The *Act* merges the Law Society and Society of Notaries Public to create a new regulator called Legal Professions British Columbia.[42]

38. The regulator will regulate lawyers, notaries, regulated paralegals, limited practice licensees, and any additional categories of legal professionals that may be designated by regulation in the future.[43]

(b) Regulator's mandate

39. The regulator's mandate is set out in s. 6 of the *Act*:

> (1) The regulator has the following duties:
>
> (a) to regulate the practice of law in British Columbia;

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[39] *Cawthorne* at para. 28.
[40] *Reference re Impact Assessment Act* at para. 70.
[41] *Reference re Impact Assessment Act* at paras. 71-72.
[42] *Act*, s. 5.
[43] *Act*, ss. 3, 53.

> (b) to establish standards and programs for the education, training, competence, practice and conduct of applicants, trainees, licensees and law firms;
>
> (c) to ensure the independence of licensees.
>
> (2) The regulator must exercise its powers and perform its duties under this Act in the public interest.[44]

40. The mandate in s. 6 of the *Act* does not contain an obligation for the regulator to "protect the public interest in the administration of justice" including by "preserving and protecting the rights and freedoms of all persons",[45] as exists in the Current Act.[46] That language in the Current Act dates only to 1987 and exists in only one other province or territory: New Brunswick, where it dates to 1996.[47]

41. The plainer language mandate in s. 6 of the *Act* is similar to the mandates of law societies in other provinces, including Manitoba and Saskatchewan.[48]

(c) **Guiding principles for regulator**

42. The *Act* sets out four non-exhaustive guiding principles to which the regulator must have regard: (1) facilitating access to legal services; (2) supporting reconciliation with Indigenous peoples and implementing the UN Declaration; (3) identifying and removing barriers that disproportionately impact Indigenous persons and underrepresented groups; and (4) regulating in a manner that is transparent, timely, and proportionate.[49]

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[44] *Act*, s. 6.
[45] *Current Act*, s. 3.
[46] Law Society written submissions at para. 371.
[47] *Legal Profession Act,* S.B.C. 1987, c. 25, s. 3 [***1987 Act***]; *An Act respecting the Law Society of New Brunswick*, S.N.B. 1996, c. 89, s. 2 [***New Brunswick Act***]. The mandate of the Nova Scotia Barristers' Society refers to the administration of justice, but not the rights and freedoms of all persons: *Legal Profession Act,* S.N.S. 2004, c. 28, s. 4(2)(d) [***Nova Scotia Act***] ("seek to improve the administration of justice in the Province", including by "regularly consulting with organizations and communities in the Province having an interest in the Society's purpose, including, but not limited to, organizations and communities reflecting the economic, ethic, racial, sexual, and linguistic diversity of the Province").
[48] *Legal Profession Act*, C.C.S.M. c. L107, s. 3(1) [***Manitoba Act***]; *The Legal Profession Act*, 1990, S.S. 1990-91, c. L-10.1, ss. 3.1-3.2 [***Saskatchewan Act***].
[49] *Act*, s. 7.

43. The Current Act does not contain guiding principles as such, but the new principles are broadly similar to those in the Ontario legislation:

> In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:
>
> 1. The Society has a duty to maintain and advance the cause of justice and the rule of law.
>
> 2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.
>
> 3. The Society has a duty to protect the public interest.
>
> 4. The Society has a duty to act in a timely, open and efficient manner.
>
> 5. Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized.[50]

(d) **Governance structure**

44. The regulator is governed by a board of directors. The board is a governance board: its function is to govern the regulator, principally by making rules and overseeing the CEO.[51] Unlike the Law Society's benchers, directors of the regulator do not have operational functions: directors cannot sit on the licensing committee or discipline committee and cannot be appointed as tribunal members.[52]

45. The board is composed of 17 directors.[53] Nine directors must be lawyers (five elected, four appointed by the board). Five directors must be other legal professionals (four elected, one appointed by the board). The remaining three directors do not need to have any particular professional status or background and are appointed by the government, as lay benchers are currently. Every director has the same fiduciary duty to

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[50] *Law Society Act,* R.S.O. 1990, c. L.8, s. 4.2 [***Ontario Act***].
[51] *Act*, ss. 8-9.
[52] *Act*, ss. 51(3), 89(3), 98(4).
[53] *Act*, s. 8.

the regulator and same statutory obligation to act in the public interest as they see it. Unlike the Current Act, the *Act* requires that directors be remunerated.[54]

(e) Indigenous council

46. The *Act* creates an Indigenous council, which is a new and unique concept.

47. The Indigenous council advises the regulator and tribunal on the UN Declaration and matters relating to Indigenous legal traditions; provides input when consulted by the board, including in respect of proposed rules; participates in the regulator's strategic planning processes; and advises on the appointment of Indigenous persons to the licensing committee, discipline committee, and tribunal.[55]

48. The are two types of rules that require the Indigenous council's approval: (1) rules that reflect or are influenced by Indigenous practices in relation to dispute resolution;[56] and (2) rules made by the tribunal to meet the specific needs of Indigenous persons who are parties or witnesses in proceedings before the tribunal.[57]

49. The members of the Indigenous council are appointed by the board on merit and must, to the extent possible, collectively reflect the diversity of Indigenous peoples in British Columbia. Certain of the members of the Indigenous Council are required to be appointed from lists of candidates provided by the BC First Nations Justice Council and entities representing Métis peoples.[58]

(f) Unlicensed practice, scopes of practice, and limited practice licences

50. The definition of the practice of law in the *Act* is not materially different from the Current Act but is expressed in plainer language.[59]

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[54] *Act*, s. 19.
[55] *Act*, s. 30.
[56] *Act*, ss. 94(3).
[57] *Act*, 131(6).
[58] *Act*, s. 30.
[59] *Act*, s. 35.

51. The *Act* continues the prohibition on practising law without a licence.[60] There are exceptions, which again are not materially different from the status quo, although there is a new provision empowering Cabinet to grant further exceptions by regulation.[61]

52. The *Act* defines the permitted scope of practice for notaries.[62] The *Act* empowers Cabinet to define the scope of practice for regulated paralegals by regulation.[63] The board may make rules augmenting (but not subtracting from) the scopes of practice for notaries and regulated paralegals.[64]

53. The *Act* contains provisions, modelled on the Law Society's Innovation Sandbox, which empower the regulator to issue limited practice licences. Such licences may allow a person who is not a licensee to perform some legal services, or may permit a notary or regulated paralegal to perform some legal services beyond their profession's scope of practice.[65]

(g) **Conduct, competence, and discipline**

i. **Process**

54. The regulator must investigate complaints and may initiate investigations on its own initiative.[66] The process, depicted visually in Schedule A, does not differ materially from the Current Act, although some of the concepts are expressed in different language.

55. The regulator has various investigatory powers and the ability to apply to the court for a search warrant.[67] These powers do not differ from the status quo. The robust protections for clients' privileged information also do not differ from the Current Act.[68]

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[60] *Act*, s. 37.
[61] *Act*, s. 38.
[62] *Act*, s. 46.
[63] *Act*, s. 47.
[64] *Act*, ss. 46(1)(f), 47(1)(b).
[65] *Act*, s. 53.
[66] *Act*, s. 77.
[67] *Act*, ss. 78-81.
[68] *Act*, ss. 209-210.

56. At the conclusion of an investigation, the regulator may dismiss the complaint, enter into a consent agreement with the licensee,[69] resolve the complaint through an alternative resolution process,[70] make a professional conduct order,[71] make a competence order,[72] or submit a citation to the discipline committee.[73]

ii. **Consent agreements and alternative resolution processes**

57. The *Act* specifically empowers the regulator to enter into consent agreements with licensees and to resolve complaints through alternative resolution processes.[74] These provisions empower the regulator to continue the Law Society's existing Alternative Discipline Process and to develop additional similar programs.

iii. **Professional conduct orders**

58. Professional conduct orders may be made when a licensee is found to have contravened the *Act*, rules, or code in a manner that does not rise to the level of conduct unbecoming or professional misconduct.[75]

59. A professional conduct order may reprimand the licensee, require the licensee to submit to a practice review or complete a remedial program, impose limits or conditions on the licensee's license, fine the licensee up to $10,000 for a first violation or $20,000 for a subsequent violation, or do anything else the regulator considers appropriate other than suspending or cancelling the licensee's licence.[76]

60. Most professional conduct orders are appealable to the tribunal and then to the Court of Appeal.[77]

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[69] *Act*, s. 91.
[70] *Act*, s. 92.
[71] *Act*, s. 87.
[72] *Act*, s. 88.
[73] *Act*, s. 86.
[74] *Act*, ss. 91-92.
[75] *Act*, ss. 68 *sv* "professional conduct violation", s. 87.
[76] *Act*, s. 87.
[77] *Act*, ss. 87(6), 129. Orders reprimanding a licensee, requiring a licensee to submit to a practice review, or requiring a licensee to complete a remedial program are not appealable.

iv. **Competence orders**

61. Competence orders may be made when a licensee is found to have practised law incompetently, which the *Act* defines as follows:

> "incompetently", in relation to the practice of law, means in a manner that demonstrates either of the following:
>
> (a) deficiencies, in any of the following, that give rise to a reasonable apprehension that the quality of service to clients of a licensee or law firm may be significantly adversely affected:
>
> (i) the knowledge, skill or judgment of the licensee or law firm;
>
> (ii) the attention to the interests of clients of the licensee or law firm;
>
> (iii) the records, systems or procedures of the professional business of the licensee or law firm;
>
> (iv) other aspects of the professional business of the licensee or law firm;
>
> (b) a health condition that prevents a licensee from practising law with reasonable skill and competence[.][78]

62. As developed in detail towards the end of these submissions, paragraph (b) of this definition does not conflate having a health condition with being incompetent to practice law. Many lawyers experience health issues that do not affect their ability to practise law to an acceptable standard. A licensee cannot be found to be incompetent merely because they have a health condition. However, some health issues, in some circumstances, do affect lawyers' ability to practise law. A licensee can be found to have practised law incompetently if a health condition has prevented them from practising law to an acceptable standard. Legal professions legislation in Ontario, Newfoundland, Nova Scotia, and the Yukon have long contained similar definitions.[79]

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[78] *Act*, s. 68 *sv* "incompetently".
[79] *Ontario Act*, s. 37(1); *Law Society Act,* 1999, S.N.L. 1999, c. L-9.1, s. 41(a.1) [***Newfoundland Act***]; *Legal Profession Act,* SY 2017, c. 12, s. 49(1) [***Yukon Act***]; *Legal Profession Act,* 2004, c. 28, s. 2(ga) [***Nova Scotia Act***].

63. If a licensee is found to have practised law incompetently, the regulator may enter into a consent agreement with the licensee or resolve the matter through an alternative resolution process.[80] Otherwise, the regulator can, among other types of competence orders, require the licensee complete a practice review, complete a remedial program, or "receive counselling or medical treatment, including treatment for a substance use problem or substance use disorder".[81] If the regulator orders a licensee to receive treatment and the licensee declines that treatment, the regulator may suspend the licensee's licence or apply to the tribunal for an order cancelling their licence.[82]

64. The power to order a lawyer to receive medical treatment, where a health issue is interfering with their ability to practice law to an acceptable standard, already exists in BC and three other provinces.[83] The Law Society's Rules empower the Law Society's Practice Standards Committee to require a lawyer to "obtain a medical assessment or assistance, or both".[84] Similarly, the Law Society Tribunal has interpreted ss. 38(5)(c) and (7) of the Current Act to empower the Tribunal to require a lawyer to receive medical treatment. Those provisions state that, in certain circumstances, the Tribunal may impose "conditions or limitations" on a lawyer's practice. The Tribunal has held, at the urging of the Law Society, that such conditions may include medical treatment:

> In support of its position that the broad language of ss. 38(5)(c) and (7) permits this Panel to order medical treatment, the Law Society submits that the scheme and object of the Act requires panels to impose sanctions in the public's interest. The Law Society further submits that the public interest mandate allows panels to order conditions related to medical treatment in order to permit appropriate regulatory oversight, and to hold otherwise would be inconsistent with that public interest mandate.
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> […]

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[80] *Act*, ss. 91-92.
[81] *Act*, s. 88(1).
[82] *Act*, s. 59(1)(g), (2).
[83] *Ontario Act*, s. 40(1)(2); *Newfoundland Act*, s. 50(3)(n)(ii) to (iv); Rules of the Law Society of Saskatchewan, s. 1131(3)(a)(iii)(D) (Affidavit #1 of Dwight Gordon Newman, KC made March 28, 2025, Ex D at pp. 286-287).
[84] Law Society Rules, s. 3-20(e) (Affidavit #1 of Brook Greenberg, KC made May 24, 2024 ("**Greenberg #1**"), Ex. 1 at p. 129). The Committee must first make a recommendation, but if the lawyer does not complete the recommendation, the Committee may then make an order: see s. 3-19(1)(b)(v).

> The Panel concludes that in certain, isolated circumstances, it has the jurisdiction to order that a lawyer undergo medical therapy, even if the lawyer does not consent. We reach this conclusion due to the nature of the Act and its overarching concern with the public's interest in the administration of justice. However, this jurisdiction must not be exercised lightly and before doing so, there must be a firm, evidentiary foundation upon which to make such orders.[85]

65. Like all of the regulator's powers under the *Act*, and all of the Law Society's powers under the Current Act, the power to require a lawyer to receive medical treatment must be exercised reasonably in an administrative law sense and in accordance with the *Charter* and the *Human Rights Code*. If a licensee's conduct is being impaired by a health or substance use issue that constitutes a disability, the regulator must accommodate that disability to the point of undue hardship to its public interest mandate.[86]

66. Most competence orders are appealable to the tribunal and then to the Court of Appeal.[87]

v. **Citations and discipline hearings**

67. The regulator may submit a citation to the discipline committee if the regulator determines a licensee has practiced law incompetently, committed conduct unbecoming, or committed professional misconduct.[88]

68. The definition of conduct unbecoming changes the status quo to an extent. The definition in the Current Act refers to conduct that is "contrary to the best interest of the public or of the legal profession" or that causes "harm the standing of the legal profession".[89] The new definition refers to conduct that "brings a legal profession into disrepute".[90]

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[85] *Law Society of British Columbia v. Grewal*, 2022 LSBC 22 at paras. 81, 93 [*Grewal*].
[86] Law *Society of Ontario v. Khan*, 2018 ONLSTH 131 at paras. 51-66 [*Khan*], aff'd 2020 ONLSTA 18; see also *Law Society of Ontario v. Stewart*, 2019 ONLSTH 118 [*Stewart*].
[87] *Act*, ss. 88(6), 129.
[88] *Act*, s. 86.
[89] *Current Act*, s. 1(1) *sv* "conduct unbecoming the profession".
[90] *Act*, s. 68 *sv* "conduct unbecoming a professional".

69. The definition of professional misconduct maintains the status quo by codifying the longstanding *Martin* test of "a marked departure" from the standards of professional conduct.[91]

70. If the discipline committee approves a citation, the tribunal holds a discipline hearing.[92] If the tribunal finds the licensee has practised law incompetently, committed conduct unbecoming, or committed professional misconduct, the tribunal may reprimand the licensee; require the licensee to submit to a practice review, complete a remedial program, or receive counselling or medical treatment; impose limits or conditions on the licensee's licence; impose a fine of up to $250,000; suspend the licensee's licence; cancel the licensee's licence; or make any other order that it considers necessary in the public interest.[93]

71. Decisions of the tribunal are appealable to the Court of Appeal.[94]

(h) **Tribunal**

72. The tribunal is independent of the regulator in the exercise of its adjudicative functions.[95] Tribunal members are appointed on merit by the board. The board also appoints the tribunal chair, who is responsible for the governance and management of the tribunal and appoints tribunal members to hearing panels.[96]

73. For discipline hearings, the hearing panel must consist of at least three tribunal members. One member must be a tribunal member who is not licensed to practise the

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[91] *Act*, s. 68 *sv* "professional misconduct"; *Law Society of British Columbia v. Martin*, 2005 LSBC 16 at para. 140 ("The real question is whether on the facts before us, it can be found that the Respondent […] acted in a manner that was a marked departure from the standard expected of a competent solicitor acting in the course of his profession, and therefore amounted to professional misconduct").
[92] *Act*, s. 90.
[93] *Act*, s. 122(3).
[94] *Act*, s. 129.
[95] *Act*, ss. 21(1)(c), 96(3)(b).
[96] *Act*, ss. 96, 98, 131.

same legal profession as the respondent.[97] If the respondent or complainant is an Indigenous person, at least one tribunal member must be Indigenous.[98]

74. As noted, final decisions of the tribunal are appealable to the Court of Appeal.[99]

(i) Cabinet regulations

75. Cabinet may make regulations designating a profession as a legal profession for the purposes of the *Act*,[100] creating exceptions from prohibition on unlicensed practice,[101] and augmenting the scopes of practice of notaries and paralegals.[102]

76. The plaintiffs and allied interveners suggest Cabinet has much broader regulation-making authority. It does not. This point is addressed in detail later in these submissions.

(j) Transitional provisions

77. The transitional provisions of the *Act*, which came into force on Royal Assent, create a transitional board, a transitional Indigenous council, and an advisory committee.

78. The role of the transitional board is to prepare for and facilitate the transition, including by appointing a person to manage the transition, who will become the regulator's first CEO. The transitional board consists of seven persons, four appointed by the Law Society and one appointed by each of the Notaries Society, BC Paralegal Association, and Cabinet.[103]

79. Although it relates to the administration of the *Act* rather than the text of the *Act* itself, the current members of the transitional board are:[104]

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[97] *Act,* s. 123.
[98] *Act*, s. 123.
[99] *Act*, s. 129.
[100] *Act*, ss. 3(d), 4.
[101] *Act*, ss. 38(1)(i), 212.
[102] *Act*, s. 213. Lawyers' scope of practice cannot be augmented because it already includes the full scope of the practice of law.
[103] *Act*, ss. 223, 231.
[104] Affidavit #2 of Thomas Spraggs made June 27, 2025 ("**Spraggs #2**"), Ex. F at p. 52.

a. Bruce LeRose, KC (chair), a former President of the Law Society;[105]

b. Jeevyn Dhaliwal, KC, the immediate past President of the Law Society;

c. Katrina Harry, KC, a current bencher of the Law Society;

d. Sarah Westwood, KC, a life bencher of the Law Society;

e. Johanne Blenkin, a former CEO of Courthouse Libraries;

f. Elizabeth Kollias, the President of the BC Paralegal Association; and,

g. Scott Simpson, a notary.

80. The transitional Indigenous council has the same roles as the Indigenous council, but in relation to the transition. It consists of three persons appointed by the BC First Nations Justice Council, one by Métis Nation British Columbia, and one or two members of the transitional board chosen by the board.[106]

81. Again, this relates to the administration of the *Act* rather than the text of the *Act* itself, but the current members of the transitional Indigenous council are:[107]

a. Ms. Harry, KC;

b. Christina Cook, KC, a current bencher of the Law Society;

c. John Borrows, a law professor;

d. Andrea Hilland, KC, a law professor; and,

e. Carly Teillet, a lawyer.

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[105] Notably, Mr. LeRose, KC was the chair of the Legal Service Providers Task Force that in 2013 recommended that the Law Society merge regulatory operations with the Notaries Society and create a program in which the merged regulator would regulate lawyers, notaries, and certified paralegals. See LSBC, Final Report of Legal Service Providers Task Force (2013) (Greenberg #1, Ex. 64 at pp. 1132).
[106] *Act*, s. 224.
[107] Spraggs #2, Ex. A at p. 2, Ex. F at p. 52.

82. The transitional board and transitional Indigenous council must collaborate to develop the "first rules". The *Act* requires that both the transitional board and the transitional Indigenous council must agree to the first rules.[108]

83. The "amalgamation date", i.e., the date that Cabinet brings the rest of the *Act* into force and the regulator comes into existence, cannot happen until the first rules have been made.[109] If the transitional board and transitional Indigenous council are unable to agree on the first rules, the *Act* cannot be brought into force in its present form and would need to be amended.

II. **Context, or legislative facts**

84. In interpreting the legislative text, context is often helpful. To that end, extrinsic evidence is admissible for the "purpose of showing the mischief Parliament was attempting to remedy with the legislation".[110] In constitutional litigation, context is often referred to as "legislative facts".[111]

(a) **Legislative facts help illuminate legislative intent**

85. Identifying the problem or problems the legislature is seeking to address often makes it easier to understand the text the legislature has enacted.

86. Legislative facts are important in these actions in part because both plaintiffs have pleaded that the *Act* "is designed to and does eliminate the independent bar in British Columbia".[112] The Law Society asserts the *Act's* "intent includes curtailing lawyer independence".[113] The legislative facts help demonstrate that the legislature's intention was not to undermine lawyer independence. The legislature's intention—as disclosed by the text of the *Act* and context about the problems the legislature was seeking to

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[108] *Act*, s. 226.
[109] *Act*, s. 226(2)(a).
[110] *Heywood* at p. 787.
[111] *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 at pp. 1099-1100.
[112] Law Society notice of civil claim at part 3, para. 94 (emphasis added); copied verbatim in Trial Lawyers second amended notice of civil claim at part 3, para. 14. See also, Law Society written submissions at para. 443 arguing the intent of the Act "includes curtailing lawyer independence".
[113] Law Society written submissions at para. 443.

address—was to create a single legal regulator in the province, improve access to legal services (particularly for more basic legal services), modernize the regulatory and governance frameworks for the legal professions, protect the independence of licensees, and advance reconciliation.

(b) **Legislative facts do not invite scrutiny of policy wisdom**

87. Legislative facts do not invite an assessment of the policy wisdom of an enactment. There is a subtle but important distinction between identifying a problem the legislature is seeking to address, and scrutinizing whether that problem is truly a problem or whether the means chosen by the legislature to address the problem are necessary or likely to be effective. Many of the submissions of the plaintiffs and the Canadian Bar Association ("**CBA**") cross this line.

88. Members of the legislative assembly (MLAs) "are elected by the people to protect the public interest".[114] A foundational premise of our representative democracy is that MLAs represent their constituents' interests and perspectives and bring their collective knowledge, life experience, and judgment to bear when considering potential legislation. MLAs are periodically held accountable to the public in general elections in which candidates campaign on competing visions of the public interest. Policy wisdom is decided through the democratic process.

89. Courts "are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches".[115] As the Supreme Court of Canada put it in *Vriend*, "respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts".[116] When people disagree with the *wisdom* of an enactment (as is common in our pluralist society in which people disagree about many things), their remedy is not in a courtroom; it is in the democratic

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[114] *Waugh v. Pedneault*, 1948 CanLII 474 (B.C.C.A.) at para. 15 [*Waugh*].
[115] *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 136 [*Vriend*].
[116] *Vriend* at para. 136 (emphasis added).

process and ultimately at the ballot box.[117] The Court of Appeal recently reaffirmed this longstanding principle in the specific context of innovative provincial legislation intended to improve access to legal services.[118]

90. It follows that the policy wisdom of the *Act* is irrelevant to its constitutionality. The plaintiffs and allied interveners cannot challenge the constitutionality of the *Act* by arguing it is bad policy. Equally, the Attorney General cannot defend the constitutionality of the *Act* by arguing it is good policy. Policy wisdom is irrelevant.

91. In the following submissions about legislative facts, *i.e.*, the context in which the *Act* was enacted, the Attorney General is seeking to illuminate the intention of the legislature in enacting the *Act*. The Attorney General is not asking the Court to find that the problems identified by the legislature are real and pressing, nor that the *Act* will succeed in achieving its objectives. Those policy questions are not in issue: to the extent that some people may think the *Act* is bad policy, or not in the public interest, or was rushed through the legislative assembly, their remedy is not in this court; it is at the ballot box.

(c) **Need for legal services is not being met**

92. The market for legal services is failing the people of British Columbia. Many people cannot afford the fees that most lawyers expect to be paid. As the Law Society recognized a decade ago, the market for legal services "fails to meet the legal needs of a vast majority of the population". The current market "is not adequately serving the public".[119]

93. The problem of access to legal services has many contributing causes, but the current regulatory model is one: "the existing regulatory structures are not designed to further access to justice".[120] One dimension is that, although lawyers enjoy a near

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[117] See e.g. *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at para. 66 [*Imperial Tobacco*]; *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576 at p. 590.
[118] *Trial Lawyers 2022* at para. 11.
[119] LSBC, Report of Legal Services Regulatory Framework Task Force (2014) (Greenberg #1, Ex. 65 at pp. 1180-1182) (emphasis added).
[120] Hon. Cromwell and Anstis, "The Legal Services Gap: Access to Justice as a Regulatory Issue" (2016) 42:1 Queen's L.J. 1 at p. 12.

monopoly on the practice of law, lawyers are overqualified for certain kinds of legal services in the sense of being unable to amortize the cost of their qualifications without charging fees that are disproportionate.[121]

94. Almost 20 years ago, the Law Society recognized that licensing new types of legal services providers, and promoting competition between different types of providers, might improve public access to certain kinds of legal services.[122] In the years since, the Law Society has published many reports reaffirming that conclusion.[123]

95. In 2013, the Law Society's Legal Service Providers Task Force recommended that the Law Society seek to merge regulatory operations with the Notaries Society and create a program in which the merged regulator would regulate lawyers, notaries, and a new category of "certified paralegals".[124] Those recommendations were unanimously adopted by the benchers,[125] but nothing ultimately came of them.

96. In 2018, the legislature amended the Current Act, at the request of the benchers,[126] to empower the Law Society to licence and regulate a new category of "licensed paralegals".[127] After a protectionist reaction from many lawyers, the benchers put the idea back on the shelf.[128] At the 2018 Law Society AGM, a members resolution passed (by a

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[121] LSBC, Towards a New Regulatory Model (2008) (Greenberg #1, Ex. 63 at p. 1121).
[122] LSBC, Towards a New Regulatory Model (2008) (Greenberg #1, Ex. 63 at pp. 1125-1127).
[123] See e.g. LSBC, Future of Legal Regulation in British Columbia (2011) (Affidavit #1 of Vanessa Lever made May 23, 2025 ("**Lever #1**"), Ex. C at p. 56); LSBC, Final Report of Legal Service Providers Task Force (2013) (Greenberg #1, Ex. 64 at pp. 1132, 1150); LSBC, Report of Legal Services Regulatory Framework Task Force (2014) (Greenberg #1, Ex. 65 at pp. 1184-1185); LSBC, Unified Regulatory Regime for Legal Services (2015) (Affidavit #3 of Brook Greenberg, KC made April 3, 2025 ("**Greenberg #3**"), Ex. 57 at p. 1728).
[124] LSBC, Final Report of Legal Service Providers Task Force (2013) (Greenberg #1, Ex. 64 at pp. 1132).
[125] Greenberg XFD, response to request 5 (Lever #1, Ex. O at p. 377).
[126] Greenberg XFD at Q. 152, 155.
[127] *Attorney General Statutes Amendment Act, 2018*, SBC 2018, c. 49 (Bill 57).
[128] The lawyers who voted in support of the member resolution at the 2018 AGM probably would not describe their reaction as protectionist. Most would probably say they were voting to protect the public from providers who would be incompetent. But the benchers had already considered, and rejected, that argument. For example, a thoughtful 2014 report from the Legal Services Regulatory Framework Task Force recognized that any framework for licensing new categories of professionals will entail new forms of training and credentialling for those professionals. The relevant question, then, is not whether existing categories of non-lawyers are competent to provide legal services, but whether there are areas of unmet need for legal services for which

nearly 3:1 margin) purporting to direct the benchers not to license paralegals until the benchers had consulted more with lawyers and never to license paralegals to practise family law.[129] Members resolutions are not binding on the benchers, but *in camera* bencher meeting minutes reveal that some benchers expressed concern regarding this protectionist opposition from lawyers:

> Some Benchers expressed concerns about proceeding with the Alternate Legal Service Provider Working Group given the results of the AGM. The membership may react negatively if the Law Society is seen to be pushing forward with the licensed paralegals initiative regardless of the views expressed at the AGM.
>
> Other Benchers reminded the Bencher table of the obligation to regulate the legal profession in the public interest and said it would be dangerous for the Benchers to be taking or not taking action based on direction from the membership.[130]

97. In the result, the Law Society did not pursue the idea of licensing paralegals in any concrete way. It struck yet another task force, the Licensed Paralegal Task Force, which published yet another report, which yet again was not followed by action. The only tangible step[131] the Law Society has taken has been to create its Innovation Sandbox, through which it has exempted approximately 50 non-lawyers from the prohibition on unlicensed practice—a band-aid solution to a problem that has reached crisis levels.

98. By creating a single legal regulator and diversifying the types of legal professionals that can offer certain services, the *Act* seeks to modernize the regulatory framework for legal professionals and try to improve access to legal services in the province.

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new categories of non-lawyers could be trained to become competent. See LSBC, Report of Legal Services Regulatory Framework Task Force (2014) (Greenberg #1, Ex. 65 at p. 1187).

[129] Greenberg XFD response to request 15 (Lever #1, Ex. O at pp. 378-379).

[130] Greenberg #1 at paras. 153-155; LSBC, Bencher Meeting Minutes (*in camera*) (January 25, 2019) (Affidavit #2 of Vanessa Lever made May 23, 2025 ("**Lever #2**"), Ex. A at pp. 2-3).

[131] In March 2023, the Law Society belatedly asked the government to bring the 2018 licensed paralegal amendments into force (Greenberg #1 at para. 157). It would have made no sense to do so at that time, more than a year into the development of new legislation. If the Law Society's goal was to try to demonstrate that it was now prepared to act on the idea its various task forces had been reaffirming for 20 years, it was too little, too late.

(d) **Electoral model has disadvantages, including regulatory capture**

99. The electoral model in the Current Act has advantages: elected benchers have credibility with the profession and are independent from the government of the day. However, any realistic assessment of the current model must also concede its disadvantages. As the Supreme Court of Canada has described some of them: "the problem of conflict of interest, an orientation favourable to the regulated, and the closed shop atmosphere".[132]

100. One disadvantage of the current model is that electing virtually the entire board as individuals, risks creating a group who will not necessarily have, among them, the full range of desirable experience and expertise. As the CBA Futures Initiative has observed, the current electoral model "does not necessarily provide appropriate diversity of expertise, perspective, and lived experience".[133]

101. One strategy to compensate for this disadvantage is to increase the size of the board. A larger group is more likely to have a broad range of experience and expertise. However, larger boards can be less effective, as Mr. Cayton observed of the Law Society:

> Thirty-one non-executives is too many for effective discussion, deliberation or decision-making. Benchers' meetings are not deliberative, rather they are a series of speeches and position statements, some clearly prepared in advance. Benchers rarely ask questions of each other, rather they make counter statements as though they were in court. Many decisions are by means of formal resolutions.[134]

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[132] *Jabour* at p. 335.
[133] CBA Futures Initiative (2014) (Lever #1, Ex A at p. 21); see also Anand, "Governance gone wrong: examining self-regulation of the legal profession" (2018) 21:2 Legal Ethics 99 at p. 113 ("It makes little sense to elect benchers from various geographical areas in the province who may not know anything about the LSO, its rules, or its purpose in society. Furthermore, these individuals may know nothing about acting as directors of a board or other organisation").
[134] Cayton Report at para. 5.11 (Greenberg #1, Ex. 8 at pp. 490-491). See also LSBC, Final Report of Governance Review Task Force (2012) (Greenberg #1, Ex 7 at p. 468); LSO Governance Review Task Force Report (2024) (Greenberg #3, Ex. 73 at p. 2079); Anand, "Governance gone wrong" at p. 115 ("the larger the board, the more difficult it is to reach consensus and have an efficient but meaningful decision-making process").

102. The CBA, in its response to the Intentions Paper, said "a smaller, more agile Board composition is required, to be consistent with effective and modern regulatory operations". It recommended 19 directors.[135]

103. The most significant disadvantage of the current model is it creates the reasonable perception—and sometimes the reality—of regulatory capture. Elected benchers can lack independence from the lawyers they regulate. As the CBA Futures Initiative has observed, the electoral model "lends some truth to the perception that self-regulation may tend to protect the interests of the profession".[136]

104. Bencher elections are unusual, perhaps even unique, in that the people who vote are not the people in whose interests the benchers must govern once elected. Benchers are elected by lawyers but required to govern in the interests of the public. The interests of lawyers can conflict with the interests of the public.[137] The mismatch between benchers' electors (lawyers) and their constituency (the public) affects how law societies are reasonably perceived by the public and how some benchers act.

105. The problem with the current model is that, if most of the benchers are elected by lawyers, benchers who have done their best to act in the public interest (no matter how unpopular it is with lawyers) may find themselves replaced by candidates whose views are popular with lawyers. This is what the CBA means when it repeatedly insists that the regulator of lawyers must be "controlled by—and answerable to—lawyers".[138] In this manner, an electoral model enables lawyers to thwart and reverse actions taken by the benchers in the public interest.

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[135] CBA Response to Intentions Paper (Greenberg #1, Ex. 28 at pp. 723-724).
[136] CBA Futures Initiative (2014) (Lever #1, Ex. A at p. 21); see also LSO Governance Review Task Force Report (2024) (Greenberg #3, Ex. 73 at pp. 2082-2083); Cayton Report at para. 5.7 (Greenberg #1, Ex. 8 at p. 490); LSBC, Final Report of Futures Task Force (2020) (Greenberg #1, Ex. 66 at p. 1234); LSBC, Final Report of Governance Review Task Force (2012) (Greenberg #1, Ex 7 at p. 455); LSBC, Report of Independence and Self-Governance Committee (2008) (Greenberg #1, Ex. 20 at p. 627.
[137] Greenberg XFD at Q. 215, ll. 14-17.
[138] CBA written submissions at para. 75 [emphasis added].

106. Public discourse reflects deep skepticism with the current model, with media headlines like “Should Nova Scotia lawyers really be allowed to regulate themselves?”[139] and “Alberta’s Lawyers Police Their Own. The Process is Brutal and Broken”.[140] In short, elected benchers, although undeniably independent from the government of the day, can appear to the public to lack independence from the lawyers they regulate.

107. The problem is not limited to appearances: the mismatch between benchers’ electors (lawyers) and their constituency (the public) creates distorting pressures that can affect how some benchers govern. Malcolm Mercer, a former elected bencher and Treasurer of the Law Society of Ontario, has written that it is “clear that being elected, and the proximity of the next election, affects decision-making at the bencher table particularly where professional self-interest is at stake”.[141] Similarly, Harry Cayton observed that, through lawyers’ control of bencher elections and AGM members’ resolutions, lawyers in British Columbia “often thwart regulation in the public interest.”[142]

108. The problem is not only that elected benchers may favour lawyers’ interests over the public interest, or be unduly influenced by lawyers’ perspectives on what the public interest is. As Professor Woolley (as she then was) has observed, there is a more subtle problem that elected benchers may tend to focus on areas where the public interest coincides with lawyers’ interests, simply neglecting or deprioritizing those areas where the public interest conflicts with lawyers’ interests:

> […] there is little incentive for an elected regulator to take on cases or causes where the statutory obligation in serving the public interest may only be achievable at the expense of the happiness of one’s electorate. It is more rational, and therefore more to be expected, that elected benchers will focus on matters that will permit them to satisfy their constituency as well as the public interest—that is, on cases where the lawyer’s ethical failure is morally unambiguous or the lawyer is professionally marginalized—such that other members

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[139] Lever #1, Ex L.
[140] Lever #1, Ex M.
[141] Mercer, “Independence and Self-Regulation: I’m OK but I’m Not So Sure About You!” (2014) Slaw, online: <www.slaw.ca/2014/09/17/independence-and-self-regulation-im-ok-but-im-not-so-sure-about-you>.
[142] Cayton Report at para. 6.10 (Greenberg #1, Ex. 8 at p. 500).

> of the profession will perceive no threat, and an obvious upside, in disciplining that lawyer.[143]

109. Recognizing these disadvantages of the electoral model, the CBA Futures Initiative and Law Society of Ontario have both recommended that fewer law society directors be elected by lawyers. The CBA Futures Initiative has called for "a significant number of appointed lawyers and non-lawyers […] selected by an independent appointment process designed to fill gaps in experience, skills and diversity".[144]

110. A few months after the *Act* was enacted, a Governance Review Task Force of the Law Society of Ontario proposed to change its board composition to something very similar to the board envisaged by the *Act*, with fewer elected lawyers and a significant number of directors appointed through an independent process.[145] Notably, elected lawyers do not constitute a majority of the board in the Ontario proposal.[146] In advocating for reforms to the electoral governance model, the CBA Futures Initiative and Governance Review Task Force of the Law Society of Ontario are not trying to curtail or end lawyer independence. Rather, they are identifying public interest rationales for reforming the electoral governance model.

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[143] Woolley, "Rhetoric and Realities: What Independence of the Bar Requires of Lawyer Regulation" (2012) 45:1 UBC L. Rev. 145 at pp. 189-190. See also Rhode & Woolley, "Comparative Perspectives on Lawyer Regulation: An Agenda for Reform in the United States and Canada" (2012) 80:6 Fordham L. Rev. 2761 at p. 2776 ("Lawyers control every aspect of the governance process, and have the statutory authority to regulate in their own interests. No countervailing forces have a meaningful voice. No elaborate conspiracy theory is required to suggest that such a regulatory structure is likely to privilege professional over public interests, and to focus attention on contexts where those interests align: clear moral misconduct by the least powerful members of the bar").

[144] CBA Futures Initiative (2014) (Lever #1, Ex A at p. 22).

[145] LSO Governance Review Task Force Report (2024) (Greenberg #3, Ex. 73 at p. 2075). The proposal is for a board of 30, comprised of 14 elected lawyers, two elected paralegals, 10 directors appointed by the board, and four directors appointed by the government.

[146] The Law Society misconstrues the significance of this evidence. Its significance is not in what it reveals about the opinions that some lawyers hold about whether electoral governance is a necessary component of independence (Law Society written submissions at para. 385). With respect, lawyers' opinions on that issue are irrelevant in these actions. The significance of this evidence is that it helps to illuminate the legislative intent of the provisions of the *Act* about board composition. It confirms that there are public interest rationales for reforming the electoral governance model.

111. The provisions of the *Act* about board composition are designed to ameliorate some of the problems identified above, chiefly the reasonable perception (and sometimes reality) that elected benchers lack independence from the lawyers they regulate, and to ensure a board composition that reflects a diversity of experience and expertise.

(e) **Reconciliation is a constitutional imperative**

112. The Attorney General acknowledges British Columbia and Canada's history of colonization and related policies and practices. Reconciliation is a constitutional imperative.

113. In November 2019, the legislature enacted the *Declaration on the Rights of Indigenous Peoples Act*.[147] Its enactment was unanimous: every member of the legislative assembly voted in favour. Consistent with the Calls to Action of the Truth and Reconciliation Commission, the *Declaration Act* establishes the United Nations Declaration on the Rights of Indigenous Peoples (the "**UN Declaration**") as the Province's framework for reconciliation.

114. Numerous aspects of the *Act* are designed to advance reconciliation by ensuring that legal regulation better meets the needs of Indigenous peoples, both as legal professionals themselves and as clients of legal professionals. These provisions include the guiding principles, requirements for board composition, membership requirements on tribunal and regulatory committees, the creation of the Indigenous council, and the creation of a leadership role with a focus on Indigenous initiatives.

III. **Conclusion**

115. In the result, the purpose of the *Act* is to provide for simpler, streamlined regulation of all legal professionals in the province through a single regulator, to offer more choices (and more affordable choices) of legal service providers for the public, to modernize the governance and electoral structure of the regulator, to preserve the independence of licensees, and to advance reconciliation within the legal professions. The purpose of the

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[147] SBC 2019, c. 44 [*Declaration Act*].

Act is not to end or diminish lawyer independence. (Nor does the *Act* have that effect, as will be developed below.)

PART 2: LEGISLATIVE PROCESS IS IRRELEVANT TO CONSTITUTIONALITY OF THE ACT

Arguments relating to legislative process amount to political complaints and, in any event, lack foundation in evidence

I. Overview

116. The Law Society, Trial Lawyers, and CBA make a variety of arguments about the legislative process, i.e., the Attorney General's development of the bill and the legislative assembly's debate on that bill leading to the legislature's enactment of the *Act*. None of these issues are properly before the court.

117. The Law Society submits it is "important context" that the *Act* does not reflect "consensus between government and lawyers".[148] The Law Society also protests that the government did not publish a draft of the bill, before it was tabled in the legislative assembly, "in order to build consensus with lawyers and the public".[149]

118. The Trial Lawyers go one step further and argue there is a "constitutional convention which requires consultation and consensus to be formed between government and the Law Society […] on significant legislative changes to legal regulation".[150] Notably, the plaintiffs are at odds on this point: the Law Society expressly disclaims that it is alleging a convention.[151]

119. Finally, the CBA alleges (without having provided any notice of this allegation in its application materials) that "Bill 21 was enacted without meaningful consultation with the

[148] Law Society written submissions at paras. 29-30.
[149] Law Society written submissions at para. 29.
[150] Trial Lawyers written submissions at para. 99.
[151] Law Society written submissions at para. 290.

very people it would directly regulate".[152] The CBA also says the debate in committee stage in the legislative assembly was inadequate.[153]

120. The allegations made by the Trial Lawyers and the CBA are not substantiated by the evidence. In any case, all of these arguments about legislative process arise from misunderstandings of how our representative democracy works, raise political issues rather than legal issues, and invite the Court to transgress the separation of powers. Respectfully, the Court must decline that invitation.

II. **Trial Lawyers and CBA allegations not supported by evidence**

121. The legislative process-related allegations of the CBA are not supported by any evidence, and the allegations of the Trial Lawyers are not supported by any admissible evidence.

122. To put the allegations of the Trial Lawyers and CBA in context, it is helpful to begin with what the Law Society says and does not say about government's consultations while developing the bill. The Law Society was, of course, the main entity the government consulted with during the development of the bill.

123. The Law Society makes only two claims.[154] First, the Law Society says the government did not publish a draft of the bill before the Attorney General tabled it in the legislative assembly, which is accurate. Second, the Law Society says that the "government" (by which it might mean the legislative assembly) did not seek or achieve "consensus with lawyers and the public" in respect of the *Act*, which is also accurate: some of the 14,500 lawyers and 5.7 million people in British Columbia disagree with the *Act*.

124. Importantly, the Law Society does not take any issue—in its notice of civil claim, notice of application, affidavit evidence, or written submissions—with the adequacy of the government's extensive consultations with the Law Society as the bill was being developed. The Law Society is naturally disappointed the government did not accept all

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[152] CBA written submissions at paras. 11.
[153] CBA written submissions at para. 14.
[154] Law Society written submissions at paras. 29-30.

of its suggestions, but the Law Society does not deny that it had extensive input and involvement in every aspect of the development of the bill between March 2022 and April 2024. The Law Society also acknowledges that its representatives received drafts of the bill itself, subject to confidentiality agreements, and opportunities to comment on those drafts.[155]

125. The only evidence from the Law Society on the topic of consultations is contained in the first affidavit of Mr. Greenberg, KC.[156] He describes the government's March 2022 Intentions Paper, which invited submissions from the public and lawyers, and the May 2023 What We Heard Report, which summarized the responses that had been received.[157] Importantly, Mr. Greenberg, KC does *not* depose that these steps constituted the entirety of the government's consultations with the Law Society, because they did not. They barely scratch the surface.

126. Referring only to this evidence from Mr. Greenberg, KC, the CBA claims that "Bill 21 was enacted without meaningful consultation with the very people it would directly regulate".[158] The problem for the CBA is that, as noted, Mr. Greenberg, KC does *not* depose that the Intentions Paper and What We Heard Report constituted the entirety of the government's consultations. They did not.

127. The Attorney General expressly invited the interveners to file evidence if they wished to allege facts, and the order granting leave to intervene did not contain any term preventing the interveners from doing so.[159] The CBA did not file any evidence, nor even provide any notice in its application materials of the facts it now alleges in its written submissions. After laying in the weeds, the CBA now attempts to ambush the Attorney General with spurious allegations the Attorney General has had no opportunity to meet

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[155] Law Society written submissions at para. 27.
[156] The Law Society applied for and was granted an order permitting it to conduct examination for discovery on the consultations that occurred as the bill was being developed. It conducted a further examination for discovery. It chose not to read any of the answers in, other than Q493-496, which relate to another topic.
[157] Greenberg #1 at paras. 76-84.
[158] CBA written submissions at paras. 11-15.
[159] Order of Chief Justice Skolrood made January 21, 2025.

with responding evidence. However, as it happens, the record contains sufficient evidence to demonstrate the falsity of the CBA's allegations.

128. First, the CBA's 22-page response to the Intentions Paper provides detailed comments on many of the policy issues that were ultimately addressed in the bill. One of the purposes of organizations like the CBA is to speak on behalf of its members. The government cannot consult with the 14,500 practising lawyers in BC, let alone the 5.7 million members of the public. The government can consult with organizations that speak on behalf of their members. The CBA explained the steps it took to determine the views of its members before synthesizing those views in its response to the Intentions Paper:

> In October 2022, CBABC hosted a series of virtual and in-person Roundtables for lawyers, including CBABC members and non-members, to provide their views on the proposed reforms. CBABC also engaged its Provincial Council, a 75-member body of lawyers in all practice areas throughout British Columbia. Several of CBABC's committees and working groups, including the Access to Justice Committee, discussed the Intentions Paper and provided input. CBABC's submission is also informed by the engagement it undertook with lawyers in Spring 2022 on the Report of a Governance Review of the Law Society of British Columbia, November 2021 to explore what governance changes could be made.[160]

129. So the CBA's response to the Intentions Paper was one aspect of meaningful consultation with the CBA and its members.

130. The record contains an October 20, 2023 public statement by the CBA in which it referred to its continued discussions with the government:

> Following our response in November 2022 to the Intentions Paper, we look forward to continuing to engage with government in the development of the legislation. We meet with the Attorney General next month to tell her our support for the single regulator model is contingent on preserving lawyers' independence and self-regulation.[161]

[160] CBA Response to Intentions Paper (Greenberg #1, Ex. 28 at p. 715)
[161] CBA statement of October 20, 2023 (Greenberg #1, Ex. 42 at p. 835) (emphasis added).

131. The record also contains a January 12, 2024 letter from the CBA to the Attorney General, which thanks the Attorney General for a meeting on November 16, 2023 and expresses appreciation for "the opportunity to bring forward our 7,800 members' concerns and discuss how we can best support the administration of justice moving forward".[162]

132. Again, this is just what happens, by sheer coincidence, to be in the record already. The CBA's decision not to provide any evidence in support of its allegations, coupled with its failure to provide any notice in its application materials of the facts it is now alleging, left the Attorney General without an opportunity to provide evidence of all the government's other engagements with the CBA. There were several more meetings, and representatives of the CBA were provided with drafts of the bill and opportunities to provide line-by-line comments.

133. Turning to the Trial Lawyers, the problems with their allegations are somewhat different. Unlike the CBA, the Trial Lawyers have led some evidence, namely two paragraphs of the affidavit of Mr. Gourlay,[163] but their written submissions misstate one paragraph of that affidavit and the other paragraph is inadmissible.

134. The misstatement is in paragraph 22 of the Trial Lawyers' submissions. Below, the evidence is on the left and the submission is on the right:

Mr. Gourlay's evidence:	**Submission cited to that evidence:**
To the best of my knowledge, at no point between the government's announcement and the tabling of Bill 21 before the BC Legislature did the Attorney General open up meaningful consultation on Bill 21 <u>to TLABC or its members.</u>[164]	The Attorney General did not open meaningful consultation on Bill 21 <u>to lawyers or the public</u> subsequent to the announcement and prior to the tabling of Bill 21.[165]

[162] CBA letter of January 12, 2024 (Greenberg #1, Ex. 43 at p. 836).
[163] Affidavit #1 of Kevin Gourlay made May 27, 2024 ("**Gourlay #1**") at paras. 26, 29.
[164] Gourlay #1 at para. 26 (emphasis added)
[165] Trial Lawyers written submissions at para. 22 (emphasis added).

Mr. Gourlay's evidence is accurate: for a number of reasons, the government did not consult with the Trial Lawyers or its members (beyond the general call for submissions in the Intentions Paper, which the Trial Lawyers chose not to respond to, and aside from Trial Lawyers members who were consulted in other capacities, like Mr. Westell, who was consulted and received drafts of the bill in his capacity as a bencher). The Trial Lawyers cite this paragraph as evidence that the government did not consult meaningfully with lawyers or the public, but that is not what Mr. Gourlay deposes.

135. Mr. Gourlay goes on to say this in his affidavit:

> In TLABC's view, Bill 21 was introduced without the transparency, clarity, or consultation with lawyers or the public, or the consensus of the bar, customarily associated with fundamental changes to the governance and regulation of the legal profession.[166]

136. This evidence is inadmissible. It is opinion, argument, and unattributed hearsay. Mr. Gourlay would have no idea what consultations were occurring with the Law Society, CBA, and other organizations, on this occasion or any previous occasion. There is, accordingly, no evidence for the following allegation made by the Trial Lawyers in their written submissions, cited only to the inadmissible paragraph of Mr. Gourlay's affidavit quoted just above:

> Bill 21 was prepared behind closed doors and moved through the Legislature with utmost haste and no meaningful consultation, never mind consensus, with the Law Society, bar associations, or the legal profession more generally.[167]

137. That statement is spurious and false to the point of absurdity. Again, the Law Society was the main organization the government consulted with, and it takes no issue with the extensive input and involvement it had in every aspect of the development of the bill between March 2022 and April 2024. In any case, the adequacy of the government's consultations is not a legal issue; it is a political issue.

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[166] Gourlay #1 at para. 29.
[167] Trial Lawyers written submissions at para. 104.

III. **Law Society and CBA arguments raise political issues**

138. The argument being made by the Law Society and CBA is essentially that the Attorney General should not have tabled the bill, or the legislature should not have enacted the *Act*, without first engaging lawyers and the public to "build consensus" about whether it was a good idea. This argument misunderstands how our representative democracy works and invites the Court to wade into political issues. For that reason, the Attorney General has set out some basic principles of democratic government in the paragraphs that follow.

139. Members of the legislative assembly (MLAs) "are elected by the people to protect the public interest".[168] Prospective MLAs campaign on competing visions of the public interest. Some are elected; others are not. Those who are elected, by virtue of being elected, have a mandate to act in accordance with the vision of the public interest on which they campaigned. They also maintain constituency offices and remain engaged in their communities to help them understand their constituents' interests and perspectives. In periodic elections, MLAs defend the choices they have made while other candidates campaign on what they will do differently if they are elected.

140. The Westminster tradition of responsible government means the government is accountable to, and must have the confidence of, the legislative assembly.[169] After an election, the Lieutenant Governor invites the leader of the political party with the most MLAs to form government.[170] By convention, the Premier selects their Cabinet from among MLAs. Every day the legislative assembly is sitting, and in prolonged sessions every spring during "estimates", the Premier and their Cabinet must answer questions

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[168] *Waugh* at para. 15.
[169] *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 at para. 28.
[170] If no party has won a majority of the seats and the Lieutenant Governor (a) believes the leader of the plurality party will not have the confidence of the assembly and (b) another party leader will have the confidence of the assembly, the Lieutenant Governor may invite that leader to form government, although this is extremely rare.

from MLAs about the government's activities.[171] If the government loses the confidence of the legislative assembly, the Premier must resign and there is another election.[172]

141. Proposed enactments are presented to the legislative assembly in the form of a bill. A bill that is introduced by an MLA who is also a Cabinet minister is known as a government bill. It is not just ministers who may propose bills: it is the undisputable right of all MLAs to propose bills. A bill that is introduced by an MLA who is not a Cabinet minister is known as a private member's bill.[173]

142. Bills presented in the legislative assembly must proceed through five stages before being presented to the Lieutenant Governor for royal assent: first reading, second reading, committee stage, report stage, and third reading.[174] The key stages are second reading and committee stage.

143. Second reading provides MLAs with an opportunity to debate the bill's general principles and objectives. In the ordinary course, someone will move to close the debate. If there are any objections to the motion on a point of order, the Speaker will rule on the objection; otherwise, the Speaker puts the question on the motion, i.e., calls for a vote. If the motion is adopted, the sponsor moves that the bill be committed to a committee.[175]

144. The custom in British Columbia is to commit all public bills to be considered by a committee of the whole, i.e., a committee of all MLAs.[176] At committee stage, the bill is examined in detail on a clause-by-clause basis (enactments have sections; bills have clauses). Committee stage also provides all MLAs with an opportunity to move amendments to the bill. Every MLA has the right to ask questions and move amendments

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[171] Estimates is the process through which the legislative assembly debates and votes on the government's proposed budget. In practice, questions from MLAs are not constrained to the proposed budget and may touch on any aspect of the government's activities.
[172] If the Lieutenant Governor is of the view that the leader of another party has the confidence of the assembly, the Lieutenant Governor may invite that leader to form government, although this is rare.
[173] Legislative Assembly of British Columbia, *Parliamentary Practice in British Columbia*, 5th ed. (4 March 2020) at ch. 10.1, pp. 227-229 and ch. 10.2.1.5., p. 232.
[174] *Parliamentary Practice in British Columbia* at ch. 10.4, p. 238.
[175] *Parliamentary Practice in British Columbia* at ch. 10.4.1.5, pp. 241-243.
[176] *Parliamentary Practice in British Columbia* at ch. 10.4.4, p. 248.

at committee stage. Eventually, someone will move to close the debate, and the Speaker will rule any objections or put the question on the motion.[177] If the motion carries, the bill progresses to report stage.

145. If the bill progresses through to third reading, the vote on third reading is the decisive stage when the legislative assembly decides whether to pass the bill.[178]

146. To suggest, as the Law Society and CBA do, that the government should "build consensus with lawyers and the public" before tabling certain bills in the legislative assembly, or before the legislature enacts certain legislation, is to profoundly misunderstand what the legislative assembly is and does. One of the core functions of the legislative assembly is to serve as a forum for the public, acting through their elected representatives, to debate and decide whether bills should be enacted. Consensus is not required for the legislative assembly to make collective decisions. If it were, our pluralist society would be immobilized: people disagree about many things. Democracy is, first and foremost, a way to make collective decisions in the absence of consensus through a process that is fair, accountable, and reversible.

147. In other words, the discussion and debate the Law Society and CBA suggest should happen, happens through the democratic process and in the legislative assembly. Neither MLAs nor the government have any legal obligation to engage the public before acting; they have a mandate to act arising from the last election. MLAs are elected by the public after campaigning on their vision of the public interest. The government is drawn from and, by definition, has the confidence of the public's elected representatives. If MLAs or the government misunderstand the public interest, the public will vote them out and replace them with new representatives. This is how our representative democracy functions.

148. Courts do not scrutinize the legislative process, pass judgment on the quality of debate in the legislative assembly, nor attempt to evaluate the extent to which legislation reflects public opinion or the public interest. The separation of powers and parliamentary

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[177] *Parliamentary Practice in British Columbia* at ch. 10.4.4 - 10.4.4.1, pp. 248-250.
[178] *Parliamentary Practice in British Columbia* at ch. 10.4.6, pp. 254-255.

privilege require legislative activities to be "unimpeded by any external body or institution, including the courts".[179]

149. Each of the three branches of the state (legislative, executive, and judicial) requires a zone of autonomy within which to discharge its constitutional functions. As emphasized in *Vriend*, "respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts".[180]

150. The clearest recent articulation of this principle is in *Mikisew*, in which the Supreme Court of Canada held that no duty to consult under s. 35 of the *Constitution Act, 1982* can arise in respect of legislation:

> Extending the duty to consult doctrine to the legislative process would oblige the judiciary to step beyond the core of its institutional role and threaten the respectful balance between the three pillars of our democracy.[181]

151. *Mikisew* considered an argument that, when a minister is developing a government bill, the minister is acting in an executive rather than legislative capacity. The Court held that the development of draft bills is a legislative rather than executive function. In the result, "the law-making process — that is, the development, passage, and enactment of legislation — does not trigger the duty to consult".[182] The Court elaborated as follows:

> This Court has emphasized the importance of safeguarding the law-making process from judicial supervision on numerous occasions. […]
>
> Longstanding constitutional principles underlie this reluctance to supervise the law-making process. The separation of powers is an essential feature of our constitution. It recognizes that each branch of government will be unable to fulfill its role if it is unduly interfered with by the others. It dictates that the courts and Parliament strive to respect each other's role in the conduct of public affairs; as such, there is no doubt that Parliament's legislative activities should proceed unimpeded by any external body or institution, including the courts. Recognizing that a duty to consult applies during the law-

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[179] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 at para. 35 [*Mikisew*], citing *Canada (House of Commons) v. Vaid*, 2005 SCC 30 at para. 20 [*Vaid*].
[180] *Vriend* at para. 136 (emphasis added); see also *Vaid* at paras. 20-21.
[181] *Mikisew* at para. 2.
[182] *Mikisew* at paras. 32-33.

> making process may require courts to improperly trespass onto the legislature's domain.[183]

152. The Court in *Mikisew* also emphasized the role of elected legislators as the voice of the public:

> Recognizing that the elected legislature has specific consultation obligations may constrain it in pursuing its mandate and therefore undermine its ability to act as the voice of the electorate.[184]

153. *Mikisew* and the centuries of precedent behind it are presumably one of the reasons the Law Society has abandoned the argument in its notice of application that legislatures cannot legislate about lawyers unless the legislation is "generated or consented to by the bar".[185] However, the Law Society's watered down submission and the CBA's argument suffer from the same problems. If there can be no duty to consult with lawyers in respect of an enactment, the extent to which lawyers were consulted cannot be relevant "context" to the constitutionality of that enactment. If an absence of consultation is relevant, there is effectively a duty to consult. Treating the legislative process as relevant in this way would "threaten the respectful balance between the three pillars of our democracy" and undermine the constitutional role of the legislative assembly.

154. The CBA goes as far as to complain that, in committee stage, debate was closed before every clause had been debated.[186] This is the kind of attack on a ruling of a Speaker that the Supreme Court of Canada in *Vaid* described as "intolerable" for both principled and practical reasons. At the level of principle, it trespasses on parliamentary privilege, which is just as grave as a trespass on judicial independence. At the level of practice, "such external intervention would inevitably create delays, disruption, uncertainties and costs which would hold up the nation's [or a province's] business".[187]

155. In this case, the Court is tasked with assessing the constitutionality of the *Act*, not evaluating the legislative process that led to its enactment, passing judgment on the

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[183] *Mikisew* at paras. 34-35 (internal citations and punctuation omitted).
[184] *Mikisew* at para. 36.
[185] Law Society notice of application for summary trial at para. 17.
[186] CBA written submissions at para. 14.
[187] *Vaid* at para. 20.

quality of debate in the legislative assembly, or assessing the extent to which the *Act* reflects public opinion. Those political issues are properly ventilated through the democratic process.

IV. **TLABC's alleged convention fails at every stage**

156. The Trial Lawyers go further than the Law Society and CBA and assert the existence of a constitutional convention requiring government to consult with and obtain consensus from the Law Society "as the body corporate and representative of all practicing lawyers in the Province, on significant legislative changes to legal regulation in British Columbia."[188] Like the Law Society and CBA, the Trial Lawyers seek to make political issues justiciable.

157. The Trial Lawyers fail to address the legal test for a convention in their materials or to acknowledge settled authority that constitutional conventions are not enforceable by the courts.

(a) **The Alleged Convention Cannot Exist**

158. As a preliminary issue, the Trial Lawyers' argument suffers from the same misunderstanding of our constitutional structure discussed in the preceding section regarding the Law Society and the CBA's submissions. The Trial Lawyers allege a convention binding "government" rather than the legislature. But it is the legislature, not the government, that enacts legislation. As set out above, when Ministers develop legislation, they act in their legislative, not executive capacity.[189] Any constitutional convention regarding the enactment of legislation would need to bind the legislature, not the executive. In any event, the Trial Lawyers have failed to establish that any such convention binds either the legislature or the executive.

159. More fundamentally, the practice of legislatures consulting with law societies prior to enacting legislation that affects legal regulation, cannot evolve into a constitutional

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[188] Trial Lawyers written submissions at para. 99.
[189] *Mikisew* at para. 32-33.

convention. As the Supreme Court of Canada explained in *Ontario Teachers*, constitutional conventions must relate to the principles of responsible government, not to how legislative powers are exercised.[190]

160. No constitutional convention has ever been recognized that restricts the legislative assembly itself. The Trial Lawyers' proposed convention—requiring the legislature to reach consensus with "representatives of all practicing lawyers"—would subordinate democratically elected representatives to a professional body. This is not only unrelated but antithetical to the principles of responsible government. It is precisely the argument that the Supreme Court rejected in *Mikisew.*[191]

(b) The Trial Lawyers have not satisfied the test for a new constitutional convention

161. In any event, even if this type of constitutional convention could emerge, the Trial Lawyers have failed to meet the test to establish a new constitutional convention. The applicable test for determining the existence of a convention consists of three questions: (i) what are the precedents; (ii) did the actors in the precedents believe that they were bound by a rule; and (iii), is there a reason for the rule?[192] The Trial Lawyers cannot satisfy any branch of the test.

i. **Insufficient Precedent Exists**

162. To establish the existence of a constitutional convention at the first stage of the test, the Trial Lawyers must demonstrate a generally accepted principle routinely followed by the relevant actors.[193] The Trial Lawyers identify only three instances of the legislature consulting with the Law Society prior to enacting legislation that affected it.[194] The Attorney General acknowledges that legislatures have often consulted with law societies prior to enacting legislation that affects law societies. This is not surprising. As Dr. Girard

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[190] *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, 2001 SCC 15 at para. 65 [*Ontario Teachers*].
[191] *Mikisew* at para. 35, citing *Vaid* at para. 20.
[192] *Re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, p. 888 [*Patriation Reference*].
[193] *Ontario Teachers* at para. 65.
[194] Trial Lawyers written submissions at paras. 100-102.

observes, provincial legislatures did not have active or sophisticated policy departments until fairly recently. Legislatures were "largely reactive, and if a professional body came forward with desired amendments that were not obviously problematic, the legislature was likely to take the path of least resistance and pass them". Beginning around 1970, however, this "cozy relationship largely came to an end".[195]

163. The following examples in evidence show that legislatures have, in fact, legislated over the objections of a law society.

164. In BC, the legislature first created a right of appeal from admissions decisions in 1949.[196] The right of appeal was retroactive by one year so it could be exercised by a graduate of UBC Law whom the benchers had refused to call and admit because of his communist political beliefs.[197] The benchers lobbied against the creation of this right of appeal, but the legislature enacted it anyway. Law Society meeting minutes from 1953 record the Treasurer at the time of the 1949 amendment describing the situation as follows:

> In 1949 there was an ex-solder by the name of Martin, who was a young Communist, tried to join the Vancouver Bar. There was a tremendous uproar all over the profession. Well now, when the 1949 amendment came up for consideration, the Attorney General of the day told the committee who were in charge of the matter that he was going to put in an amendment to the Legal Professions Act to allow Martin to appeal to the Court of Appeal. […] When I saw this amendment coming, giving this appeal, of course I naturally had objected, and got on the telephone and did what I could. Mr. Haldane, Mr. Crease and Mr. Moresby – they were in charge of the matter here in Victoria – they saw the Attorney General and the Attorney General gave certain reasons why, in his opinion, it was essential that this appeal should be granted, and the result was a holus bolus – 47, subsection 2, was amended, which now gives an appeal to the Court of Appeal from a refusal of an applicant who has been denied acceptance by the Benchers.[198]

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[195] Expert report of Dr. Philip Girard dated May 16, 2025 ("**Girard Report #2**") at paras. 4, 6.
[196] *Act to amend the "Legal Professions Act"*, S.B.C. 1949, c. 35, s. 2.
[197] See *Martin v. Law Society of British Columbia*, [1950] 3 D.L.R. 173, 1950 CanLII 242 (B.C.C.A.).
[198] Minutes of the Annual Meeting of the Law Society (June 25, 1953) (Affidavit #4 of Brook Greenberg, KC made June 30, 2025 ("**Greenberg #4**"), Ex. 26 at pp. 1884-1885). Messrs. Haldane, (Arthur) Crease, and Moresby were benchers. Mr. Moresby had been Treasurer from

165. In Québec, the legislature had amended the *Bar Act* in 1967 to change the Barreau's governance structure and make most of the Barreau's rule-making authority subject to Cabinet approval.[199] According to Dr. Girard, these changes were unpopular with lawyers.[200] The Barreau's website describes the 1967 amendments as follows: "For the first time, the Barreau's autonomy was curtailed".[201]

166. The Castonguay-Nepveu Report led the legislature of Québec to enact the system of co-regulation currently governing lawyers in Québec. The legislature did not consult with the Barreau before doing so.[202] The Barreau's website indicates it "had a difficult time accepting the introduction of this new professional system".[203] A contemporaneous article in the *Advocate* put it more colourfully: "The Castonguay Report recommendations, to the astonishment and confusion of a myopic Québec Bar which had not been consulted and appeared to be blissfully unaware of what was going on, were passed into law".[204]

167. The Barreau subsequently lobbied the legislature for changes. The legislature accepted most of the Barreau's suggestions, but not all of them.[205]

168. Around the time of the McRuer Commission, the Law Society of Upper Canada (as it was then called) had prepared draft amendments and provided them to the Attorney General of Ontario; however, after the McRuer Report, the Ontario Attorney General shelved that draft and moved ahead with its own plans instead.[206] The 1970 *Act to consolidate and revise The Law Society Act* imposed changes to the size of the board, the length of benchers' terms, and the manner of elections; provided for lay benchers; and made much of the Law Society's rule-making power subject to Cabinet approval.[207]

1940 to 1942 and Mr. Crease had been Treasurer from 1946 to 1947. Mr. Haldane would later be Treasurer from 1951 to 1953. Greenberg #3, Ex. 39 at p. 1030.

[199] *Québec Bar Act*, S.Q. 1966-67, c. 77.

[200] Girard Report #2 at p. 6.

[201] Affidavit #1 of Michel Jolin made April 4, 2025 ("**Jolin #1**"), Ex. J at p. 328 (in French), translated at Affidavit #1 of Philip Bull, made May 16, 2025 ("**Bull #1**"), Ex A at p. 4.

[202] Girard Report #2 at para. 9.

[203] Jolin #1, Ex. J at p. 329 (in French), translated at Bull #1, Ex A at p. 5.

[204] "Entre Nous" (1972) 30:3 Advocate (Vancouver) 134 at p. 135.

[205] Girard Report #2 at para. 9.

[206] Girard Report #2 at paras. 6-7.

[207] *Act to consolidate and revise The Law Society Act*, S.O. 1970, c. 19.

169. The CEO of the LSM has provided evidence of some more recent examples of a legislature legislating over the opposition of a law society. She deposes that amendments to the Manitoba legal professions legislation have "almost always been at the request of the LSB […] or in consultation with the LSM", meaning not always.[208] She describes one counter-example in some detail. She deposes that the LSM requested a legislative amendment to empower it to approve, certify, and regulate "limited practitioners". She says the government agreed, but the bill it developed also empowered Cabinet to make regulations about limited practitioners that take precedence over rules made by the Law Society. She says the Law Society objected to those provisions, but the legislature enacted them anyway (although the government has not yet brought them into force).[209]

170. The CEO of the LSM also deposes that the Law Society objects to being subject to the *Fair Registration Practices in Regulated Professions Act*, which it sees as "an improper infringement on the purposes and duties of the LSM" and "inconsistent with the necessity of the independence of lawyers".[210] Despite the LSM's opposition, the Legislature of Manitoba has subjected the LSM to that legislation for the last 18 years.

171. What this evidence demonstrates is the absence of any consistent practice that could ground a constitutional convention. While legislatures must respect constitutional limits on their authority, no convention has emerged requiring consultation or consensus with law societies as a precondition to exercising their legislative jurisdiction. The fact that some legislatures have more consistently consulted with the relevant law society reflects discretionary policy choices, not the arrival of a new principle of responsible government.

172. In *Ontario Teachers,* the Supreme Court of Canada rejected the argument that a constitutional convention had arisen regarding the design of the public education system in Ontario. The Court held that this convention could not exist because the main purpose of conventions was to ensure the constitutional framework operated in accordance with generally accepted principles, but: (1) there was no generally accepted principle in

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[208] Affidavit #2 of Leah Kosokowsky made March 31, 2025 ("**Kosokowsky #2**") at para. 17 (emphasis added).
[209] Kosokowsky #2 at paras. 21-24.
[210] Kosokowsky #2 at para. 25.

Canada as to the design of the public education system; (2) every province had designed its public school system in a different way; and (3) the fact that "one province has used a particular design for an extended period of time reflects consistency in public policy. It does not announce the arrival of a new principle of responsible government."[211] The Court's reasoning applies with equal force here.

173. On a more practical level, consultation with interested groups and rightsholders prior to the introduction of a bill allows for the government to draw upon a broad array of expertise and identify unanticipated consequences. In other words, it amounts to good governance. Were this Court to find that the practice of the legislature accepting the suggestions of a certain group through the consultation process could, over time, lead to the creation of a constitutional convention that binds the legislature and prevents it from exercising parliamentary sovereignty, it would likely have a chilling effect on consultation going forward.

ii. **No evidence legislatures believed they were bound by a convention**

174. The second requirement is that the relevant actors must have explicitly recognized themselves as bound by the convention, not through inference but through written or oral statements.[212] The Supreme Court of Canada has identified this second requirement as "the most important".[213] The Trial Lawyers' complete failure to satisfy this central requirement of the test is fatal to their attempt to establish a new constitutional convention.

175. The Trial Lawyers provide no evidence whatsoever that any legislature has ever believed itself *constitutionally obligated* to consult with or form consensus with law societies before enacting legislation that affects the law societies. Not a single statement or acknowledgement is in evidence.

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[211] *Ontario Teachers* at para. 65.
[212] *Re: Objection by Québec to a Resolution to Amend the Constitution,* [1982] 2 S.C.R. 793, pp. 814, 817 [*Québec Objection Reference*].
[213] Malcolm Rowe and Nicolas Déplanche, "Canada's Unwritten Constitutional Order: Conventions and Structural Analysis," 2020 98-3 *Canadian Bar Review* 431, 2020 CanLIIDocs 3304 at p. 436; *Québec Objection Reference*, pp. 814, 817.

176. Moreover, the evidence contradicts this entirely. No law society anywhere in Canada has ever claimed legislatures cannot act without their consent. The Law Society itself never asserted such a requirement before the enactment of the *Act*. The Law Society's position was merely that "the public and legal professions" should be "significantly involved in commenting and advising"— a far cry from asserting a constitutional requirement.[214] When legislatures across Canada have acted over law society opposition, neither side suggested such conduct violated a constitutional convention.

177. A clear statement in the evidence arises from the minutes of the 1953 Law Society Annual Meeting, where a bencher (Mr. Hutcheson) describes his experience with amendments to the *Legal Professions Act* and other statutes in these terms:

> […] I have had something to do with the drafting of amendments, something to do with the handling of amendments through the Legislature, not only with regard to the Legal Professions Act, but Acts, and I simply want to draw these matters to your attention to be sure that they have been in your mind when dealing with this resolution.
>
> Now Mr. McPhillips, in moving the Resolution has referred to the parallel of companies, of the respective positions of directors and shareholders. There is quite a difference, I feel, in our position, in that members of the Society have no power to amend their constitution in any way at all. Their constitution is laid down by the Legislature, and any party, whether it be the C.C.F. in Saskatchewan, or any individual Member of the House, can apply to amend the *Legal Professions Act*, as they can any other Act, and to take away or to add to our privileges as they see fit.[215]

178. A bencher acknowledging that MLAs can "take away" or "add to [the Law Society's] privileges as they see fit" contradicts any notion that the legislature could not act without the Law Society's consent.

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[214] Letter from the Law Society to the Attorney General dated April 46, 2024 (Greenberg #1, Ex. 38 at p. 819).
[215] Minutes of the Annual Meeting of the Law Society (June 25, 1953) (Greenberg #4, Ex. 26 at pp. 1881-1882).

179. The absence of any evidence of a perceived obligation is not surprising. Such an obligation would be constitutionally absurd: it would mean elected legislatures could not enact legislation in respect of the regulation of lawyers without reaching consensus with a delegated regulatory body. No legislature has ever believed this because it would represent an abandonment of parliamentary sovereignty itself.

180. It is notable that in Hansard, quoted in the Trial Lawyers' submissions, Mr. Sihota stated that "in future the type of approach that was embraced with respect to Bill 25 ought to be the type of approach taken with all forms of legislation dealing with various professions."[216] The use of "ought to be" clearly expresses a policy preference for future practice, not recognition of an existing constitutional obligation.

181. This language does not support the Trial Lawyers' convention claim. Constitutional conventions require actors to believe they are *required* to follow past practice. When legislators say they 'ought' to do something in future, they are expressing aspiration, not obligation. Moreover, Mr. Sihota's reference to "all forms of legislation dealing with various professions" demonstrates this was about general good governance, not a specific constitutional requirement unique to lawyers.

iii. **No valid constitutional rationale**

182. Even if precedent existed and the relevant actors felt bound to follow it (which they clearly do not), the Trial Lawyers proposed convention lacks any valid constitutional rationale. As discussed above, constitutional conventions exist to operationalize fundamental principles of responsible government, not to restrict the exercise of legislative powers.[217]

183. The proposed convention would directly contradict the Supreme Court of Canada's holding in *Mikisew* that no duty to consult exists regarding legislative development. As the Court recognized, such a duty would "undermine [the legislature's] ability to act as the voice of the electorate".[218]

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[216] Trial Lawyers written submissions at para. 101.
[217] *Ontario Teachers* at para. 65.
[218] *Mikisew* at para. 36.

184. Put simply, there is no constitutional rationale for the alleged constitutional convention. The Trial Lawyers ask this Court to recognize a constitutional convention that would grant lawyers alone among all professions a veto over legislation, thereby transforming the bar into a fourth branch of government immune from any form of oversight.

185. The alleged convention cannot exist under our constitutional structure and fails every element of the required test to establish a convention. It must be rejected.

iv. **No Remedy Available**

186. Finally, even if such a convention existed, this Court cannot provide any remedy. Constitutional conventions are, by definition, political in nature.[219] Sanction for the violation of a convention lies in the political realm, not the courts.[220]

PART 3: THE CONSTITUTION DOES NOT PROTECT ABSOLUTE LAWYER INDEPENDENCE

Overview of constitutional argument and preliminary issues

187. The plaintiffs argue that their conception of absolute lawyer independence finds expression in four ways:

a. as an unwritten constitutional principle;

b. in the structure of the Constitution;

c. under the judicature provisions; and

d. under ss. 7, 10(b) and 11(d) of the *Charter.*[221]

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[219] *Patriation Reference* at pp. 774-775.
[220] *Conacher v. Canada (Prime Minister),* 2009 FC 920 at paras. 74-75.
[221] Law Society written submissions at paras. 54-55.

188. In the result, the plaintiffs assert the *Act* falls outside the Province's jurisdiction to legislate under s. 92(13) and (14) and is therefore *ultra vires* provincial legislative competence.[222]

189. The Attorney General's answer to this is fourfold:

a. The Law Society's conception of absolute lawyer independence is not an unwritten constitutional principle, and even it was, unwritten constitutional principles cannot invalidate legislation.

b. The structure of the Constitution does not support absolute lawyer independence.

c. The judicature provisions are structural provisions that constitutionally protect the role of superior courts, not lawyer independence.

d. Although the *Charter* protects lawyer independence as freedom from improper interference with advice or advocacy on behalf of clients, it does not protect the plaintiffs' definition of absolute lawyer independence. [223]

190. Before addressing each of these arguments, it is helpful to first identify the key components of the Law Society's definition of lawyer independence, and to briefly address: (1) the province's legislative competence under s. 92; and (2) the manner in which lawyer independence has been given constitutional protection by the courts.

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[222] Law Society written submissions at para. 129.

[223] These actions focus on *lawyer* independence. The Notaries Society submits that "the constitution guarantees not the independence of lawyers, but the independence of *legal professions*" (Notaries Society written submissions at para. 4). The Attorney General agrees with this submission in part: most of the principles of fundamental justice that protect dimensions of lawyer independence under s. 7 likely apply equally to other legal professionals. However, the Law Society's case is about the independence of lawyers, and the Attorney General agrees with the Law Society and CBA that the independence of lawyers is and will remain different in some respects from the independence of other legal professionals. The *Act* requires the regulator to ensure the independence of licensees (s. 6(1)(c)) but does not express or imply that independence has precisely the same meaning or significance for all categories of licensee.

I. Key components of Law Society's conception are electoral governance and freedom from all external influence

191. The Law Society asserts that the *Constitution Act, 1867* requires lawyers to be regulated and governed by a body consisting of a strong majority of lawyers who are elected by lawyers. The Law Society puts it this way: "self-governance and self-regulation are essential conditions of independence of the bar … Self-governance means an independent legal regulator that is governed by a board composed of a strong majority of lawyers; and self-regulation means independent regulation guided by the board's determination of what is in the public interest in the administration of justice."[224]

192. The Law Society defines legal regulation as comprising of three core aspects:

a. membership and authority to practise law;

b. professional conduct; and

c. complaints and discipline.[225]

193. Within those three core aspects, there are two key components to the Law Society's conception of lawyer independence:

a. self-governance, defined as a board "composed of a strong majority of lawyers elected by lawyers"; and

b. self-regulation, defined as freedom from any and all "influence by public authorities (or any other source)".[226]

194. The Attorney General refers to this conception as "absolute lawyer independence".

195. The breadth of this conception is arresting. The Law Society's conception of absolute lawyer independence goes far beyond the traditional understanding of lawyer independence as freedom from improper interference with advice and advocacy or

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[224] Law Society written submissions heading C. and para. 93, emphasis added.
[225] Law Society written submissions at paras. 54, 310.
[226] Law Society written submissions at paras. 67, 92-94.

commitment to a client's cause. It is nothing less than complete immunity from any kind of democratic regulation or oversight. If accepted, it would be the first time in Canadian history that a court has found that a legislature is constitutionally required to delegate its powers in this way.

196. Absolute lawyer independence means lawyers are "accountable only to the public interest"[227]—meaning the public interest as defined exclusively by lawyers elected by lawyers, with no influence whatsoever from any external sources. In other words, the public must blindly trust that lawyers elected by lawyers will be able to identify the public's interests and act accordingly.

197. It is also worth noting that the Law Society's definition of self-governance in this litigation contradicts its position during consultation. When responding to the Intentions Paper, the Law Society said "self-regulation of the legal profession requires that a majority of the board that governs lawyers are themselves lawyers and a majority of the lawyer directors are elected".[228] The *Act* delivered on that request: a majority of the board are lawyers (9/17), and a majority of the lawyer directors are elected (5/9).

II. **Province's legislative competence to regulate lawyers**

198. It is common ground between the parties that the provinces have legislative authority to regulate the practice of law in the province under ss. 92(13) and 92(14). [229]

199. The Supreme Court of Canada has recognized that the powers and regulatory authority of lawyers' governing bodies are *delegated to them* by the provincial legislature.[230] Without that delegated legislative authority, the governing bodies would have no powers to regulate or discipline their members beyond those available to voluntary associations.

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[227] Law Society written submissions at para. 294.
[228] LSBC Response to the Ministry of Attorney General's Intentions Paper (Greenberg #1, Ex. 25 at p. 690).
[229] *Law Society of British Columbia v. Mangat,* 2001 SCC 67 at paras. 38 and 42 [*Mangat*]; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869 at 886-888 [*Pearlman*].
[230] *Finney* at paras. 1, 14 and 22 and *Jabour*, p. 336.

200. The questions in these actions are whether that delegation is *constitutionally* required and whether the only possible legislative scheme delegating those powers and functions is one that provides for absolute lawyer independence – i.e. self-governance and self-regulation as the plaintiffs define those terms.

III. **Limits on legislative competence to regulate lawyers under the *Charter***

201. To be clear, legislatures are not unconstrained in how they may regulate lawyers. Lawyer independence is constitutionally protected by the principles of fundamental justice under s. 7 of the *Charter*. One such principle recognized in *Federation* is that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes.[231] Another is that the state cannot require lawyers to divulge privileged information (except in extremely limited circumstances).[232] These and similar principles of fundamental justice—including principles that may be recognized in the future as and when the need arises—give constitutional protection to the various dimensions of lawyer independence and help to ensure public access to independent advice and zealous advocacy from lawyers.

202. Given the judicial emphasis on lawyer independence in a criminal context,[233] it is reasonable to assume that a co-extensive right is protected by s. 10(b) of the *Charter* in circumstances where that section applies. The Law Society also invokes s. 11(d) of the *Charter*, but its trial fairness component is coextensive with s. 7.[234]

203. Deciding this case based on the constitutional protection of lawyer independence as a principle of fundamental justice under s. 7 of the *Charter* has two significant advantages over the Law Society's theory of unwritten principles.

204. First, it avoids the problems with the separation of powers and legitimacy of judicial review that afflict the Law Society's unwritten principle theory (described in detail in a later

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[231] *Federation* at para. 84.
[232] *R. v. McClure*, 2001 SCC 14 at para. 41.
[233] *Federation* at para. 98 citing *Jabour* at pp. 335-336.
[234] *R. v. J.J.*, 2022 SCC 28 at paras. 113-114 [*J.J.*].

section of these submissions, with reference to *Toronto*).[235] Unlike the Law Society's theory, an understanding of lawyer independence that is rooted in s. 7 of the *Charter* is consistent with our democracy and the institutional role of the courts.

205. The text of the constitution was negotiated, debated, and ultimately enacted by the public's elected representatives. The text of s. 7 of the *Charter* refers to the "principles of fundamental justice". In enacting this constitutional text, Canadians conferred on courts the responsibility of developing its meaning in response to changing social views about what is fundamental to the administration of justice.

206. Constitutional protection for lawyer independence under s. 7 offers full and robust protection to the public's interest in access to independent legal advice and zealous advocacy from lawyers, in a manner that is consistent with the jurisprudence and that avoids all the problems afflicting the Law Society's unwritten principles theory.

207. A second advantage of this approach is its specificity, i.e., the clear and precise guidance it provides to legislatures, governments, lawyers, and the public. Lawyer independence is a broad concept with many dimensions, even on the definition the Attorney General submits is correct (freedom from improper interference with lawyers' advice or advocacy). What distinguishes improper interference from benign external influence on lawyers (such as the *Human Rights Code*)? It is impossible to give a single answer to this question, i.e., to identify with a single principle all and only those forms of external influence on lawyers that are improper. Approaching lawyer independence under s. 7 of the *Charter*, as the Supreme Court of Canada did in *Federation*, avoids any need to provide a single answer. Instead, different principles of fundamental justice can delineate and protect different dimensions of lawyer independence in a clear and precise manner.

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[235] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 [*Toronto*].

The plaintiffs' absolute conception of lawyer independence is not an unwritten constitutional principle

I. Overview

208. The Law Society's submissions are structured around two questions: (1) is lawyer independence an unwritten constitutional principle, and (2) if so, what is the meaning and content of lawyer independence?[236] Framing the issue as a single question (is the Law Society's conception of absolute lawyer independence an unwritten constitutional principle?) makes the analysis more precise than it is on the Law Society's framing.

209. The Law Society's framing invites imprecision because lawyer independence is a vague and contested concept. The risk of asking whether lawyer independence is a constitutional principle is that the generality of the question will obscure details that are material to the test for unwritten constitutional principles.

210. The single question framing is also more in keeping with the judicial restraint that courts bring to constitutional cases. Courts are traditionally reluctant to decide constitutional issues when it is unnecessary to do so.[237] In these actions, it is unnecessary to decide whether there is *a* definition of lawyer independence that is an unwritten constitutional principle. That issue may arise in a subsequent case, but the issue in these actions is whether *the plaintiffs'* definition of lawyer independence is an unwritten constitutional principle.

211. However, should this Court wish to consider the issues raised in these proceedings on the Law Society's framing, the Attorney General addresses the proper scope of lawyer independence and the constitutionality of the *Act* in Part 4 of these submissions.

212. It is dispositive of the Law Society's legal theory that absolute lawyer independence is not an unwritten constitutional principle.

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[236] Law Society written submissions at para. 9.
[237] *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy),* [1995] 2 S.C.R. 97; *R. v. McGregor*, 2023 SCC 4 at para. 24.

213. Four main points are developed below.

a. First, electoral self-governance and self-regulation do not have historical lineages stretching back to Confederation: they are policy choices that have been made at different times, and to different extents, by different legislatures.

b. Second, absolute self-regulation has *never* existed in Canada: lawyers are not now, and have never been, absolutely "free of influence by public authorities (or any other source)".

c. Third, the jurisprudence, academic literature, and other sources do not support an absolute conception of lawyer independence.

d. Fourth, the text of the constitution contemplates independent lawyers, but offers no support for an absolute definition of lawyer independence nor any particular institutional arrangements (regulatory models) for lawyers.

II. **Test for unwritten constitutional principles**

214. The Attorney General largely agrees with how the Law Society has articulated the test for unwritten constitutional principles.[238]

215. As the Law Society concedes, unwritten constitutional principles predate Confederation.[239] Unwritten constitutional principles have a "historical lineage stretching back through the ages" and are the "baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated". The reason that unwritten principles were not expressly codified in the *Constitution Act, 1867* is that doing so "might have appeared redundant, even silly, to the framers".[240]

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[238] Law Society written submissions at paras. 56-57.
[239] Law Society written submissions at para. 56.
[240] *Reference re Secession of Québec,* [1998] 2 S.C.R. 217 at paras. 49-51, 62.

216. Although the Law Society concedes that unwritten constitutional principles predate Confederation, its submissions do not reflect that concession: they focus mostly on the Current Act and the status quo today. The status quo and history since Confederation are relevant, but the most important moment in time is 1867, and the analysis is Canada-wide. An unwritten constitutional principle is something that was already so well established in 1867 that it went without saying, so it did not need to be codified in the *Constitution Act, 1867*.

217. In any event, as set out below, the Law Society's definition of absolute lawyer independence is not met by any jurisdiction in Canada today.

III. Lawyer self-governance and self-regulation were not widespread at Confederation

218. Lawyer self-governance and self-regulation do not have historical lineages stretching back to Confederation. Unlike every unwritten constitutional principle that has been recognized to date, lawyer self-governance and self-regulation are not part of the baseline against which the framers of the *Constitution Act, 1867* and our elected representatives have always operated. They are policy choices that have been made at different times, and to different extents, by different legislatures.

(a) Four different regulatory models at Confederation

219. The original provinces had four different models of lawyer regulation at Confederation. Lawyers in Québec were self-governing and mostly, although not entirely, self-regulating. Lawyers in Ontario were partially self-regulating but not self-governing. Lawyers in Nova Scotia and New Brunswick were neither self-governing nor self-regulating. None of those models is consistent with the Law Society's absolute conception of lawyer independence, meaning that conception cannot be an unwritten constitutional principle.

220. **Québec** was closest to meeting absolute lawyer independence: lawyers were self-governing and largely self-regulating at Confederation. Lawyers were not entirely self-regulating, however: the admission criteria were prescribed in detail by legislation, rather

than being left to the Barreau.[241] The key legislative criterion was a clerkship of specified length with a qualified lawyer, a requirement dating originally to English legislation of 1729.[242] (Modern articling descends from this practice.) Given that the criteria for admittance were prescribed in legislation, the Barreau was not self-regulating in the Law Society's absolute sense of being free from all external influence.

221. In **Ontario**, lawyers were partially self-regulating but not self-governing in the electoral sense, benchers were not elected. As with the English Inns of Court,[243] benchers of the Law Society of Upper Canada held office indefinitely and selected new benchers to join them from time to time.[244] While the Law Society of Upper Canada largely controlled admission at Confederation, and in that sense was self-regulating, it needed court approval to make rules on certain topics, including admission, and all disciplinary authority remained with the courts.[245] This was partial or qualified self-regulation. The Law Society of Upper Canada had no statutory authority over discipline until 1875, and even then, its disciplinary authority was shared with the courts (i.e., the courts could suspend and disbar on their own motion).[246]

222. The Law Society claims the Law Society of Upper Canada "has been self-governing from its inception",[247] but it has not been on the Law Society's definition of self-governance: "a board composed of a strong majority of lawyers elected by lawyers".[248] As noted, the benchers of the Law Society of Upper Canada did not begin to be elected until 1871, which was 74 years after its inception. The first general meeting of the members of

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[241] Expert report of Dr. Philip Girard dated November 11, 2024 ("**Girard Report #1**") at para. 17; *Act respecting the Bar of Lower Canada*, C.S.L.C. 1861, c. 72, ss. 26-28; *Act respecting the legal Profession in this Province*, S.Q. 1869, c. 28, ss. 1-2.
[242] *Act for the better Regulation of Attornies and Solicitors* (1729), 2 Geo. 2, c. 23 (Eng.).
[243] McDougal, "The Inns of Court" (1937) 9:15 Can. Bar. Rev. 675 at p. 681.
[244] It was not until 1871 that any benchers of the Law Society of Upper Canada were elected: *Act to make the Members of the law Society of Ontario elective by the Bar thereof*, S.O. 1870-1871, c. 15.
[245] Girard Report #1 at paras. 24, 26-27; see e.g. *Act respecting Attorneys at Law*, C.S.U.C. 1859, c. 35, s. 8. The Law Society of Upper Canada did exert some informal disciplinary authority over barristers before 1876: Girard Report #1 at para. 26.
[246] *An Act to amend the Laws respecting the Law Society*, S.O. 1875-76, c. 31.
[247] Law Society written submissions at para. 223.
[248] Law Society written submissions at para. 93.

the Law Society of Upper Canada occurred in 1969, which was 172 years after its inception.[249]

223. In **New Brunswick**, lawyers were regulated by the courts at Confederation, although the Barristers' Society of New Brunswick de facto controlled admission through rules that had been approved by the court.[250] In effect, the court had delegated its authority over admission to the Barristers' Society. However, until 1903 the Society's by-laws and regulations required the approval of at least three Supreme Court judges.[251] The Barristers' Society had no authority over discipline until decades later in 1903.[252] Additionally, the courts retained first instance disciplinary authority until 1931.[253]

224. In **Nova Scotia**, lawyers were largely regulated by the courts at Confederation. Legislation prescribed admission criteria and courts made rules for clerkship applications, although applications for admittance (by persons who had clerked in Nova Scotia) were decided by a committee of a judge and two barristers.[254] The Nova Scotia Barristers' Society did not control admission until 32 years later, in 1899,[255] and had no meaningful disciplinary authority until nearly eight decades later in 1941.[256]

225. In summary, at Confederation, the moment in time that unwritten constitutional principles crystallized, none of the original provinces satisfied the Law Society's conception of absolute lawyer independence. This is sufficient to establish that absolute lawyer independence is not an unwritten constitutional principle.

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[249] Arthurs, "Authority, Accountability, and Democracy in the Government of the Ontario Legal Profession" (1971) 49:1 Can. Bar Rev. 1 at p. 12.
[250] Girard Report #1 at para. 4.
[251] *An Act to incorporate the Barristers' Society of New Brunswick,* S.N.B. 1846, c. 48, s. III; *Act respecting the Barristers' Society, and Barristers, Attorneys and Students-at-Law*, C.S.N.B. 1903, c. 68 [*New Brunswick 1903*].
[252] *An Act to incorporate the Barristers' Society of New Brunswick*, R.S.N.B. 1855, c. 48; *New Brunswick 1903*, ss. 13(3), 16-19.
[253] *New Brunswick 1903*, ss. 20-23; *The Barristers' Society Act 1931,* 21 George V., c. 50.
[254] *Of Barristers and Attornies*, R.S.N.S. 1864, c. 130, ss. 2-10.
[255] *Act to amend and consolidate the Acts relating to Barristers and Solicitors*, S.N.S. 1899, c. 27.
[256] *Act to Amend Chapter 9 of the Acts of 1939, "The Barristers' and Solicitors' Act"*, S.N.S. 1941, c. 52, s. 2.

(b) **Provinces and territories subsequently joining Canada**

226. The provinces and territories that joined Canada after 1867 also had varied regulatory models. None of these provinces' regulatory models, at the time they joined Canada, satisfied the conditions for absolute lawyer independence.

227. The Law Society acknowledges some (although not all) of the legislative features described below. That is, the Law Society acknowledges that its absolute conception of lawyer independence did not exist in any province or territory at the time that province or territory joined Canada. The Law Society acknowledges that, in some provinces and territories, it was several decades before lawyers were delegated full self-regulatory authority (particularly with respect to discipline). These concessions are fatal to the Law Society's position.

228. Again, an unwritten constitutional principle is something that, by definition, was so deeply intrenched at Confederation that it did not require mention in the *Constitution Act, 1867*. An unwritten constitutional principle does not arise because provinces and territories make broadly similar policy choices over a period of decades. In other words, unwritten constitutional principles do not freeze legislative policy choices at an arbitrary moment in time, decades after Confederation, because a litigant claims those policy choices are optimal and should ossify. An unwritten constitutional principle is not a ratchet that, after being gradually turned in one direction over many years, prevents any movement in the opposite direction.

229. **Manitoba** joined Canada on July 15, 1870. Legislation in 1871 provided that, once 15 lawyers had been admitted by the courts to practise in Manitoba, they could form themselves into a "Bar Society" and make rules regulating admission, but such rules required the approval of Cabinet to take effect. Such a Bar Society was formed in December 1871, and its first rules were approved by Cabinet in 1872.[257] That requirement for Cabinet approval, maintained until 1877,[258] derogates from absolute lawyer

[257] Girard Report #1 at paras. 13, 16; *Act to regulate the admission to the Study and Practice of Law in the Province of Manitoba*, S.M. 1871, c. 10, ss. 4-5.
[258] *Act to regulate the admission to the Study and Practice of Law in the Province of Manitoba,* S.M. 1871, c. 10, s. 4; *An Act Respecting the Study and Practice of Law,* S.M. 1877, c. 14.

independence. Moreover, the Law Society of Manitoba (as the Bar Society was renamed in 1877) was not given disciplinary authority until 1915.[259] That is, Manitoba lawyers were not self-regulating in respect of discipline until almost half a century after Manitoba joined Confederation.

230. The **Northwest Territories** joined Canada on July 15, 1870. Lawyers were not given any self-regulatory authority until almost 30 years later, in 1898.[260] Self-regulation lasted only seven years, as the Law Society of the Northwest Territories disbanded in 1905. The Law Society's written submissions[261] do not refer to the period between 1938 and 1976, when lawyers were primarily regulated by the executive.[262] It was only in 1976 that elected lawyers were once again given the power to regulate the legal profession.[263]

231. When **British Columbia** joined Canada on July 20, 1871, the judiciary, legislature, and executive each had a role in regulating lawyers. The criteria for admittance as a barrister or attorney were prescribed by legislation.[264] Admittance and discipline were the responsibility of this Court.[265] The Governor also had the power to strike attorneys (although not barristers) from the roll.[266]

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[259] *An Act to amend " The Law Society Act"*, S.M. 1915, c. 37, s. 9. Previously, the Law Society of Manitoba could merely bring applications to the court and invite the court to exercise its disciplinary authority: Girard Report #1 at para. 27.
[260] *The Legal Profession Ordinance*, O.N.W.T. 1898, No. 21.
[261] Law Society written submissions at para. 277.
[262] From 1938-1976 Northwest Territories, lawyers were primarily regulated by the executive power. Some regulatory functions were delegated to the courts: *The Legal Profession Ordinance*, O.N.W.T. 1938, s. 2.
[263] *Legal Profession Ordinance,* R.N.O.W.T., 1976, 2nd sess. c. 4 [***1976 Northwest Territories***].
[264] Girard Report #1 at para. 6; *An Ordinance respecting the Legal Profession, 1867*, S.B.C. 1867, c. 20, s. 2, adopting Mainland *Legal Professions Act, 1863*, Proclamation No. 8 of Governor Douglas. Sections I to IV of the *Legal Professions Act, 1863* repealed much of the 1858 Order, including the admittance criteria it set, and prescribed different criteria.
[265] Girard Report #1 at paras. 6, 15; Order of the Court of British Columbia dated December 24, 1858 (the "**1858 Order**"), s. XI ("All persons on either roll of Attorneys shall be subject to the authority of the Court, in the same manner as Attorneys and Solicitors are to the authority of the Superior Courts of Westminster").
[266] *Ordinance respecting the Legal Profession 1867*, s. IV, adopting 1858 Order, s. XI ("Any person, on either roll of Attorneys, shall be subject to removal at any time, by the direction of His Excellency the Governor for the time being").

232. An association called the Law Society of British Columbia existed in 1871, having been founded by 14 members of the colonial elite in 1869, but it was a voluntary association with no regulatory authority. Its founding objectives included the "furtherance and protection of the interests of the Legal Profession" and a goal of trying to take control of the admission (of barristers and attorneys of this Court) from Judge Begbie, presumably to entrench their privileged position.[267] A longtime secretary of the Law Society, later its historian, says it was "really a club within the Profession" in this period.[268] The original 1869 rules include a provision empowering members to "black ball" (veto) new proposed members in the manner of an English gentlemen's club.[269]

233. The Law Society claims its unincorporated predecessor was "recognized as the regulator of the legal profession" in 1873,[270] but that is not accurate. The only authority conferred on the unincorporated Law Society in 1873 was the authority to make rules, subject to the approval of the judges of this Court, regarding the use of the law library located in the Court.[271]

234. In 1874, the legislature created an Incorporated Law Society of British Columbia and gave it considerable regulatory authority. The Law Society controlled admission of candidates who had been trained in BC and wished to practice in this Court. However, qualified lawyers from other jurisdictions could be admitted by the Court and, once admitted by the Court, would automatically become members of the Law Society. The 1874 legislation also granted the Law Society ostensibly exclusive disciplinary authority over its members (i.e., to the exclusion of the Court), which was unprecedented in Canada. However, there was no requirement to be a barrister or attorney to practise in inferior courts and many qualified lawyers took advantage of this exception to practise law

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[267] Greenberg #4, Ex. 1 at p. 2.
[268] See Watts, "History of the Law Society, Discipline Part 1" (1970) 28:6 Advocate 305 at p. 306.
[269] Transcription of the meeting minutes of the Law Society of British Columbia on July 22, 1869 at rule 9 (Greenberg #3, Ex 9 at p. 122).
[270] Law Society written submissions at para. 163.
[271] *An Act to enable Attorneys of the Supreme Court of British Columbia to be called to the Bar of the said Court*, S.B.C. 1873, c. 37, s. 5.

in British Columbia without having to pay fees to, or be subject to the authority of, the Law Society.[272]

235. Three years later, in 1877, the legislature reinstated this Court's authority to disbar lawyers, such that the Law Society's disciplinary authority over its members was no longer exclusive.[273] In 1884, the legislature curtailed the Law Society's authority over admission by prescribing detailed admission criteria (although the Law Society retained the power to make rules for examinations and related matters).[274]

236. **Prince Edward Island** joined Canada on July 1, 1873. The Law Society of PEI was granted authority over admission in 1876 with some supervision by judges.[275] Almost half a century later, in 1930, the Law Society of PEI was granted the authority to disbar for misconduct and make rules without needing judicial approval.[276] The Law Society's submissions on PEI are inaccurate, perhaps because of copy-paste errors: it says "the legislation governing the regulation of lawyers has never provided that rules made by Council would be subject to consultation with or approval by Alberta's [*sic*] provincial government, such as the LGIC, or any other organization or body (other than the members of the LSPEI as a collective)".[277] In fact, the Law Society of PEI needed the approval of the judges to make rules for half a century from its founding in 1876 to 1930.[278] Also omitted from the Law Society's submissions is the fact that from 1930 to 2022, Cabinet could make regulations for the examination and certificates of notaries public.[279]

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[272] *Act respecting the Legal Professions*, S.B.C. 1874, c. 18, s. 7(d), 10; Girard Report #1 at paras. 8, 10, 15, 25.
[273] *An Act to consolidate the Laws relating to the Legal Professions in this Province*, R.S.B.C. 1877, c. 136, s. 7.
[274] *Legal Professions Act*, S.B.C. 1884, c. 18, ss. 32(4), 32(5), 33, 34, 43, 54.
[275] *An Act to Incorporate* a *Law Society,* S.P.E.I. 1876, c. 24, s. 5 [***P.E.I. 1876***]. For students at law, the Law Society's bylaw power over examinations and admission needed to be approved by two judges (s. 16).
[276] *P.E.I. 1876*; *The Legal Profession Act, 1930,* S.P.E.I. 1930, c. 14, ss. 48-55 [***P.E.I. 1930***].
[277] Law Society written submissions at para. 268.
[278] *P.E.I. 1876*, ss. 9, 16.
[279] *P.E.I., 1930,* ss. 61-62; *Legal Profession Act,* R.S.P.E.I. 1988, c. L-6.1 [***P.E.I. Act***], ss. 52-53, repealed by 2022, c. 82, s. 28.

237. **Yukon** joined Canada on June 13, 1898, but only implemented a system of lawyer self-regulation 86 years later, in 1984.[280] While the Law Society's submissions say that until 1984 lawyers were regulated by the Supreme Court,[281] this is misleading as it omits the role government played in regulating lawyers along with the courts. For example, under the 1902 version of the *Legal Profession Ordinance:* it was the Territorial Secretary that prepared and kept the Barristers' and Solicitors' roll (s. 2), articles had to be filed with the Territorial Secretary (s. 4), annual fees were paid to the Territorial Treasurer (s. 11), and the Commissioner handled exams for admissions (s. 13).[282]

238. The Law Society also says Yukon's legislation "has never granted the provincial government or any other body the power to make rules or regulations of any kind, including for the governance of lawyers or the practice of law",[283] but that statement is susceptible to misinterpretation. From 1898 to 1984, the reason that legislation (mostly)[284] did not empower "the provincial government or any other body to make rules or regulations" is *not* that lawyers made such rules; the reason is that the rules were set out in the legislation itself. That is not self-regulation. Moreover, as the Law Society acknowledges, from 1984 to 2017, Cabinet could annul any rules of the Law Society of Yukon that Cabinet considered to be contrary to the public interest.[285] (Yukon's Cabinet has had additional regulation-making powers from 2017 to present, which are described in a later subsection of these submissions.)

239. **Alberta** joined Canada in 1905, but the Law Society of Alberta was only formed in 1907. That was the year when elected lawyers were given meaningful control of admission to the profession.[286] It was only in 1922 that the Law Society of Alberta was given

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[280] *The Legal Profession Ordinance*, O.Y.T. 1914, c. 15; *Legal Profession Act,* S.Y.T 1984, c. 17 [***Yukon 1984***].
[281] Law Society written submissions at paras. 54, 93.
[282] *The Legal Profession Ordinance,* C.O.Y.T. 1902, c. 47 [***Yukon 1902***].
[283] Law Society written submissions at para. 273.
[284] The legislation empowered the judges to prescribe the content of exams for entry into articles and admission: see e.g. *Yukon 1902,* s. 12.
[285] *Yukon 1984*, s. 8(3); *Yukon Act*.
[286] *Legal Profession Act,* S.A. 1907, c. 20, ss. 34-35 [***Alberta 1907***]. However, judges of the Supreme Court of Alberta were visitors until 1966, and their approval was required for certain rules and bylaws.

meaningful control over lawyer discipline,[287] although courts remained the first instance disciplinary authority until 1942.[288] Until 1928, the Law Society of Alberta required approval by a majority of its visitors (who were Supreme Court judges) to make rules and regulations about member fees.[289] Until 1966, the Law Society of Alberta required approval by visitors for bylaws about borrowing and debentures.[290]

240. **Saskatchewan** joined Canada in 1905, but the Law Society of Saskatchewan only received authority over admission in 1907[291] and was not given full disciplinary authority until 1923.[292]

241. **Nunavut** joined Canada in 1999. Until 2017, the statutory framework required changes to the rules and bylaws to be reviewed by the Registrar of Regulations, who was to review for issues including consistency with the *Charter* and to ensure that the regulation did not constitute an "unusual or unexpected" use of the regulator's authority.[293] According to Hansard from the amendment removing this requirement, the requirement was not followed in practice.[294]

242. This history confirms that absolute lawyer independence is not an unwritten constitutional principle. None of the provinces or territories joining Canada after Confederation satisfied absolute lawyer independence when they joined. Authority over admission was often delegated to law societies fairly quickly, but was sometimes subject to judicial or Cabinet oversight. Authority over discipline usually was not delegated until later, sometimes many decades later. In every jurisdiction, there were legislative criteria that derogated from the Law Society's absolute definition of self-regulation as freedom from all external influence. Again, the Law Society's conception of absolute independence

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[287] *Alberta 1907*; *Legal Profession Act,* R.S.A. 1922, c. 206*,* ss. 51-58 [***Alberta 1922***]; Law Society written submissions at para. 199.
[288] *Alberta* 1922, s. 51; *Legal Profession Act,* R.S.A. 1942, c. 294, s. 32.
[289] *Alberta 1907*, s. 32(3)-(4); *The Legal Professions Act Amendment Act, 1928*, 1929 S.A., c. 19, s. 3.
[290] *Alberta 1907*, s. 40; *Legal Profession Act*, S.A. 1966, c. 46.
[291] *The Legal Profession Act,* S.S. 1907, c. 19, s. 35(2).
[292] *An Act to amend the Legal Profession Act,* S.S. 1923, c. 49, s. 49.
[293] *Statutory Instruments Act,* R.S.N.W.T. (Nu) 1988, c. S-13, s. 2.
[294] Affidavit #1 of Nalini Vaddapalli, made March 31, 2025*,* Ex. I, p. 350.

is not grounded in history. It does not support the view that the Constitution's drafters would have considered absolute lawyer independence to be "obvious".

243. Although the Law Society is now independent from government, in the decades after British Columbia joined Confederation in 1871, and indeed well into the 20th century, there was considerable overlap between Cabinet and the elected benchers. This overlap and lack of de facto independence is inconsistent with an unwritten constitutional principle of absolute independence.

244. When British Columbia joined Confederation and gained responsible government, its first Premier was John McCreight, who acted as his own Attorney General.[295] McCreight was one of the original benchers of the Law Society, elected on founding in 1869, and remained a bencher until his appointment to the bench in 1880.[296] That is, he was an elected bencher the entire time he was Premier. Among the persons he named to his Cabinet in 1871 were George Walkem and Alexander Rocke Robertson, who may have been benchers at the time: we know they were elected or re-elected as benchers in March 1874,[297] but there appear to be no surviving Law Society meeting minutes dated between 1869 and 1874. If Walkem and Rocke Robertson were benchers in 1871, benchers constituted 75% of the first Cabinet of British Columbia and members of that Cabinet constituted 60% of the benchers. McCreight resigned as Premier in December 1872,[298] before becoming Treasurer of the Law Society in 1874.[299]

245. Of the next eight Premiers, three were elected benchers for some or all of the time they were Premier:

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[295] British Columbia Legislative Library, *Executive Council Appointments, 1871 – 1986* [***Executive Council Appointments***] at p. 16.
[296] Greenberg #4 at pp. 4, 10, 40. It is not clear if the Law Society used the term "bencher" in 1869. The 1869 minutes refer to an elected "Council". The first use of the term "bencher" in evidence is 1874: Greenberg #1 at p. 10.
[297] Greenberg #4 at p. 10.
[298] *Executive Council Appointments* at p. 16.
[299] Greenberg #3, Ex. 39 at p. 1030.

a. George Walkem was an elected bencher and sometimes referred to as "President" of the Law Society for roughly half the time he was Premier and Attorney General from February 1874 to January 1876;[300]

b. Andrew Elliott was an elected bencher for roughly half the time he was Premier and Attorney General from March 1876 to March 1881;[301] and,

c. Theodore Davie was an elected bencher for most of the time he was Premier and Attorney General from July 1892 to March 1895.[302]

246. All of the first seven Attorneys General were elected benchers, and in one case Treasurer, for some or all of the time they were Attorney General:

a. McCreight, Walkem, and Elliott, noted above;

b. J. Roland Hett was the Treasurer the entire time he was Attorney General from June 1882 to January 1883;[303]

c. Alexander Davie was an elected bencher for part of the time he was Attorney General from January 1883 to August 1889;[304]

d. Theodore Davie, noted above; and,

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[300] *Executive Council Appointments* at p. 18. Walkem was an elected bencher from March 1874 (possibly earlier, as noted above) to March 1875: Greenberg #4 at pp. 10, 70. The reference to Walkem as "President" of the Law Society is on p. 70 of Greenberg #4 in a meeting from December 1875. McCreight was Treasurer at that time. It may be that "President" was a courtesy title, given that Walkem was Premier at the time, or it may be that the Treasurer was originally just the treasurer, i.e., the person who handled the Law Society's finances.
[301] *Executive Council Appointments* at p. 19. Elliott was an elected bencher from February 1876 to June 1878: Greenberg #4 at pp. 21, 26, 31, 47.
[302] *Executive Council Appointments* at p. 24. Theodore Davie was an elected bencher from March 1884 to March 1894: Greenberg #4 at pp. 76, 78, 83, 84, 85, 94, 103, 115, 117, 118.
[303] *Executive Council Appointments* at p. 21. Hett was an elected bencher from March 1880 to March 1887 and Treasurer from 1880 to 1884: Greenberg #4 at pp. 40, 71, 74, 75, 84; Greenberg #3, Ex. 39 at p. 1030.
[304] *Executive Council Appointments* at p. 22, 23. Alexander Davie was an elected bencher from March 1874 to March 1885: Greenberg #4 at pp. 10, 17, 21, 26, 71, 75, 77, 78.

e. David Eberts was an elected bencher for the entire time he was Attorney General from March 1895 to August 1898.[305]

247. A number of other Cabinet ministers in early BC were elected benchers, and sometimes Treasurer, for at least part of the time they were Cabinet ministers. Two notable examples are as follows:

a. Montague Tyrwhitt-Drake, who was an elected bencher the entire time, and Treasurer for part of the time, that he was President of the Executive Council from January 1883 to December 1884;[306] and,

b. Charles Pooley, who was Treasurer the entire nine years he was President of the Executive Council from August 1889 to August 1898.[307]

248. We have not attempted to trace this overlap exhaustively past 1900, but there are some notable examples well into the 20th century. For example, Royal Maitland was both Treasurer and Attorney General from 1942 to 1944.[308]

249. Alfred Watts, KC, secretary of the Law Society for 20 years and later its historian, remarked of the tendency for the Attorney General and Treasurer to be the same person that "the wearing of two hats by the Honourable Gentlemen through the years has contributed much, which would otherwise have been lost, to the administration of justice in this province".[309]

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[305] *Executive Council Appointments* at p. 26. Eberts was an elected bencher from March 1884 to at least 1900: Greenberg #4 at pp. 76, 78, 83, 84, 85, 103, 106, 115, 118, 124, 258, 270.
[306] *Executive Council Appointments* at p. 22. Tyrwhitt-Drake was an elected bencher from founding in 1869 to March 1889 and Treasurer from March 1884 to March 1889: Greenberg #4 at pp. 4, 10, 17, 21, 26, 29, 37, 48, 71, 74, 77, 78, 83, 84, 85, 92; Greenberg #3, Ex. 39 at p. 1030.
[307] *Executive Council Appointments* at pp. 24-26. Pooley was an elected bencher from March 1884 to 1912 and Treasurer from 1892 to 1894 and 1897 to 1912: Greenberg #4 at pp. 76, 78, 83, 84, 85, 94, 100, 106, 115, 118, 124, 134, 171, 237, 258, 270; Greenberg #3, Ex. 39 at p. 1030.
[308] *Executive Council Appointments* at p. 52; Greenberg #3, Ex. 39 at p. 1030.
[309] Watts, "History of the Law Society" (1973) 31 Advocate 91 at p. 95.

IV. **No Canadian jurisdiction has absolute lawyer independence**

250. The Law Society asserts that the following features of the *Act* are incompatible with absolute lawyer independence:

a. Having a regulator that is not governed by a "strong majority of lawyers elected by lawyers".[310]

b. Lacking a broad mandate to "uphold and protect the public interest in the administration of justice" including by "preserving and protecting the rights and freedoms of all persons".[311]

c. Giving bodies other than the Law Society the power to approve the code, rules, regulations, or bylaws for the practice of law, or allowing bodies other than the Law Society to create them.[312]

d. Giving government the power to pass regulations creating new classes of legal professions.[313]

e. Including statutory definitions of certain disciplinary terms like conduct unbecoming, incompetence, or professional misconduct.[314]

251. As described in the next section, even in British Columbia lawyers have never been self-regulating in the absolute sense of being free from all external influence. But when it comes to the features of the *Act* listed above, the Law Society cannot argue that these features eliminate lawyer independence in British Columbia, while also asserting that Canadian jurisdictions that embrace the same features maintain lawyer independence.[315]

252. At paragraphs 194-289 of its submissions, the Law Society provides a partial and at times inaccurate interjurisdictional summary of the current regulatory schemes in

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[310] Law Society written submissions at paras. 54, 93.
[311] Law Society written submissions at paras. 49(a)-(b), 371-374 ,375.
[312] Law Society written submissions at paras. 49(f), 170, 295(c), 304, 396-401, 403, 411(d).
[313] Law Society written submissions at paras. 435-440.
[314] Law Society written submissions at paras. 49(h), 320, 327, 445(a).
[315] Law Society written submissions at para. 193.

Canada. The Law Society starts that summary by asserting that absolute lawyer independence "has existed and still exists in every province and territory in Canada".[316]

253. However, a more exhaustive interjurisdictional review reveals that all other Canadian jurisdictions share some of the features of the *Act* that the Law Society argues are unconstitutional. In many cases, the provisions in those jurisdictions have gone well beyond what the *Act* does.

254. This shows that:

a. there is nothing novel or unique about the impugned provisions of the *Act*;

b. absolute lawyer independence as conceived by the Law Society is at odds with the current understanding of lawyer independence in Canada;

c. by the Law Society's own admission, there is more than one way to regulate the legal profession while maintaining the independence of lawyers; and

d. the Law Society's arguments seek to enshrine provisions of the Current Act based on purported constitutional requirements that are not followed anywhere else in Canada.

(a) Canadian jurisdictions with alternative governance models

255. Long after joining confederation, Québec and Manitoba adopted alternative governance models that today remain at odds with the Law Society's conception of self-governance and absolute lawyer independence.

256. **Québec** adopted a co-regulatory model in 1973. In Québec, lawyers are regulated by the Office des professions du Québec, the Interprofessional Council, and the Barreau du Québec,[317] with the National Assembly (Cabinet) of Québec also playing an important role. The Office des professions has seven members, all appointed by Cabinet.[318] The

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[316] Law Society written submissions at para. 193.
[317] Expert report of Jakub Adamski dated May 13, 2025 ("**Adamski Report**") at p. 5.
[318] *Professional Code,* C.Q.L.R. c. C-26, s. 4 [***Québec Professional Code***].

Barreau is required to nominate a "syndic", who investigates and brings complaints of misconduct against lawyers independently of the Barreau.[319]

257. **Manitoba** did away with the LSM's majority of elected lawyers in 2015. In Manitoba, only 12 of the 25 benchers are lawyers elected by lawyers.[320]

(b) Canadian jurisdictions with narrower statutory mandates than the Law Society's mandate

258. The Law Society argues that one of the features of the *Act* that ends self-regulation and self-governance is changing the Law Society's broad statutory mandate found in s. 3 of the Current Act. Specifically, the Law Society takes issue with the fact that:

> Bill 21 no longer provides that the object and duty of the society is to uphold and protect the public interest in the administration of justice by, among other things, preserving and protecting the rights and freedoms of all persons.[321]

259. The only jurisdiction in Canada with similar language is New Brunswick, which introduced a similar mandate in 1996.[322]

260. Yukon's statute had similar language between 2004 and 2017, but it was removed as a part of a larger reform. Notably, in 2011, when the broad mandate was in place, the Law Society of Yukon requested it be changed saying that a mandate "should not be excessively broad so as to exceed the Society's resources and capabilities" and conceding that it "[did] not believe it [was] possible for it to 'preserve and protect the rights and freedoms of all persons'".[323]

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[319] *Québec Professional Code,* ss. 121-122; Adamski Report at p. 12.
[320] *Legal Professions Amendment Act,* S.M. 2015 c. 29, s. 3; *Manitoba Act*, s. 5.
[321] Law Society written submissions at paras. 49(a)-(b). See also paras. 371-374.
[322] *Barristers' Society Act*, S.N.B. 1973(1), c. 80 [***New Brunswick 1973***]; *New Brunswick Act*, s. 5(a)-(b).
[323] Affidavit #1 of Grant McDonald, KC made April 2, 2024 ("**McDonald #1"**), Ex. N at p. 651-652.

(c) Canadian jurisdictions where external bodies have a role in the creation of the code, rules, regulations, and bylaws for the practice of law

261. The Law Society argues that self-regulation and absolute lawyer independence are incompatible with:

a. "[a] statutory requirement for the approval of rules that govern lawyers by any body other than a majority-elected board";[324] and

b. giving Cabinet the power to pass regulations regarding the practice of law.[325]

262. In particular, the Law Society takes issue with the *Act* giving a role to the transitional Indigenous council, the Indigenous council, and Cabinet in the creation of the rules or regulations under the *Act*.[326]

263. The Law Society's submissions attempt to paint these features of the *Act* as novel or unique. In summarizing the history of lawyer regulation in other Canadian jurisdictions, the Law Society repeatedly (and often mistakenly) asserts that in those jurisdictions the legislation governing lawyers:

a. has never provided that rules made by the elected lawyers would be subject to consultation or approval by any external body; and

b. has never granted government the power to make rules or regulations of any kind.[327]

264. As set out in greater detail below, the reality is that there is nothing novel or unique about these features of the *Act*. In nine Canadian jurisdictions the statutes governing lawyers include a role for external bodies in the creation of the regulations and rules about the practice of law.

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[324] Law Society written submissions at para. 401.
[325] Law Society written submissions at para. 170.
[326] Law Society written submissions at paras. 49(f), 170, 295(c), 304, 396-401, 403, 411(d).
[327] See for example Law Society written submissions paras. 202-204 (Alberta), 210 (Saskatchewan), 219 (Manitoba), 248 (Newfoundland), 255 (New Brunswick), 262 (Nova Scotia), 268 (PEI), 273 (Yukon), 282 (Northwest Territories).

265. In **Alberta**, since 1999, the Law Society of Alberta has needed Cabinet approval for rules regarding liability insurance for limited liability partnerships, and Cabinet can make its own regulations if the benchers do not follow the Minister's request to amend where the Minister believes the benchers' rules provide insufficient protection.[328]

266. In **Manitoba**, in 1989 the legislature gave Cabinet the power to make rules about agents acting in highway traffic matters.[329] That power remains with Cabinet today.[330] This fact is missing from the Law Society's submissions.[331]

267. In **New Brunswick,** since 1996, the statute has required Cabinet to approve rules about the taxation of lawyer fees.[332] This fact is missing from the Law Society's submissions.[333]

268. In the **Northwest Territories**, since self-regulation was reintroduced in 1976, the legislation has always required that changes to the rules and bylaws be examined by the Registrar of Regulations, which must review for various factors including consistency with UNDRIP.[334] This requirement will be removed once the Northwest Territories new *Legal Profession Act* comes into force.[335] This fact is missing from the Law Society's submissions.[336]

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[328] *Legal Profession Act*, R.S.A. 1980, c. L-9; *Legal Profession Act,* R.S.A. 2000, c. L-8, s. 8(2)-(4) [*Alberta Legal Profession Act*].
[329] *The Law Society Amendment Act (2),* S.M. 1989-90, c. 35, s. 2.
[330] *Manitoba Act*, s. 42.
[331] The Law Society written submissions at para. 219 inaccurately assert that in Manitoba since 1877: "the legislation has never granted the provincial government or any other body the power to make rules or regulations of any kind, including for the governance of lawyers or the practice of law".
[332] *New Brunswick 1973*; *New Brunswick Act*, s. 17(8).
[333] The Law Society written submissions at para. 255 inaccurately assert that in New Brunswick: "since 1846, the legislation governing the regulation of lawyers has never provided that rules made by the Council would be subject to consultation with or approval by New Brunswick's provincial government, such as the LGIC, or any other organization or body".
[334] *Northwest Territories 1976*; *Statutory Instruments Act*, R.S.N.W.T. 1988, c. S-13, s. 2. Affidavit #1 of Jessica Copple made March 24, 2025, Ex. S, pp. 539.
[335] *Legal Profession Act,* SNWT 2023, c. 28, ss. 55(3), 67(3).
[336] The Law Society written submissions at para. 282 inaccurately assert that in Northwest Territories: "in the years for which a law society has existed in the territory, its governing legislation has never provided that rules made by the Executive would be subject to consultation with or approval by the Northwest Territory's government, such as the LGIC, or any other organization or body (other than the members of the LSNWT, as a collective)".

269. In **Nova Scotia**, since 2004, Cabinet has had authority to pass various regulations about the practice of law,[337] including broad powers to make regulations respecting any matter it "considers necessary or advisable to carry out effectively the intent and purpose of [the] Act".[338] This fact is missing from the Law Society's submissions.[339]

270. In **Ontario**, at all times since confederation various rules and regulations for the practice of law have required and, in the case of regulations, continue to require Cabinet approval.[340]

271. In **Québec** , since 1973, rules or regulations proposed by the Barreau must be sent to the Office for examination, and submitted, with the Office's recommendation, to Cabinet to consider approval with or without amendment.[341]

272. In **Saskatchewan**, since 1948, the legislature has had the power to nullify any Law Society of Saskatchewan rules or amendments the legislature considers to be "beyond the powers delegated by the Legislature or in any way prejudicial to the public interest".[342]

273. In **Yukon**, regulation by elected lawyers only started in 1984.[343] From that date onwards, Cabinet has always had a role in the creation of rules and regulations. From

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[337] *Barristers and Solicitors' Act*, 1 R.S.N.S. 1989, c. 30; *Nova Scotia Act*, s. 71.
[338] *Nova Scotia Act*, s. 71(k). The same language is found in numerous other Nova Scotia statutes, including the statutes regulating other professions and commercial activities. See for example: *Pharmacy Act,* S.N.S. 2011, c. 11, s. 83(1)(j); *Securities Act,* S.N.S. 1996, c. 32; *Farm Machinery Dealers and Vendors Act,* S.N.S. 2003(1), c 3, s. 15(1)(d).
[339] The Law Society written submissions at para. 262 inaccurately assert that in Nova Scotia: "since 1899, the legislation has never granted the provincial government or any other body the power to make rules or regulations of any kind, including for the governance of lawyers or the practice of law".
[340] *Statute Revision Amendment Act, 1927,* S.O. 1927, c. 28, ss. 12-13; *Statute Law Amendment Act, 1934,* S.O. 1934, c. 54, ss. 3, 14, 19; *Act to consolidate and revise The Law Society Act,* S.O. 1970, c. 19, ss. 54-55; *Act to amend the Law Society Act,* S.O. 1998, c. 21, ss. 28-29; *Ontario Act*, s. 63(1)(13)-(14).
[341] *Québec Professional Code*, s. 95.
[342] *Saskatchewan Act*, s. 91(2). See *An Act to amend The Legal Profession Act*, S.S. 1948, c. 69 s. 87.
[343] *Yukon 1984*.

1984 to 2017, Cabinet had the power to annul rules contrary to the public interest.[344] Since 2017, Cabinet can make regulations creating new categories of legal professionals.[345]

(d) Canadian jurisdictions that allow Cabinet to create new professions by regulation

274. The Law Society also takes issue with the *Act* giving Cabinet the power to create new professions by regulation, which it describes as "a sword of Damocles above the head of the legal regulator".[346] Again, there is nothing unique or novel about this feature of the *Act*. Three other Canadian jurisdictions currently give Cabinet similar powers.

275. In **Québec** , Cabinet has been able to create new classes of legal professions by regulation since 1973.[347]

276. In **Yukon**, Cabinet has been able to create new classes of legal professions by regulation since 2017.[348]

277. In **Nova Scotia**, Cabinet can pass regulations permitting classes of persons to practice law if Cabinet "considers the carrying on of the activities to be necessary or advisable for the purposes of the government of the Province" since 2004.[349]

(e) Canadian jurisdictions that define conduct unbecoming, incompetence, or professional misconduct

278. Another feature of the *Act* that the Law Society argues undermines self-regulation and absolute lawyer independence is that the *Act* defines disciplinary terms, such as conduct unbecoming, incompetence, or professional misconduct.[350] This feature of the *Act* is shared with the statutes currently governing five other Canadian jurisdictions, where definitions for similar terms were added over the last 50 years.

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[344] *Yukon 1984*, s. 8(3); repealed by S.Y. 2017, c. 12.
[345] *Legal Profession Act*, R.S.Y. 2002, c. 134; *Yukon Act*, s. 19.
[346] Law Society written submissions at paras. 435-440.
[347] *Québec Professional Code*, s. 27.
[348] *Yukon Act*, s. 19.
[349] *Barristers and Solicitors' Act*, R.S.N.S. 1989, c. 30; *Nova Scotia Act*, ss. 16(4)(m), 71(1)(h).
[350] Law Society written submissions at paras. 49(h), 320, 327, 445(a).

279. The **New Brunswick** statute has defined "conduct deserving sanction" and "incompetence" since 1996.[351]

280. The **Northwest Territories** statute has defined "conduct unbecoming" since 1976[352] and "unprofessional conduct" since 2008.[353]

281. The **Prince Edward Island** statute has defined "unprofessional conduct" and "misconduct" since 1992.[354]

282. The **Saskatchewan** statute has defined "conduct unbecoming" since 1990,[355] and "competence" since 2010.[356]

283. The **Yukon** statute has defined "conduct unbecoming a member", "professional misconduct", and "incompetence" since 2017.[357]

V. Lawyers have never been self-regulating in the absolute sense of being free from all external influence

(a) Overview

284. Lawyers have never been "free of influence by public authorities (or any other source)", as the Law Society submits is required for self-regulation and lawyer independence. Although lawyer self-regulation is often described in absolute terms, as though the profession is completely autonomous of all external controls, lawyers are subject to all kinds of influence, standards, and oversight from sources outside the profession.

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[351] *New Brunswick 1973*; *The Law Society Act,* S.N.B. 1996, c. 89, s. 38.
[352] *Legal Profession Act,* R.S.N.W.T. 1988, c. L-2, s. 22 [***NWT 1988***].
[353] *An Act to Amend the Legal Profession Act,* S.N.W.T. 2008, c.17, s. 5; both unprofessional conduct and conduct unbecoming are defined as "sanctionable conduct" in *Legal Profession Act*, SNWT 2023, c. 28, s. 31.
[354] *P.E.I. Act*, s. 37.
[355] *The Legal Profession Act*, R.S.S. 1978, c. L-10; *Saskatchewan Act*, s. 2.
[356] *The Legal Profession Amendment Act, 2010*, S.S. 2010, c. 17, s. 3; *Saskatchewan Act*, s. 2.
[357] *Yukon Act*, s. 49.

285. As the following examples demonstrate, the Law Society's absolute conception overshoots the function or purpose of lawyer independence. Many of the CBA's submissions have the same problem.

286. The function or purpose of lawyer independence is not to benefit lawyers, but to ensure that members of the public have access to independent legal advice and zealous advocacy from lawyers. The point the Law Society and CBA overlook is that most external influence, standards, and oversight of lawyers and law societies do not adversely affect the advice or advocacy that members of the public may receive from lawyers, and for that reason have never been understood to diminish lawyers' independence.

(b) **External influence on, and regulation of, lawyers**

287. The *Criminal Code* constrains how lawyers may act on behalf of clients.[358] Human rights legislation regulates lawyers' relationships with clients and prospective clients. Human rights tribunals have jurisdiction to adjudicate complaints that a lawyer has discriminated against a client or prospective client.[359] Lawyers are also subject to the jurisdiction of securities commissions, which may discipline lawyers for misconduct committed while acting for clients in securities investigations and proceedings. The courts of Ontario have held that securities commissions' jurisdiction over lawyers does not erode lawyer independence because it does not constitute improper interference with lawyers' advice or advocacy:

> The proposed proceeding against [the lawyer] does not represent an encroachment on the independence of the bar. It is noteworthy that the applicants and the intervenor take the position that the allegation against [the lawyer] could properly be before the courts—for example, through invoking the procedures in ss. 122 and 128 of the Act. They argue that the OSC [i.e., the Ontario Securities Commission], in contrast, is insufficiently independent to hear [the lawyer]'s case. This argument ignores the fact that the OSC acts as a quasi-judicial tribunal in conducting its enforcement proceedings. Such proceedings do not constitute state interference in the independence of the bar "in the political sense", as suggested by the

[358] For a helpful example, see Giles, "Independence of the Bar" (2001) 59:4 Advocate 549 at p. 551, where Giles describes Parliament effectively requiring the lawyer to provide specific advice to the client and prohibiting the lawyer from acting for the client except on certain conditions.
[359] *Williams (by Williams) v. Hertzberg*, 2024 BCHRT 310 at para. 5.

> applicants and intervenor [quoting here from *Jabour*]. All that the Commission seeks to do here is to ensure that lawyers, among others, do not mislead the Commission, in the way that [the lawyer] is alleged to have done. This exercise of jurisdiction by the Commission will not interfere with the ability of lawyers who practise securities law to continue to provide excellent and vigorous representation to their clients.[360]

The Law Society has no answer to this Ontario authority, except perhaps to say that it was wrongly decided and should not be followed in BC.

288. The Current Act regulates aspects of the contractual relationship between lawyers and clients, including by prohibiting certain contingency fee agreements;[361] prohibiting lawyers from suing to collect on a bill until 30 days after the bill was delivered, a requirement which can be traced to English legislation of 1605;[362] and empowering the court to review lawyers' bills and decide what fees are appropriate.[363]

289. Most significantly, lawyers have always been regulated by the courts. In addition to the courts' oversight over the Law Society (canvassed in the next subsection), the courts directly regulate lawyers by deciding disqualification applications, applications for leave to withdraw, applications for costs against lawyers personally, and similar matters. To give just a few examples, *Neil* and *McKercher* created the "bright line" conflict of interest rule[364] and *Cunningham* held that criminal lawyers may not always withdraw for non-payment of fees in circumstances where withdrawal is permitted under law society codes of professional conduct. The Supreme Court of Canada in *Cunningham* unanimously rejected the submission, made by intervener law societies, that this undermines lawyer independence:

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[360] *Wilder v. Ontario Securities Commission*, 2000 CanLII 29062 (O.N.S.C.D.C.) at para. 24, aff'd 2001 CanLII 24072 (O.N.C.A.) at para. 29 ("these arguments [about lawyer independence] were fully and correctly dealt with in the reasons for judgment of Swinton J., writing for the Divisional Court. I cannot improve upon her analysis of these issues and for the reasons she gave, I would dismiss this aspect of the appeal").
[361] *Current Act*, s. 78(5) (voiding contingency fee agreements relating to child custody or access matters).
[362] *Current Act*, s. 69(5); *Act to reform the Multitudes and Misdemeanors of Attornies and Solicitors at Law*, 3 Ja. 1 (1605), c. 7 (Eng.)
[363] *Current Act*, ss. 70-74.
[364] *R. v. Neil*, 2002 SCC 70 [*Neil*]; *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39 [*McKercher*].

> Ms. Cunningham and the interveners [including two law societies] submit that court supervision over withdrawal threatens the independence of the bar. As I note above, lawyers are intimately involved in the administration of justice. I do not agree that an exceptional constraint on counsel, necessary to protect the integrity of the administration of justice, threatens counsel's independence. For instance, McLachlin J. in *Young v. Young*, [1993] 4 S.C.R. 3, at pp. 135-36, acknowledged that a court can award costs against counsel personally in rare cases where counsel acts in bad faith by encouraging abuse and delay of the court's process. There is no suggestion that this rare constraint has threatened the independence of the bar. Furthermore, court oversight of lawyer withdrawal has been the practice in Alberta at least since the decision in *C. (D.D.)* in 1996. There is no suggestion that this practice affects the independence of the Alberta bar. Finally, all law society rules recognize that an independent bar has obligations beyond those owed to clients. Lawyers must comply with their professional obligations to the administration of justice and the public; these obligations do not undermine counsel's independence[.][365]

290. The Law Society describes the *Code of Professional Conduct* as "an expression of the Benchers' views on the special ethical responsibility that comes with the lawyer's role" and "an integral part of independent self-regulation of lawyers in the public interest",[366] but that is only partially accurate. Much of the *Code* codifies judicially defined ethical standards, such as those created in *Neil*, *McKercher*, and *Cunningham*.[367] Judicially defined ethical standards are not the product of lawyer self-regulation; they are the product of judicial regulation. Judicially defined ethical standards cannot be modified or abrogated by law societies. They apply as a matter of common law regardless of whether law societies choose to codify them in codes of professional conduct.

(c) **External influence on, and regulation of, law societies**

291. Like lawyers, law societies are subject to various forms of external oversight, standards, and influence.

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[365] *R. v. Cunningham*, 2010 SCC 10 at para. 39 [*Cunningham*].
[366] Law Society written submissions at para. 295(d).
[367] See e.g. BC *Code of Professional Conduct*, ss. 3.4-1[1] (codifying *Neil* and *McKercher*), 3.7-3[2] (codifying *Cunningham*) (Greenberg #1, Ex. 2 at pp. 287, 319).

292. Beginning with influence, law societies are frequently (and quite properly) influenced by the perspectives of people who are not lawyers. Law societies do not exist in total isolation from the public they are meant to serve. For example, lay benchers have existed for decades. The late Gordon Turriff, KC, while President of the Law Society, said "we benefit immeasurably from the contributions that [lay benchers] make to the Society's work".[368] Lay benchers "help [lawyer benchers] to understand what the public interest requires and they remind [lawyer benchers] repeatedly that it is not necessary to answer every question by thinking like lawyers".[369] The Law Society has also been influenced by the Truth and Reconciliation Commission.[370]

293. Turning to oversight, law societies are subject to the jurisdiction of human rights tribunals. Just as human rights legislation applies to lawyers in the provision of legal services, human rights legislation applies to law societies in the exercise of its regulatory functions. Human rights tribunals have made decisions that require law societies to change aspects of their regulatory practices.[371]

294. In some provinces (Ontario and Manitoba), law societies are also subject to fair access to regulated professions legislation.[372] The Manitoba legislation, as an example, requires the LSM to ensure its registration practices comply with trade agreements Manitoba has entered into and to give notice to the Director of Fair Registration Practices if the LSM proposes to change its registration practices. The Director periodically reviews

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[368] Turriff, "Self-Governance as a Necessary Condition of Constitutionally Mandated Lawyer Independence in British Columbia" (Greenberg #1, Ex 22 at p. 646). See also Greenberg XFD at Q. 36, 42, 43 (agreeing that Mr. Turriff, KC was speaking on behalf of the Law Society and that the Law Society benefits immeasurably from lay benchers).
[369] Turriff, "Self-Governance" (Greenberg #1, Ex 22 at p. 646).
[370] See Law Society written submissions at para. 324 ("in response to the Truth and Reconciliation Commission, the Law Society determined that lawyer competence requires Indigenous intercultural training"); Law Society notice of civil claim, part 1 at para. 21 ("the Benchers unanimously acknowledged the findings of the Truth and Reconciliation Commission (the TRC) and committed to addressing all of the TRC calls to action that fall within the Law Society's mandate. Since that time, the Law Society has continued to work on developing a full and impactful response to the TRC calls to action").
[371] See e.g. *Gichuru v. Law Society of British Columbia (No. 4)*, 2009 BCHRT 360 (holding that the Law Society's application form for temporary articles discriminated on the basis of disability). The Law Society subsequently changed the form.
[372] *Fair Access to Regulated Professions and Compulsory Trades Act, 2006*, S.O. 2006, c. 31; *Fair Registration Practices in Regulated Professions Act*, C.C.S.M. c. F12.

the LSM's registration practices to assess whether its requirements "are necessary for, or relevant to, the practice of the profession" and otherwise comply with the Fair Registration Practices Code.[373] The evidence in these proceedings from the CEO of the LSM is that the LSM regards this legislation as "an improper infringement on the purposes and duties of the LSM" and "inconsistent with the necessity of the independence of lawyers from government control"; nonetheless, the LSM has been subject to the legislation for 18 years.[374]

295. Law societies are subject to the *Charter*. Rules made by law societies must conform to the *Charter*.[375] When making decisions that engage *Charter* values, law societies must proportionately balance those *Charter* values with their statutory mandate.[376]

296. Law societies are, of course, subject to the oversight of the courts. Decisions of the Law Society are subject to judicial review in this Court.[377] Decisions of the Law Society Tribunal are appealable to the Court of Appeal.[378] Appellate standards of review apply in such appeals, meaning the Court of Appeal does not show any deference to the Law Society Tribunal on questions of law.[379] When a court finds that the Law Society or Law Society Tribunal has erred, and the court substitutes the correct determination, that is not lawyer self-regulation. It is independent judicial regulation.

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[373] *Fair Registration Practices in Regulated Professions Act*, C.C.S.M. c. F12, ss. 4.1, 5(2), 15.
[374] Kosokowsky #2 at para. 25.
[375] See e.g. *A Lawyer v. The Law Society of British Columbia,* 2021 BCCA 437 ["*A Lawyer*"], aff'g 2021 BCSC 914 (assessing whether provisions of the *Law Society Rules* are consistent with s. 8 of the *Charter*).
[376] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at paras. 78-82 [*Trinity Western*].
[377] See e.g. *Samarakoone v. Law Society of British Columbia*, 2025 BCSC 492 (quashing a decision of the Law Society that a lawyer had breached two provisions of the *Law Society Rules*).
[378] *Current Act*, s. 58.
[379] See e.g. *Ahmadian v. Law Society of British Columbia*, 2023 BCCA 470 (holding the Law Society Tribunal had erred in law in holding that a lawyer had contravened a provision of the *Law Society Rules* and committed misappropriation).

(d) Law Society's absolute conception, if accepted, would radically change the status quo

297. The Law Society submits that lawyer independence requires the regulator of lawyers to be free from any and all external influence when making regulatory decisions.[380] This is how the Law Society defines self-regulation. However, as demonstrated by the examples given above, lawyers are not currently self-regulating in this absolute sense. The status quo is that law societies are constrained by the *Charter*, human rights legislation, fair access to regulated professions legislation (in some provinces), and judicial precedent (cases like *Neil*, *McKercher*, and *Cunningham* that set ethical standards, and decisions on judicial review or statutory appeal that interpret and apply concepts like professional misconduct).

298. If the Law Society is correct that the constitution requires lawyers to be self-regulating in the absolute sense of being "free of influence by public authorities (or any other source)", it follows that all of the external oversight, standards, and influence set out above are unconstitutional. To give some examples:

a. lawyers would have to be exempt from the *Criminal Code* and free to commit criminal offences on behalf of clients, unless law societies decide otherwise;

b. law societies would have to be exempt from human rights legislation and free to discriminate against lawyers, applicants, and members of the public, unless law societies decide otherwise; and,

c. the provisions of the *Law Society Rules* requiring lawyers to take the Indigenous intercultural course[381] would be unconstitutional, given that they were made "in response to the Truth and Reconciliation Commission".[382]

299. It also seems to follow from the Law Society's position, although this cannot be what the Law Society intends, that courts cannot decide disqualification applications,

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[380] See e.g. Law Society written submissions at para. 104(b).
[381] *Law Society Rules*, s. 3-28.1, 3-28.11, 3-28.2 (Greenberg #1, Ex. 2 at pp. 134-135).
[382] Law Society written submissions at para. 324.

applications for leave to withdraw, applications for costs against lawyers personally, or any other matter that would set an ethical standard for lawyers; and decisions of law societies and law society tribunals cannot be subject to judicial review of statutory appeal. Again, that cannot be what the Law Society intends, but it seems to follow from the absolute definition it gives of lawyer independence. Cases like *McKercher* result in ethical standards being set for lawyers by an entity other than a board "composed of a strong majority of lawyers elected by lawyers".

300. The Law Society cannot avoid these consequences by moderating its position and conceding that some forms of external oversight, standards, and influence are unproblematic. If the Law Society concedes that some forms of external influence are unproblematic, the Law Society has all but conceded the case, because it has not advanced any criterion for distinguishing between problematic and unproblematic external influence, nor has it made any submissions on how such a criterion might apply to the *Act*.

VI. **Jurisprudence, academic literature, and other sources do not support absolute conception of independence**

(a) **Overview**

301. The Law Society engages with the jurisprudence only superficially. It notes that courts have often remarked on the crucial role that independent lawyers play in the administration of justice, which is undeniable. However, when the jurisprudence is read in depth, it becomes apparent that courts have not understood lawyer independence in anything like the absolute terms the Law Society espouses. Moreover, although courts have endorsed the status quo regulatory model in the common law Canadian provinces, they have done so in the course of describing it as legislative policy choice that properly includes protective constraints from outside the profession and is open to legislatures to revise. The academic literature and other sources are to the same effect: lawyer independence is crucial, but lawyer independence is not, and should not be, absolute.

(b) ***Jabour***

302. Although the Law Society has often quoted a portion of a sentence from *Jabour* in support of its position (including in its notice of civil claim[383]), *Jabour* contradicts the Law Society's position in at least three respects. First, *Jabour* defines lawyer independence not as freedom from any and all external influence, but freedom from "state interference, in the political sense, with the delivery of services".[384] That is the traditional definition, the one the Attorney General is paraphrasing as freedom from improper interference with advice or advocacy on behalf of clients. Second, *Jabour* describes self-regulation as a legislative policy choice, not a requirement. Third, *Jabour* suggests that self-regulation is properly subject to protective constraints from outside the profession, meaning that such constraints do not contravene lawyer independence as defined in *Jabour*.

303. Jabour was a BC lawyer who published an advertisement for "legal services at prices middle income families can afford".[385] The Law Society found that this advertisement constituted conduct unbecoming and suspended him for six months. By modern standards that seems outrageous, but at this time (in the late 1970s and early 1980s) the Law Society did not yet have a clear public interest mandate.

304. Jabour commenced a proceeding in which he challenged, on various grounds, the Law Society's legal authority to regulate lawyer advertising. He also alerted federal competition authorities, who opened an investigation into whether the Law Society was committing offences under the *Combines Investigation Act* in prohibiting advertisements about price. The Law Society commenced a proceeding for a declaration that the *Combines Investigation Act* did not apply to it or alternatively was *ultra vires* Parliament. The proceedings were heard and decided together.

305. In interpreting *Jabour*, it is helpful to be aware of some features of Québec and Ontario legal professions legislation that existed when *Jabour* was decided. Québec had moved to the co-regulatory system described in greater detail later in these submissions.

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[383] Law Society notice of civil claim at para. 3.
[384] *Jabour* at pp. 335-336.
[385] The full advertisement is quoted in *Jabour* at pp. 318-319.

For present purposes, it is sufficient to note that the Barreau du Québec required (and still requires) the approval of the Office des professions and provincial Cabinet to make or amend rules, including the code of professional conduct. In Ontario in this time period, as noted above, the Law Society of Upper Canada also needed Cabinet approval to make rules on any topic engaging the public interest, including admission, conduct (including the code of professional conduct), and discipline.

306. The Court in *Jabour* ultimately concluded that the *Combines Investigation Act*, properly interpreted, did not apply to actions taken by the Law Society pursuant to its enabling legislation.[386] On the way to that conclusion, the Court commented on the self-regulatory model that provincial legislatures had chosen for lawyers, explaining its rationale and some of its benefits and disadvantages. In the course of that discussion, the Court said this:

> 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.[387]

307. The Law Society seizes on this passage but misinterprets it in two ways.

308. First, the definition of lawyer independence given here is much narrower than the Law Society's absolute conception. *Jabour* does not say anything about bencher elections being a component of independence. *Jabour* does not say lawyers and law societies must be "free of influence by public authorities (or any other source)", but rather that lawyers must be "free from state interference, in the political sense, with the delivery of services". That is the definition the Attorney General adopts, paraphrased as freedom from improper interference with advice or advocacy on behalf of clients.

309. The Law Society's second misinterpretation of *Jabour* arises from a failure to read the context of the statement quoted above. Immediately above it and again immediately

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[386] *Jabour* at pp. 356-359.
[387] *Jabour* at pp. 335-336.

below it, the Court describes self-regulation as a policy choice that is up to the legislatures and refers to protective constraints from outside the profession that mitigate the risks of self-regulation. This is the full passage:

> Different views may be held as to the effectiveness of the mode selected by the Legislature, but none of the parties here challenged the right of the province to enact the legislation. It is up to the Legislature to determine the administrative technique to be employed in the execution of the policy of its statutes. I see nothing in law pathological about the selection by the provincial Legislature here of an administrative agency drawn from the sector of the community to be regulated. Such a system offers some immediate advantages such as familiarity of the regulator with the field, expertise in the subject of the services in question, low cost to the taxpayer as the administrative agency must, by the statute, recover its own expenses without access to the tax revenues of the Province. On the other hand, to set out something of the other side of the coin, there is the problem of conflict of interest, an orientation favourable to the regulated, and the closed shop atmosphere. In some provinces some lay Benchers are appointed by the provincial governments; in other provinces the Attorney General is seized with the duty as an *ex officio* Bencher of safe-guarding the public interest; a right of appeal from decision affecting members is given to the Court; and the confirmation by the Provincial Executive, the Lieutenant Governor in Council, of all regulations adopted by the Society as a prerequisite to their validity. It is for the Legislature to weigh and determine all these matters and I see no constitutional consequences necessarily flowing from the regulatory mode adopted by the province in legislation validly enacted within its sovereign sphere as is the case here.
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> There are many reasons why a province might well turn its legislative action towards the regulation of members of the law profession. These members are officers of the provincially-organized courts; they are the object of public trust daily; the nature of the services they bring to the public makes the valuation of those services by the unskilled public difficult; the quality of service is the most sensitive area of service regulation and the quality of legal services is a matter difficult of judgment. 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. The uniqueness of position of the barrister and solicitor in

> the community may well have led the province to select self-administration as the mode for administrative control over the supply of legal services throughout the community. Having said all that, it must be remembered that the assignment of administrative control to the field of self-administration by the profession is subject to such important protective restraints as the taxation officer, the appeal to the courts from action by the Benchers, the presence of the Attorney General as an *ex officio* member of the Benchers and the legislative need of some or all of the authority granted to the Law Society. In any case this decision is for the province to make.[388]

310. Reading the entire passage, there can be no doubt the Law Society's position is contrary to *Jabour*. The Court does not suggest that any particular regulatory model is required to ensure lawyer independence, defined as freedom from state interference, in the political sense, with the delivery of legal services. To the contrary, the Court says the provinces have "select[ed] self-administration as the mode for administrative control", the verb "select" suggesting a freedom to make other selections. The Court describes self-regulation as carrying disadvantages ("the problem of conflict of interest, an orientation favourable to the regulated, and the closed shop atmosphere") and therefore properly subject to "important protective restraints", including requirements for law societies to obtain Cabinet approval for proposed rules. Overall, the Court says it is "for the Legislature to weigh and determine all these matters", again suggesting a freedom to make different policy choices so long as lawyers are free from interference, in the political sense, with their delivery of legal services.[389]

311. The Law Society makes no attempt to distinguish *Jabour*, or to engage with it in any detail. The Law Society offers only two brief submissions on *Jabour*.

312. The Law Society's first submission pertains to the Court's comment that "this decision [about how lawyers should be regulated] is for the province to make". The Law Society says the Court was "referring to the relationship between the province and the federal government, not the relationship between the province and the Bar".[390] This interpretation is implausible. The Court cannot have meant that lawyers control how they

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[388] *Jabour* at pp. 334-336.
[389] *Jabour* at pp. 334-336.
[390] Law Society written submissions at para. 110, n149.

are regulated: the statement that “this decision is for the province to make” comes after the Court has identified the disadvantages of self-regulation (“the problem of conflict of interest, an orientation favourable to the regulated, and the closed shop atmosphere”) and described the “important protective restraints” from outside the profession that legislatures have adopted to mitigate those disadvantages. The Court also says it is “for the Legislature”, i.e., not lawyers, “to weigh and determine all these matters”.

313. The Law Society’s second submission about *Jabour* is that, where the Court says the regulation of lawyers “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” (emphasis added), the Court intended for the underlined part of this phrase to constitute a legal test.[391] In other words, the Law Society says lawyers must be regulated with the model that is literally the most autonomous model that human ingenuity can imagine.

314. Again, this interpretation is not plausible. Immediately before this phrase, the Court referred to lay benchers appointed by the provincial government, the Attorney General as a bencher *ex officio*, rights of appeal from law society decisions to the courts, and the requirements that then existed in Ontario and Québec for proposed law society rules to be approved by Cabinet. It does not take much ingenuity to imagine a model that would be more autonomous: a model without these features. But the Court described these features positively, as “important protective restraints” that mitigate the risks of self-regulation. The Court obviously did not see these legislative features as constituting or enabling “state interference, in the political sense, with the delivery of services”.

(c) ***Federation***

315. *Federation* is significant for two reasons. First, it supports the Attorney General’s position that lawyer independence is constitutionally protected by specific principles of fundamental justice under s. 7 of the *Charter*. *Federation* suggests that defining specific principles of fundamental justice as and when the need arises, each principle identifying

[391] Law Society written submissions at para. 110.

a single dimension of lawyer independence, is the optimal constitutional methodology. That is the approach the Supreme Court of Canada took in *Federation*.

316. The second reason *Federation* is important is that it strongly suggests (although admittedly does not quite *decide*) that the Law Society's absolute conception of lawyer independence is too broad. The Court of Appeal had defined lawyer independence as requiring that lawyers be "free from incursions from any source, including from public authorities".[392] This is similar to the Law Society's position that lawyers must be "free of influence by public authorities (or any other source)", although the Law Society's conception is broader: "influence" is a broader concept than the Court of Appeal's "incursion".

317. Notably, although the Court of Appeal defined independence very broadly, it decided the case on narrower grounds. If lawyers must be "free from incursions from any source, including from public authorities", as the Court of Appeal said, one might have thought the impugned federal legislation was unconstitutional simply because it was legislation: it came from a public authority (Parliament), not the profession. But that is not what the Court of Appeal held. The Court of Appeal held that the impugned legislation put lawyers in a conflict between their duty of loyalty to their clients and their own interest in avoiding prosecution for non-compliance with the legislation.[393] Despite the broad definition, the focus of the analysis was on how the legislation would affect the advice and advocacy that members of the public would receive from lawyers. This is the approach the Attorney General submits is correct: the focus is on lawyers' role of providing independent legal advice and zealous advocacy to clients. Lawyer independence is undermined by improper interference with that advice or advocacy. The constitutional right at issue is that of the client.

318. Regarding the definition, although the Supreme Court of Canada did not expressly state that the Court of Appeal had erred, it said there was "considerable merit" to the

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[392] *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2013 BCCA 147 at para. 113 [*Federation* BCCA].
[393] *Federation* BCCA at paras. 122-123.

submission that the Court of Appeal had defined independence too broadly.[394] The Court then resolved the case on different grounds, by recognizing it as a principle of fundamental justice that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes.[395]

319. The Attorney General accepts that, in saying there was "considerable merit" to the submission that the Court of Appeal had defined independence too broadly, the Court did not decide the point. *Federation* is not strictly controlling as a matter of *stare decisis*. Nonetheless, the caution sounded in *Federation* about the Court of Appeal's definition is the kind of guidance that, although not strictly binding, is entitled to considerable weight by this Court.

320. The leading case on the authoritativeness of Supreme Court of Canada *obiter* is its decision in *Henry*. There is a spectrum between: (1) guidance that was intended to be authoritative; and (2) comments that may be helpful but are not binding:

> All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not "binding" in the sense the *Sellars* principle in its most exaggerated form would have it [i.e., that "whatever was said in a majority judgment of the Supreme Court of Canada was binding"].[396]

321. The guidance in *Federation* about the Court of Appeal's definition of independence, while not binding, is close to the binding end of the spectrum and should be afforded significant weight.

322. The Law Society says very little about *Federation*, noting only that the Court left open the question of whether self-regulation is constitutionally required.[397] The Law

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[394] *Federation* at para. 80.
[395] *Federation* at para. 84.
[396] *R. v. Henry*, 2005 SCC 76 at paras. 55, 57.
[397] Law Society written submissions at para. 85, citing *Federation* at para. 86.

Society has not engaged with the Court's comments about the Court of Appeal's definition, nor attempted to justify its even broader definition in light of *Federation*.

(d) ***LaBelle***

323. The Law Society cites some obiter in the Ontario Superior Court decision in *LaBelle*,[398] but omits to note that, on appeal, the Court of Appeal expressed "reservations" about the judge's reasoning on the point the Law Society cites.[399] The *obiter* in *LaBelle* was effectively overruled, and in any event, is demonstrably flawed. It should not be accorded any persuasive value.

324. *LaBelle* was a claim by a self-represented litigant, against the Attorney General for Ontario, arising from the plaintiff's dissatisfaction with the conduct of her lawyers in an earlier family proceeding. The claim was essentially that the Attorney General was liable for the allegedly deficient conduct of the plaintiff's lawyers because the Ontario *Law Society Act* provides that the Attorney General "shall serve as the guardian of the public interest in all matters within the scope of this Act or having to do with the legal profession in any way".

325. The Superior Court struck the claim against the Attorney General on the ground that "it has a radical defect, namely, the suggestion that the Attorney General for Ontario has the power to usurp the disciplinary regime set out in the provisions of the *Law Society Act*".[400] The Court also offered extended discussion, presumably without any submissions, to the effect that lawyer independence is a "constitutional convention" which limits the Attorney General's role as a bencher and entails that unelected benchers like the Attorney "should not be capable at any time to control the proceedings of Convocation, by outvoting those benchers who are elected by the members of the bar".[401]

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[398] Law Society written submissions at paras. 70, 82, 113.
[399] *LaBelle v. Law Society of Upper Canada*, 2001 CanLII 28255 (O.N.S.C.) [*LaBelle*], aff'd 2001 CanLII 5226 (O.N.C.A.) [*LaBelle CA*].
[400] *LaBelle* at para. 44.
[401] *LaBelle* at paras. 31-43.

326. The Court of Appeal for Ontario dismissed the appeal, i.e., it affirmed the order striking the claim. Appeals lie from the order, not the reasons.

327. The Court of Appeal expressed "reservations" about the judge's interpretation of the Attorney General's role as a bencher as set out in paragraphs 40-41 of the judge's reasons.[402] Paragraphs 40-41 of the lower court judge's reasons read as follows:

> [40] Thus, I read s. 13, which provides that the Attorney General serves as "the guardian of the public interest in all matters within the scope of this Act or having to do with the legal profession in any way", as being confined to the Attorney General's function as a bencher of the Law Society of Upper Canada, and as contemplating no other superincumbent [*sic*] power or duty. In the role of bencher, the Attorney General is bound to guard the public interest.
>
> [41] Any other reading of s. 13 would, in my view, not be in keeping with the traditional role of the legal profession enjoying independence from government. To import into the wording of s. 13 an overarching obligation on the part of the Attorney General to usurp the discipline function of the Law Society would destroy one of the hallmarks of a free and democratic society, namely, an independent bar.[403]

328. The Law Society does not cite these exact paragraphs (40-41); it cites paragraphs 36-38.[404] However, paragraphs 40-41 are the conclusion to the analysis in 36-39. The Court of Appeal's reservations about the conclusion in 40-41 must logically extend to the analysis in 36-39.

329. The Superior Court's *obiter* was not just rejected by the Court of Appeal but is also demonstrably flawed. The Court described lawyer independence as a "constitutional convention",[405] but constitutional conventions are not law; they are political norms and, accordingly, are not enforced or applied by the courts.[406] *LaBelle* does not cite any of the settled authority about constitutional conventions.

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[402] *LaBelle CA* at para. 4.
[403] *LaBelle* at paras. 40-41.
[404] Law Society written submissions at paras. 70, 82, 113.
[405] *LaBelle* at paras. 31, 36, 43.
[406] See e.g. *Patriation Reference* at p. 774-784 and the many cases cited there.

330. Incidentally, even in *LaBelle* the Court indicated "no one would argue that independence should exist in a vacuum",[407] which is precisely what the Law Society is arguing here. Self-regulation "free of influence by public authorities (or any other source)" is independence in a vacuum.

(e) ***Pearlman***

331. The Law Society cites *Pearlman* for the proposition that "the public interest in an independent Bar is a primary rationale for self-governance".[408] Yet, reading *Pearlman* in full, the Supreme Court of Canada clearly frames self-governance as a policy choice for the legislature to make:

> 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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> > In the government of the professions, both public and professional authorities have important roles to play. When the legislature decrees, by statute, that only licensed practitioners may carry on certain functions, it creates valuable rights. As the ultimate source of those rights, the legislature must remain ultimately responsible for the way in which they are conferred and exercised. Furthermore, the very decision to restrict the right to practise in a professional area implies that such a restriction is necessary to protect affected clients or third parties. The regulation of professional practice through the creation and the operation of a licensing system, then, is a matter of public policy: it emanates from the legislature; it involves the creation of valuable rights; and it is directed towards the protection of vulnerable interests.
> >
> > 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 of those 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

[407] *LaBelle* at para. 36.
[408] Law Society submissions at para. 107, citing *Pearlman*.

> 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 added.]
>
> […]
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> In the case at bar, the Manitoba Legislature has spoken, and spoken clearly. The *Law Society Act* manifestly intends to leave the governance of the legal profession to lawyers and, unless judicial intervention is clearly warranted, this expression of the legislative will ought to be respected.[409]

332. The Supreme Court of Canada does not say that self governance is constitutionally required; rather it describes self-governance as an "expression of the legislative will".

(f) Other cases cited by Law Society

333. The Law Society cites *Jabour*, *Ryan*, *Trinity Western*, and *Finney* for this proposition: "An independent Bar composed of lawyers who are free of influence by public authorities (or any other source) is a fundamental component of our free society".[410] The Attorney General agrees that independent lawyers play a fundamental role in our society, but none of these cases supports the view that the plaintiffs' absolute independence is required.

334. *Jabour* has been dealt with at length above. *Ryan* and *Trinity Western* do not say anything about independence. *Ryan* and *Trinity Western* describe law societies as self-regulating bodies that must exercise their self-regulatory authority in the public interest.[411] In citing these comments about self-regulation in support of a definition of independence, the Law Society is assuming the very point at issue, i.e., it is assuming that independence and self-regulation are synonymous. If anything, *Ryan* and *Trinity Western* suggest the opposite: both describe self-regulation as a "privilege" that has been "granted" to lawyers and must, "in exchange", be exercised in the public interest.[412] This language suggests

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[409] *Pearlman* at 886-888.
[410] Law Society written submissions at para. 67, citing *Jabour* at p. 336; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para. 36 [*Ryan*]; *Trinity Western* at para. 32; *Finney* at para. 1.
[411] *Ryan* at para. 36; *Trinity Western* at para. 32.
[412] *Ryan* at para. 36; *Trinity Western* at para. 32.

that, if the public believes lawyers have violated that bargain and are not self-regulating in the public interest, the public can revoke the privilege it previously granted.

335. *Finney*, at first blush, seems to support the Law Society's definition: the opening line of the English version of LeBel J.'s reasons is "An independent bar composed of lawyers who are free of influence by public authorities is an important component of the fundamental legal framework of Canadian society".[413] However, as with all of the cases cited by the Law Society, a closer inspection reveals that it actually undermines the Law Society's position. Where the Court referred to "influence", it could not have meant anything approaching the Law Society's expansive use of "influence" to encompass even general guiding principles from the legislature.

336. *Finney* was a Québec case. As is described in detail later in these submissions, lawyers are regulated very differently in Québec than in other Canadian jurisdictions. Québec has a system of co-regulation. For example, the Barreau needs the approval of the Office des professions and Cabinet to make or amend rules, including the code of professional conduct; and the Office can demand that the Barreau make or amend rules and, if it refuses, Cabinet can make the rules itself. The Court was well aware of the details of that regime, not least because three of its justices are from Québec and practised within that regime before being appointed to the judiciary. *Finney* cites[414] *Fortin*, in which the Court described some of the features of the Québec system as follows:

> For many years, the Québec legislator has made the practice of certain professions subject to restrictions and various control mechanisms. The *Professional Code*, which was first enacted in 1973, now governs the 44 professional orders constituted under the Act. It establishes a body, the Office des professions du Québec, whose function is to see that each order carries out the mandate expressly assigned to it by the Code, which is the principal reason for the existence of the order: to ensure the protection of the public. In pursuing this fundamental objective, the legislature has granted the members of certain professions the exclusive right to perform certain acts. […]

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[413] *Finney* at para. 1 (emphasis added). The original French is less emphatic: "Un barreau indépendant, composé d'avocats libres vis-à-vis des pouvoirs publics, constitue un élément important de l'ordre juridique fondamental de la société canadienne".
[414] *Finney* at para. 16.

> The legal profession is one such profession. […]
>
> In return for this monopoly, the legislature has imposed a number of obligations and responsibilities on the people who perform these exclusive acts.[415]

337. Thus, when the Court in *Finney* used the word "influence", whatever it meant by "influence" must not have included the various "control mechanisms" that the legislature of Québec had imposed on lawyers and the Barreau. *Finney* cannot plausibly be read as supporting the Law Society's conception of absolute independence, which has not existed in Québec for 50 years.

(g) **Judicial independence**

338. The Law Society describes lawyer independence as "deeply connected" to judicial independence[416] and argues that the independence of the judiciary is "contingent upon analogous conclusions about independence of the bar".[417]

339. Lawyer independence may be analogized to judicial independence, although the analogy should not be stretched too far. If the Law Society's position were accepted, lawyers would have a degree of independence that judges – whose independence has a clear and long-standing constitutional basis – do not have.

340. Judicial independence has not been defined as requiring that judges be absolutely free from any kind of external influence from any source. Rather, courts have defined judicial independence in functional terms, by considering what arrangements are necessary for judges to fulfil their function of judging impartially.[418]

341. Judicial independence does not mean that the legislature and government can have no influence whatsoever on court administration, nor does it require that only judges elected by judges decide who is appointed a judge, or select those who decide if they

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[415] *Fortin v. Chrétien*, 2001 SCC 45 at paras. 11-13 (emphasis added, internal citations omitted).
[416] Law Society written submissions at para. 76.
[417] Law Society written submissions at para. 84. The Law Society's arguments regarding ss. 96, 97 and 98 of the *Constitution Act, 1867*, are addressed later in these submissions.
[418] See e.g. *Reference re Remuneration of Judges of the Provincial Court (P.E.I.),* [1997] 3 S.C.R. 3 [*Remuneration Reference*]; see also *Ell v. Alberta*, 2003 SCC 35 at para. 29.

have engaged in misconduct or should be removed from office. Judicial independence means the legislature and government state cannot interfere with administrative decisions that bear "directly and immediately on the exercise of the judicial function", such as the assignment of judges, sittings of the court, courts lists, and the allocation of courtrooms.[419]

342. Lawyer independence should be understood and defined in functional terms, as judicial independence has been. This would mean that the legislature cannot interfere with those aspects of lawyer regulation that "bear directly and immediately" on lawyers carrying out their functions of providing independent advice and advocacy to clients. It would not prevent the legislature from ever legislating in respect of lawyers or their regulation.

343. *Imperial Tobacco* is illustrative. *Imperial Tobacco* was a challenge to the constitutional validity of the *Tobacco Damages and Health Care Costs Recovery Act*. The appellants argued the *Act* violated the independence of the judiciary, both in reality and appearance, because it contained rules of civil procedure that the appellants deemed were unfair and illogical and fundamentally interfered with the adjudicative role of the court. In rejecting this argument, the Supreme Court of Canada found that the appellants had misapprehended the scope of the constitutional protection afforded to judicial independence. The court's adjudicative role does not require it to only apply laws of which it approves. In the Court's words, accepting the appellant's position "would be to recognize a constitutional guarantee not of judicial independence, but of judicial governance".[420] The Court went on to apply a functional approach to find that the *Act* did not interfere, in either appearance or in fact, with the court's adjudicative role or any of the essential conditions of judicial independence.[421]

344. Like the appellants in *Imperial Tobacco,* the Law Society too overshoots the mark in defining the scope of lawyer independence. They invite this Court to recognize a constitutional guarantee not of lawyer independence, but of lawyer governance, where law societies govern only on their own view of what is in the public interest. If judicial

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[419] *Remuneration Reference* at para. 117.
[420] *Imperial Tobacco* at para. 53.
[421] *Imperial Tobacco* at para. 55.

independence does not extend that far, it cannot be said that the Constitution provides lawyers with this right.

(h) **UK jurisprudence**

345. The Law Society cites the Court of Appeal for England and Wales in *Lumsdon*, where the Court describes "the independence of advocates" as "a long-established common law principle and one of the cornerstones of a fair and effective system of justice and the rule of law".[422] The Attorney General of course agrees with that statement. Again, though, when one reads *Lumsdon* in more depth, it quickly becomes apparent that the Court did not understand independence as anything like the Law Society's absolute conception. Indeed, the Court specifically stated that the independence of advocates "is not absolute".[423]

346. In England and Wales, barristers are regulated by the Bar Standards Board and solicitors by the Solicitors Regulation Authority. Each of these entities is overseen by the Legal Services Board. Incidentally, the boards of directors of each of these entities must have a majority of lay persons and be chaired by a lay person.[424] Again, the changes made by the *Act* are not radical by comparison to the reforms that have been made in most other democracies.

347. *Lumsdon* was a judicial review of a decision by the Legal Services Board to approve a proposal by the Bar Standards Board and Solicitors Regulation Authority to create a "Quality Assurance Scheme for Advocates". The goal of the scheme was to improve the quality of advocacy in criminal cases. In essence, the scheme contemplated that judges would assess the performance of advocates[425] appearing before them and advocates who did not pass the assessments would be precluded from taking certain kinds of cases.

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[422] Law Society written submissions at para. 62, quoting *Lumsdon & Ors v. General Council of the Bar* [2014] EWCA Civ. 1276 at para. 14 [*Lumsdon*].
[423] *Lumsdon* at para. 21.
[424] Boon, *The Ethics and Conduct of Lawyers in England and Wales* (4th ed) (London: Hart Publishing, 2023) at pp. 297-303; *Legal Services Act 2007*, (UK), 2007 c. 29, Schedule 1, ss. 1-2; Affidavit #1 of C. Blatchford made 7 June 2024 at Ex. G, p. 123 and Ex. I at p. 251.
[425] Meaning barristers and occasionally solicitors with higher rights of audience.

348. One of the arguments in *Lumsdon* was that this scheme compromised the independence of advocates and was therefore not authorized by the *Legal Services Act*, which includes as one of its objectives "encouraging an independent, strong, diverse and effective legal profession".[426] The Court rejected that argument for several reasons, one being that the independence of advocates "is not absolute. There is no legal requirement for the advocate to be shielded from any possible pressure to act otherwise than independently in the client's interest".[427] Looking at the details of the scheme, the Court concluded "there may occasionally be an unfair judge who undermines the independence of a susceptible barrister", but the scheme as a whole would not prevent advocates from meeting their professional obligations.[428]

349. *Lumsdon* cannot be read as supporting the Law Society's conception of absolute lawyer independence. *Lumsdon* affirms the importance of lawyer independence but says that such independence is "not absolute".[429] When assessing whether something interfered with lawyer independence, the Court assessed whether it would interfere with lawyers' ability to fulfil their function of providing independent advice and zealous advocacy. This is precisely the kind of functional approach the Attorney General submits is correct.

(i) **Law society sources**

350. Even law society sources contradict the Law Society's conception of absolute independence.

351. The speech made by Gordon Turriff, KC in 2009, on behalf of the Law Society,[430] is about as full-throated an articulation of lawyer independence as one can find. But even he did not define lawyer independence as expansively as the Law Society does in this litigation. He defined independence as meaning that lawyers must be "free of all influences that might impair their ability to discharge the duty of loyalty they owe each of their

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[426] *Legal Services Act 2007,* s. 1(1)(f).
[427] *Lumsdon* at para. 21.
[428] *Lumsdon* at para. 30.
[429] *Lumsdon* at para. 21.
[430] Greenberg XFD at Q. 36.

clients".[431] Not free of all influences, but free of influences that might impair lawyers from providing independent advice and zealous advocacy to their clients.

352. In 2007, in the wake of England and Wales largely eliminating lawyer self-regulation in favour of the regime briefly described above, the Law Society of Upper Canada (as it was then called) published a paper defining lawyer independence as follows: "lawyers must be in a position to give independent legal advice to their clients free from government control or other improper external pressure".[432] In referring to "improper external pressure", this definition recognizes that external influence is not necessarily problematic, i.e., does not necessarily interfere with lawyers' advice or advocacy. Some kinds of external pressure are improper, while others are not. The paper also specifically acknowledges that lawyer independence is not absolute:

> The independence of the Bar is not absolute. A balance must be struck regarding the need for lawyers to be, and to be seen to be independent, and the boundaries which other priorities of public protection might place on that independence.[433]

(j) **Academic literature**

353. The academic literature offers no meaningful support for the Law Society's conception of absolute lawyer independence.

354. The Law Society does not cite a single article, and the Attorney General is not aware of any, that would support its conception of absolute lawyer independence.

355. The Law Society cites Roy Millen's article (from which the Law Society has drawn its legal theory and many of its arguments),[434] but Mr. Millen specifically says "this paper is not concerned with the independent governance of the legal profession by the provincial

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[431] Turriff, "Self-Governance" (Greenberg #1, Ex 22 at p. 639).
[432] Law Society of Upper Canada, "Protecting the Public through an Independent Bar: The Task Force Report" in *The Report and Research Papers of the Law Society of Upper Canada's Task Force on the Rule of Law and the Independence of the Bar* (Toronto: Irwin Law, 2007) at p. 13.
[433] LSUC, "Protecting the Public" at p. 8.
[434] Law Society written submissions at paras. 69, 82, 84(a).

and territorial law societies" and that such self-governance "is not the *gravamen* of the principle [of lawyer independence]".[435]

356. The Law Society also cites a speech by Chief Justice McLachlin in which she describes "independent governance" as a component of lawyer independence.[436] She does not say anything about electoral self-governance; she says "independent governance".[437]

357. An exhaustive review of the literature would fill many pages, but two consistent themes can be summarized briefly.

358. One consistent theme is that "absolute forms of self-regulation are difficult, if not impossible, to defend", as Trebilcock puts it.[438] Absolute forms of self-regulation involve a structural conflict between lawyers' interests and the public interest and are, for that reason, susceptible to the appearance and sometimes reality of self-interested behaviour.[439]

359. Another consistent theme of the academic literature is that a variety of different regulatory models can preserve lawyer independence while also making lawyer regulation less captured by lawyers' interests and more responsive to the interests of the public.[440]

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[435] Millen, "The Independence of the Bar: An Unwritten Constitutional Principle" (2005) 84:1 Can. Bar Rev. 107 at p. 111 n29.
[436] Law Society written submissions at para. 103.
[437] "Remarks of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada" (2007) 23 Windsor Rev. L. & Soc. Issues 3 at p. 7.
[438] Trebilcock, "Regulating the Market for Legal Services" (2008) 45:5 Alta. L. Rev. 215 at p. 230.
[439] See e.g. Anand, "Governance gone wrong" at p. 104; Devlin & Heffernan, "The End(s) of Self-Regulation" (2008) 45:5 Alta. L. Rev. 169 at pp. 182, 200; Hadfield and Rhode, "How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering" (2016) 67:5 Hastings L.J. 1191 at p. 1214; Rhode & Woolley, "Comparative Perspectives" at pp. 2762, 2776-2778.
[440] See e.g. Anand, "Governance gone wrong" at pp. 112-113; Arthurs, "The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs" (1995) 33:3 Alta. L. Rev. 800 at p. 801; Devlin & Heffernan, "The End(s) of Self-Regulation" at pp. 198-206; Hadfield and Rhode, "How to Regulate" at pp. 1216-1223; Monahan, "The Independence of the Bar as a Constitutional Principle in Canada" in *The Report and Research Papers of the Law Society of Upper Canada's Task Force on the Rule of Law and the Independence of the Bar* (Toronto: Irwin Law, 2007) at pp. 120, 148; Rhode & Woolley, "Comparative Perspectives" at pp. 2786-2790; Trebilcock, "Regulating the Market" at pp. 229-231; Webb, "Are Lawyers Regulatable?" (2008) 45:5 Alta. L.

360. Two of the most thoughtful papers are Professor (now Justice) Monahan's "Independence" and Professor (now Justice) Woolley's "Rhetoric and Realities". The Attorney General does not necessarily agree with every one of the conclusions they reach, but submits their analysis is likely to assist the Court.

361. Professor Monahan distinguishes between two possible meanings of lawyer independence. One conception understands independence as "the lawyer's ability to provide effective representation of clients in litigious as well as non-litigious matters without improper external pressure", which is essentially the definition the Attorney General submits is correct (freedom from improper interference with advice or advocacy). Another, broader conception understands independence as essentially synonymous with self-governance and self-regulation, which is the view the plaintiffs and allied interveners espouse in these actions.[441]

362. Professor Monahan concludes that the narrower conception is an unwritten constitutional principle, but the broader conception is not. Monahan notes that lawyer self-regulation is "by no means absolute", in that lawyers are "already subject to a number of significant controls by bodies or institutions external to the profession".[442] Ultimately, he concludes that lawyer independence requires a regulator that is independent from the executive branch of government, but does not specifically require electoral self-governance:

> the term 'independence' in an institutional sense requires that the legal profession be independent of government, but not necessary 'self-governing.' The critical requirement is that lawyers retain the ability to act independently of government and are thus in a position to advocate fearlessly on behalf of their clients and act in accordance with their ethical obligations of loyalty and confidentiality.[443]

Rev. 233 at p. 244; Wilkins, "Who Should Regulate Lawyers" (1992) 105:4 Harv. L. Rev. 799 at pp. 854, 873-887; Woolley, "Rhetoric and Realities" at pp. 166, 186-190.

[441] Monahan, "Independence" at pp. 118-120.

[442] Monahan, "Independence" at p. 136.

[443] Monahan, "Independence" at p. 148.

363. This is a functional approach. The focus is on the institutional arrangements that are necessary to ensure lawyers can discharge their function of providing independent legal advice and zealous advocacy.

364. Professor Woolley takes a similar functional approach but explains it somewhat differently. She writes that independence "is not, in and of itself, a normative principle against which the adequacy and sufficiency of lawyer regulation should be assessed". In other words, independence is not valuable for its own sake; its value is instrumental. Independence is a "mechanism for achieving the normative principles that constitute and underlie lawyers' legal and ethical obligations". Those are the relevant normative principles, the ones that underlie lawyers' legal and ethical obligations. This is another way of articulating the functional approach. The focus is not on independence as such, or in the abstract. The focus is on whether lawyers can fulfil their obligations, i.e., whether lawyers are able to provide independent legal advice and zealous advocacy on behalf of clients within the boundaries of their duties to the court and others.[444]

365. Taking that approach, Professor Woolley defines independence as meaning that lawyers are "free from external pressures that might distort their fulfillment of their legal and ethical obligations".[445] Independence does not mean that lawyers are free from all external influence; it means they are free from influence that might distort their ability to fulfill their function of providing independent legal advice and zealous advocacy on behalf of clients.

(k) **International sources**

366. Lastly, international sources do not support the Law Society's absolute conception of lawyer independence. The Law Society is correct that international sources affirm the importance of lawyer independence, but when one looks at the sources in more detail, it becomes apparent that they define independence in narrower, functional terms.

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[444] Woolley, "Rhetoric and Realities" at p. 149.
[445] Woolley, "Rhetoric and Realities" at p. 162.

367. The United Nations Basic Principles on the Role of Lawyers (the "**UN Principles**") certainly affirm the importance of lawyer independence but acknowledge this does not require lawyers to be regulated solely by bodies controlled by the profession.

368. The Law Society refers to article 24 of the UN Principles:

> Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.[446]

369. The Trial Lawyers quote selectively from this principle: they quote the right to "form and join self-governing professional associations" but omit the modifier "to represent their interests". As is apparent from that modifier, this principle does not apply to regulators like the Law Society; it applies to organizations, like the CBA and the Trial Lawyers, that "represent [lawyers'] interests". The Law Society used to have a mandate to both regulate and represent lawyers, but it ceased to have that dual mandate in 2012 and now is intended to play a fundamentally different role from the "professional associations" that "represent [lawyers'] interests" referred to in article 24.[447]

370. The Law Society does not refer to articles 26 or 28 of the UN Principles, which contradict its conception of absolute independence. Article 26 contemplates that codes of conduct for lawyers may be established through legislation rather than by the profession:

> Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognized international standards and norms.[448]

371. Similarly, article 28 contemplates that disciplinary proceedings against lawyers may be decided by an independent statutory tribunal rather than by a tribunal established by the profession:

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[446] Law Society written submissions at para. 88, citing UN Principles, art. 24 (Affidavit #1 of Patti Lewis, made May 24, 2024 ("**Lewis #1**"), Ex. O at p. 405) (emphasis added).
[447] UN Principles, art. 24 (Lewis #1, Ex. O at p. 405).
[448] UN Principles, art. 26 (Lewis #1, Ex. O at pp. 405-406).

> Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review.[449]

372. On the Law Society's absolute conception of lawyer independence, lawyers must control their code of conduct, and disciplinary allegations against lawyers must be decided by lawyers. The Law Society's absolute conception is not protected by articles 26 or 28 of the UN Principles.

373. The Law Society's absolute conception of lawyer independence also goes far beyond the definition espoused by the International Bar Association, an organization that represents lawyers. It defines lawyer independence in functional terms. Acknowledging that not all external influence is problematic, the International Bar Association suggests focusing on whether external influence impairs lawyers from discharging their functions:

> The fact that there is external involvement in the regulatory scheme (eg, in the form of governmental regulation) does not necessarily threaten the independence of the profession, provided this does not have an impact on the ability of lawyers to carry out their professional duties in accordance with the rule of law. In assessing independence, one should thus examine both the legal and regulatory provisions in place and the actual impact they have on the ability of lawyers to carry out their duties in an independent and impartial manner.[450]

374. The International Bar Association expresses a preference for self-regulation, which is unsurprising for a representative organization. Unlike the Law Society, however, the International Bar Association does not define self-regulation or self-governance in electoral terms:

> For the purpose of this report, self-regulation or self-governance means that the majority of individuals who promulgate the rules and regulations and investigate and make decisions about lawyers are also lawyers or legal professionals.[451]

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[449] UN Principles, art. 28 (Lewis #1, Ex. O at p. 406).
[450] International Bar Association, "Stakeholder Submission to the Special Rapporteur on the Independence of Judges and Lawyers" (2018) (Lever #1, Ex B at p. 30) (emphasis deleted).
[451] International Bar Association, "Stakeholder Submission to the Special Rapporteur on the Independence of Judges and Lawyers" (2018) (Lever #1, Ex B at p. 32).

375. Those definitions of self-regulation and self-governance are satisfied by the *Act*: the majority of individuals who will promulgate the rules for lawyers, investigate lawyers, and make decisions about lawyers are lawyers or other legal professionals.

376. The International Bar Association also acknowledges that "effective self-regulation can be achieved in many ways". Most jurisdictions employ mixed approaches with elements of self-regulation and elements of external oversight, it says:

> In practice, states tend to retain a mixed approach, where the direct involvement of the profession is retained while there is some form of state involvement through varying models of co-regulation. This can help to alleviate concerns voiced by those who are sceptical of total self-regulation and contribute to the establishment of a more balanced regulatory system.[452]

377. Again, the *Act* is consistent with the principles espoused by the International Bar Association.

VII. **The structure of the Constitution does not support absolute lawyer independence**

(a) **Overview**

378. The Law Society submits that its conception of absolute lawyer independence is supported by the structure of the Constitution. It argues that, as a matter of structure, any constitution that guarantees rights and freedoms must guarantee access both to independent courts and to independent lawyers.[453] However, lawyers are not essential to the administration of justice in the way that courts are, and it is settled law that there is no general right to counsel.[454]

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[452] International Bar Association, "Stakeholder Submission to the Special Rapporteur on the Independence of Judges and Lawyers" (2018) (Lever #1, Ex B at pp. 32-33).
[453] Law Society written submissions at paras. 65-68.
[454] *British Columbia (Attorney General) v. Christie*, 2007 SCC 21 [*Christie*].

(b) Structure of the Constitution does not imply a general right to counsel

379. The Law Society's structure argument adopts a 2001 paper by Jack Giles, KC in which he argues that a constitution which guarantees rights and freedoms must also "protect that which makes it possible to benefit from such guarantees, namely every citizen's constitutional right to effective, meaningful and unimpeded access to a court of law through the aegis of an independent bar".[455]

380. However, six years after Mr. Giles's paper was published, the Supreme Court of Canada unanimously held in *Christie* that there is no such right. There is no general right to counsel.

381. The argument in *Christie* was framed around the rule of law. The claim was that "the right to have a lawyer in cases before courts and tribunals dealing with rights and obligations is constitutionally protected, either as an aspect of the rule of law, or a precondition to it".[456] That is essentially what the Law Society is arguing here, i.e., that a constitution with rights and freedoms must, in addition to guaranteeing access to courts, also guarantee access to counsel. Without access to counsel, the argument goes, individuals will not be able to assert and enforce their rights. Thus, the existence of constitutional rights necessarily implies a general right to counsel to help assert and enforce those rights.

382. The Court in *Christie* held that, although lawyers play an important role in the administration of justice, access to lawyers is not an aspect of, or precondition to, the rule of law:

> Access to legal services is fundamentally important in any free and democratic society. In some cases, it has been found essential to due process and a fair trial. But a review of the constitutional text, the jurisprudence and the history of the concept does not support

[455] Law Society written submissions at para. 68, quoting Giles, "Independence of the Bar" (Greenberg #3, Ex. 69 at p. 2034).
[456] *Christie* at para. 18.

> the respondent's contention that there is a broad general right to legal counsel as an aspect of, or precondition to, the rule of law.[457]

383. Among other considerations, the Court in *Christie* referred to s. 10(b) of the *Charter*, which creates a right to counsel on arrest or detention. The Court noted that, if the reference to the rule of law in the preamble to the *Constitution Act, 1867* were found to imply a general right to counsel, s. 10(b) would be redundant. For that reason, the "text of the *Charter* negates the postulate of the general constitutional right to legal assistance contended for here".[458]

384. The reasoning in *Christie* applies equally to the framing of the argument in Mr. Giles's paper and the Law Society's submissions. It is the same argument. *Christie* held that the rule of law does not imply a general right to counsel in court or tribunal proceedings in which rights or obligations are at stake. By the same logic, the existence of constitutional rights does not imply a general right to counsel to help assert and enforce those rights.

385. The Law Society is not advocating for a general right to publicly funded counsel, but its submissions, if accepted, would seem to have that implication. The reason the costs of the court system are almost entirely socialized is that courts are essential to the administration of justice. The Supreme Court of Canada has held that hearing fees, although permissible, "must be coupled with an exemption that allows judges to waive the fees for people who cannot, by reason of their financial situation, bring non-frivolous or non-vexatious litigation to court".[459] If access to lawyers were recognized (contrary to *Christie*) as being essential to the administration of justice in the same way as access to courts, it would seem to follow that the costs of accessing counsel would need to be socialized in a similar manner to the costs of accessing courts.

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[457] *Christie* at para. 23.
[458] *Christie* at para. 24. Courts have, in fact, strictly limited orders for state-funded counsel to the unique circumstances in *R. v. Rowbotham*, 1988 CanLII 147 (O.N.C.A.) [*Rowbotham*] and *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 [*J.G.*]. Where a party seeks an order for state-funded counsel under the *Charter*, it must do so pursuant to these narrow and well-established exceptions.
[459] *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 at para. 48 [*Trial Lawyers SCC*].

VIII. Text of the Constitution offers no support for absolute conception of lawyer independence

386. Finally, the Law Society argues that ss. 96-101 of the *Constitution Act, 1867* and ss. 7, 10(b), and 11(d) of the *Charter* imply "specific constitutional propositions of self-regulation and self-governance by a body with a strong majority elected by lawyers".[460] Most of these provisions do not express or imply anything about lawyers. It is fair to interpret ss. 7 and 10(b) of the *Charter* as contemplating the existence of independent lawyers. However, these provisions do not imply any particular institutional arrangement or regulatory model for lawyers.

(a) Law Society ignores settled jurisprudence on the limits of the judicature provisions

387. The Law Society argues that lawyer independence finds expression in the judicature provisions because:

a. the "Independence of the Bar is intertwined with the public's access to independent courts";

b. the "public and the judiciary rely on lawyers to present facts and argue the law… so that judges may exercise their jurisdiction to independently resolve disputes"; and

c. "the judiciary is chosen from among the independent bar".[461]

388. The Law Society's attempt to fit the right to an independent lawyer under the judicature provisions is misguided because those provisions are structural, not rights-conferring.[462]

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[460] Law Society written submissions at paras. 54, 69-86.
[461] Law Society written submissions at para. 71.
[462] *British Columbia (Attorney General) v. Le*, 2023 BCCA 200 at paras. 187, 190, 193, 198 [*Le*]; *Poorkid Investments Inc. v. Ontario (Solicitor General),* 2023 ONCA 172 at para. 31 [*Poorkid*].

389. The judicature provisions along with s. 92(14) embody a compromise reached at Confederation for the structural design of the judiciary in Canada.[463] Together, those provisions preserve a unitary justice system, the cornerstone of which are independent superior courts with inherent jurisdiction.[464] The structure created by the judicature provisions reflects a fine balance that results in "compulsory co-operative federalism".[465] The federal government appoints judges (s. 96), but must select them from the bar of each province (ss. 97-98). The federal government sets the judges' salaries (s. 100), but the provinces have exclusive authority over the administration of justice.[466]

390. This compromise explains the purpose of the judicature provisions, which is to protect "the special status of the superior courts of general jurisdiction as the cornerstone of our unitary justice system".[467] The Law Society's arguments invite the Court to extend the purpose of the judicature provisions beyond recognition.

391. In its submissions, the Law Society correctly defines lawyer independence as a client's right.[468] This reflects how lawyer independence is defined in Canadian law: what is protected is the *client's* right to an independent lawyer.[469] That is the basis of lawyer independence as a principle of fundamental justice protected under s. 7 of the *Charter.*

392. However, a client's right to an independent lawyer is not protected by the judicature provisions or the rule of law principles underlying them. The scope of the judicature provisions is much narrower than that.

393. At the core of the Law Society's argument that the judicature provisions protect a client's right to an independent lawyer is an attempt to expand the *Trial Lawyers* decision, where the Supreme Court of Canada held that a right to "access the superior courts"

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[463] *Reference re Code of Civil Procedure (Que.), art. 35,* 2021 SCC 27 at paras. 1, 32-40 [*Re Code of Civil Procedure*].
[464] *Re Code of Civil Procedure* at para. 41. *Poorkid* at para. 47.
[465] Peter W. Hogg*, Constitutional Law of Canada,* loose-leaf, 5th ed. (Toronto: Thomson Reuters Canada Ltd., 2007) at § 7-2.
[466] *Re Code of Civil Procedure* at paras. 1, 36-40.
[467] *Re Code of Civil Procedure* at para. 4.
[468] Law Society written submissions at para. 95.
[469] *Jabour* at pp. 335-336.

flowed by necessary implication from s. 96.[470] The Law Society's submissions, however, ignore that the Supreme Court reached that conclusion for structural reasons, because s. 96 protects the "core jurisdiction" of superior courts. As the Supreme Court explained:

> The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the superior courts do. Indeed, it is their very book of business. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*. As a result, hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts.[471]

394. In that context, the Court found that a right to access superior courts flowed by necessary implication from s. 96 because barring litigants from accessing superior courts would strip the courts of their original general jurisdiction.[472] As the Ontario Court of Appeal explained in *Poorkid,* the focus of the analysis in *Trial Lawyers* "was necessarily on the courts as an institution rather than on individual rights".[473]

395. The core jurisdiction of superior courts protected under s. 96 and in the *Trial Lawyers* decision is "very narrow". [474] As the Supreme Court of Canada notes, it includes "only critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and to the preservation of its fundamental role within our legal

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[470] *Trial Lawyers SCC* at para. 37.
[471] *Trial Lawyers SCC* at para. 32.
[472] *Re Code of Civil Procedure* at para. 69, citing *Trial Lawyers SCC* at para. 32.
[473] *Poorkid* at para. 31.
[474] *Le* at paras. 184-185; *Poorkid* at para. 34.

system".[475] In other words, s. 96 focuses on the essential business of the superior courts.[476] Specifically, s. 96 preserves:

a. the guarantee of judicial independence in superior courts;[477]

b. the power of superior courts to review legislation for constitutionality;[478]

c. the power of superior courts to engage in judicial review;[479]

d. the ability of superior courts to control their own process;[480]

e. the structural and institutional protection of the role of superior courts in the Constitution;[481] and

f. the prohibition against creating "parallel courts".[482]

396. As the Supreme Court of Canada has held, neither the judicature provisions nor the rule of law principles underlying them protect:

a. the right to a fair civil trial *(Imperial Tobacco)*;[483] or

b. the right to a lawyer in court and tribunal proceedings dealing with rights and obligations *(Christie)*.[484]

397. The Law Society's arguments under the judicature provisions ignore these well settled limits. Specifically:

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[475] *Reference re Amendments to the Residential Tenancies Act (N.S.)* [1996] 1 S.C.R. 186, *per* Lamer C.J. (concurring) at p. 224.
[476] *Le* at paras. 184-185; *Poorkid* at para. 34.
[477] *Remuneration Reference* at para. 84.
[478] *Jabour*.
[479] *Crevier v. Attorney General of Québec*, [1981] 2 S.C.R. 220.
[480] *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725.
[481] *Trial Lawyers SCC*.
[482] *Re Code of Civil Procedure*.
[483] *Imperial Tobacco* at paras. 73-77.
[484] *Christie* at para. 23.

a. the Law Society's argument that the judicature provisions must protect lawyer independence because they protect access to superior courts cannot stand, because the judicature provisions do not protect the right to a lawyer at all,[485] let alone the right to an independent one.

b. The Law Society's argument that the judicature provisions protect the public's and judiciary's expectation that lawyers will present the facts and argue the law cannot stand, because the judicature provisions do not protect the right to a fair civil trial[486] or to a lawyer.[487]

398. Further, the Law Society's arguments ignore the narrow context in which the judicature provisions operate — they only apply to superior courts.[488] For example, the judicature provisions do not apply to inferior courts where judicial independence primarily finds expression in the *Charter*.[489] It is hard to conceive how provisions that do not even protect the independence of judges outside of superior courts would protect the independence of every lawyer in the country.

399. Similarly, the argument that the judicature provisions protect lawyer independence because judges are chosen from the bar must fail, as it conflicts with the narrow context within which the judicature provisions operate. The judicature provisions safeguard judicial independence, but they do so within the boundaries of the superior courts.[490] The judicature provisions ensure that lawyers–upon becoming superior court judges–are independent, regardless of their prior careers and loyalties. The guarantees of tenure and salary in the judicature provisions are there to protect judicial independence. On being appointed judges, lawyers end all client relations. No one suggests their independence as judges is tainted by their prior commitments as lawyers. For example, no one would

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[485] *Christie* at para. 23.
[486] *Imperial Tobacco* at paras. 73-77.
[487] *Christie* at para. 23.
[488] *Therrien c. Québec (Ministre de la justice),* 2001 SCC 35 at para. 63 [*Therrien*].
[489] *Therrien* at para. 63.
[490] *Therrien* at para. 63.

suggest that a judge lacks independence because they worked for the government,[491] or because that same government appointed them to the bench.

400. In the specific context of this litigation, it is also worth noting that when lawyers become judges, the *Act* no longer applies to them.

(b) Sections 97 and 98 of the *Constitution Act, 1867* do not guarantee absolute lawyer independence

401. In essence, the Law Society argues that ss. 97 and 98 are akin to s. 96; they say that just as s. 96 protects the independence of the judiciary, ss. 97-98 must be interpreted to protect the independence of lawyers.[492] The Law Society asserts that ss. 97-98 recognize "provincial Bars" as "constitutional institutions", and that legislation purporting to "abolish the Bar" would be contrary to ss. 97-98.[493]

402. The point is largely academic, because:

a. the Law Society does not allege (nor could it be alleged) that the *Act* abolishes "the Bar"; and

b. while the ss. 97-98 mention "the Bar", they say nothing about its regulator.

403. In any event, the Law Society reads far too much into ss. 97-98. These provisions do not protect lawyer independence; as set out above, they are structural provisions. They ensure that federally appointed judges "are lawyers and that they are versed in the local law" of the province in which they will serve as judges.[494]

404. Sections 97 and 98 provide as follows:

> 97 Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of

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[491] See for example *Roberts v. R.*, 2003 SCC 45 at para. 84; Yashcheshen v. Teva Canada Ltd., 2022 SKCA 49 at para. 23.
[492] Law Society written submissions at paras. 70-83.
[493] Law Society written submissions at paras. 71-75.
[494] Peter W. Hogg, Wade Wright, Constitutional Law of Canada, 5th ed., § 7:2.

> those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.
>
> 98 The Judges of the Courts of Québec shall be selected from the Bar of that Province.

405. The text of these provisions, particularly when read against the backdrop of ss. 91-92, leaves no doubt about their purpose. Under ss. 91-92, criminal law and procedure are within federal competence, while property and civil rights and the administration of justice are within provincial competence.[495] Criminal law and procedure, being within federal jurisdiction, are fairly uniform across the country. On the other hand, private law and civil procedure, being within provincial jurisdiction, vary between provinces. However, all superior court judges are appointed by the federal government.

406. By requiring the federal government to appoint superior court judges for each province from among "the Bar" of that province, ss. 97-98 ensure that superior court judges are familiar with the substantive and procedural law of the province in which they will serve as judges. [496] This is why s. 97 begins with the modifier "Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform […]".[497] No such modifier exists for Québec because it was assumed that Québec would always keep its distinctive civilian tradition.

407. As to the Law Society's submission that ss. 97-98 recognize "provincial Bars" as "constitutional institutions", those provisions say nothing of legal regulators or law societies. In any event, the mere fact that an entity is referred to in the text of the Constitution does not constitutionalize its existence. Section 96 refers to "the Superior, District, and County Courts in each Province", but there was never a District Court in British Columbia and the County Court of British Columbia was abolished in 1989.[498]

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[495] *Constitution Act, 1867*, ss. 91(27), 92(13), 92(14).
[496] Peter W. Hogg, Wade Wright, Constitutional Law of Canada, 5th ed., § 7:2.
[497] The aspiration of uniform laws across the common law Provinces was also reflected in s. 94 of the *Constitution Act, 1967.* Needless to say, it remains an unfinished venture.
[498] *Supreme Court Act*, S.B.C. 1989, c. 40, merged the County Court with this Court.

Indeed, both county and district courts have now been eliminated in all the provinces that once had them.

408. The most fundamental point is that, even if ss. 97-98 were interpreted to (1) grant rights; (2) protect the right to an independent lawyer; and (3) recognize "provincial Bars" as "constitutional institutions", ss. 97-98 still would not support the Law Society's conception of absolute lawyer independence nor constitutionalize the current regulatory structure for lawyers in British Columbia.

409. The Law Society's conception of absolute lawyer independence prohibits the legislature from "unilaterally impos[ing] regulatory frameworks on lawyers based on the government's policy" because "self-regulation is a privilege and a duty… not an indulgence to be dispensed by the state".[499]

410. The Supreme Court of Canada rejected similar arguments made by Alberta school boards in *Public School Boards' Assn.*[500] The school boards argued that the Alberta legislature could not unilaterally remove the school boards' taxing powers or generally reform their funding structure because:

a. local school boards had autonomy and powers of taxation when Alberta joined confederation;[501] and

b. the text of the constitution enshrined their autonomy through ss. 92(8) and 93 of the *Constitution Act,*[502] as well as s. 17 of the *Alberta Act,*[503] all of which protect denominational education.

411. As a result, the school boards argued they had an "institutional sphere of reasonable autonomy", such that their structure was not subject to legislative reform.[504]

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[499] Law Society written submissions at para. 114.
[500] *Public School Boards' Assn. (Alberta) v. Alberta (Attorney General)*, 2000 SCC 45 [*Public School Boards' Assn.*].
[501] *Public School Boards' Assn.* at paras. 31, 41.
[502] Section 93 of the *Constitution Act, 1867* specifically mentions school trustees.
[503] *The Alberta Act,* 1905, 4-5 Edw. VII, c. 3 (Can.), is a constitutional statute of Canada that expressly provides for the protection of separate schools in Alberta in s. 17.
[504] *Public School Boards' Assn.* at paras. 31, 37, 41.

412. The Court acknowledged that school boards are unique because they are the vehicle through which individuals realize their constitutional denominational rights.[505] Nevertheless, the Court held that while denominational education rights were constitutionally entrenched, the institutions that protected those rights were not:

> 34 Municipal institutions do not have an independent constitutional status. School boards are somewhat unique, however, as they represent the vehicles through which the constitutionally entrenched denominational rights of individuals are realized. Yet that is not to say that the institutions themselves are entrenched or must remain mired in their historical form to fulfill these constitutional guarantees.
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> 35 The proposition that educational institutions are malleable and subject to legislative reform is sound. The introductory language of s. 93 has been found to confer upon the provinces a plenary jurisdiction over education. See *Reference re Roman Catholic Separate High Schools Funding,* [1987] 1 S.C.R. 1148 (S.C.C.), at pp. 1169, per Wilson J., and 1202, per Estey J.; , *Renvoi relatif à la Loi sur l'instruction publique,* 1988 (Québec), [1993] 2 S.C.R. 511 (S.C.C.), at pp. 530-31, 541-42 and 564-65. Per Gonthier J., at pp. 541-42:
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> > What s. 93 of the Constitution guarantees ... is the right to dissent itself, not the form of the institutions which have made it possible to exercise that right since 1867. This means, for example, that while the right of dissent obviously includes the means and framework in which it is exercised, the latter are not in themselves constitutionally guaranteed. The framers of the Constitution were wise enough not to determine finally the form of institutions, as it is those very institutions which must be capable of change in order to adapt to the varying social and economic conditions of society.
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> 36 This conclusion is applicable to public schools. See *Adler v. Ontario,* [1996] 3 S.C.R. 609 (S.C.C.), at p. 648, per Iacobucci J.:
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> > ... public school rights are not themselves constitutionally entrenched. It is the province's plenary power to legislate with regard to public schools, which are open to all members of society, without distinction, that is constitutionally entrenched....
> >
> > One thing should, however, be made clear. The province remains free to exercise its plenary power with regard to

[505] *Public School Boards' Assn.* at para. 34.

> education in whatever way it sees fit, subject to the restrictions relating to separate schools imposed by s. 93(1).
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> 37 A claim to an institutional sphere of reasonable autonomy is inconsistent with, and would impair, this plenary power. Section 17 of the Alberta Act does not alter this position. The Province of Alberta may alter educational institutions within its borders as it sees fit, subject only to those rights afforded through the combined effect of s. 93 and s. 17. Whether the impugned provisions infringe these rights in respect of public schools in Alberta is the subject matter of the following two constitutional questions in this appeal.

413. That reasoning applies with equal force in this case. Like the school boards, the Law Society is a "delegate of provincial jurisdiction".[506] While the Law Society is a vehicle through which lawyer independence has been historically advanced in British Columbia—that does not enshrine the regulator's current structure or put its reform beyond the legislature's purview. The institution regulating lawyers is not itself entrenched and does not have to stay "mired in its historical form".[507] To suggest otherwise would conflict with the province's plenary powers over the administration of justice and property and civil rights. It would turn a delegate of provincial jurisdiction into a legislative power.

414. The Law Society's argument also ignores the Supreme Court's imperative that institutions "must be capable of change in order to adapt to the varying social and economic conditions of society".[508] Legal needs and services look different today than in 1874, when the Law Society was first given regulatory powers. They look different today than in 1987, when the Current Act last underwent a major revision. Legal service providers have evolved in that time. Notably, notaries and paralegals have stepped up in certain fields to respond to the unmet need for legal services. The *Act* reflects that reality by having one regulator for all legal professions and by giving each of those professions a seat at the governance table of their regulator.

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[506] *Public School Boards' Assn*. at para. 33.
[507] *Renvoi relatif à la Loi sur l'instruction publique,* 1988 (Québec), [1993] 2 S.C.R. 511 (S.C.C.) at pp. 541-42.
[508] *Public School Boards' Assn.* at para. 35 citing *Reference Re Education Act (Que.),* [1993] 2 S.C.R. 511 at 541-542.

(c) The Law Society's legal theory on the judicature provisions is foreclosed by binding authority

415. The Law Society's arguments on the use of unwritten constitutional principles to interpret the judicature provisions ask this Court to:

a. ignore that the judicature provisions are structural provisions that operate in a narrow context to protect the special status of superior courts;

b. ignore "the theories on which the [constitutional] text [of ss. 97-98] is based", which are to ensure that federally appointed judges are lawyers and that they are versed in the local law of the province in which they will serve as judges; and

c. conclude that law societies form part of the "basic institutions of the state", despite not being mentioned in the constitutional text.[509]

416. While the Law Society frames its use of unwritten constitutional principles as "interpretive aids" to give meaning and effect to the text of the judicature provisions,[510] in effect, what the Law Society is asking the Court to do is ignore or stretch the constitutional text despite binding authority that says unwritten elements of the Constitution cannot be "taken as an invitation to dispense with the written text of the Constitution", which "provides a foundation and a touchstone for the exercise of constitutional judicial review".[511]

417. Without any nexus to the text of the judicature provisions, nexus which was clearly made out with respect to superior courts and s. 96 in *Trial Lawyers*,[512] the Law Society's reliance on unwritten constitutional principles to read down s. 92 is foreclosed by *Toronto*.[513] In *Toronto,* the Supreme Court of Canada specifically rejected the

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[509] The Hon. Justice Rowe and Manish Oza, "Structural Analysis and the Canadian Constitution" (2023) 101 Can Bar Rev. 205 [Rowe and Oza, "Structural Analysis"] at 222.
[510] Law Society written submissions at para. 118.
[511] *Secession Reference* at para. 53.
[512] *Trial Lawyers* at para. 39.
[513] *Toronto*.

methodology of using a standalone unwritten principle to read down provincial legislative competence under s. 92.[514]

418. The Law Society's attempt to confine *Toronto* to its facts is the same argument that was correctly rejected by the Court of Appeal of Yukon in *Mercer*.[515] For the reasons set out in *Toronto* and *Mercer*, the Law Society's legal theory transgresses the separation of powers.

419. Before turning to *Toronto*, it is helpful to recall the rationale for judicial review of legislation on constitutional grounds. In many democracies, including the United Kingdom, courts are not empowered to invalidate legislation enacted by the public's elected representatives. In Canada, courts have this power and responsibility because Canadians, acting through their elected representatives, democratically enacted constitutional limits and asked courts to enforce them:

> It ought not to be forgotten that the historic decision to entrench the *Charter* in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility.[516]

420. This rationale holds only insofar as courts apply the constitution that Canadians democratically enacted.

421. *Toronto* dealt with Ontario legislation that reduced the size of Toronto City Council in the middle of a municipal election. Section 3 of the *Charter* creates a right to vote in elections for Parliament and provincial legislatures, but not municipalities. Democracy is a recognized unwritten constitutional principle. The City made two arguments that are relevant for present purposes. First, the City argued that the unwritten principle of democracy could be used to invalidate the legislation directly. Second, the City argued

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[514] *Toronto* at para. 57.
[515] *Mercer v. Yukon (Government of),* 2025 YKCA 5 at para. 43 [*Mercer*].
[516] *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at para. 16. See also *Vriend* at para. 134 ("it should be emphasized again that our Charter's introduction and the consequential remedial role of the courts were choices of the Canadian people through their elected representatives").

the principle of democracy could be used to read down provincial legislative competence over municipalities under s. 92(8) of the *Constitution Act* to invalidate the legislation indirectly. The Court rejected both arguments.

422. The Court's reasons were grounded primarily on the separation of powers, the legitimacy of judicial review, and the rule of law. Of the argument that unwritten principles could be used to invalidate legislation directly, the Court said this:

> Attempts to apply unwritten constitutional principles […] as an independent basis to invalidate legislation, whether alone or in combination, suffer from a normative and a practical deficiency, each related to the other, and each fatal on its own.
>
> First, such attempts trespass into legislative authority to amend the Constitution, thereby raising fundamental concerns about the legitimacy of judicial review and distorting the separation of powers. Our colleague's approach, which invites the use of unwritten constitutional principles in a manner that is wholly untethered from the text, ignores this fundamental concern.
>
> Secondly, unwritten constitutional principles are highly abstract and unlike the rights enumerated in the *Charter* — rights whose textual formulations were debated, refined and ultimately resolved by the committees and legislative assemblies entrusted with constitution-making authority — the concept of democracy has no canonical formulation. Unlike the written text of the Constitution, then, which promotes legal certainty and predictability in the exercise of judicial review, the nebulous nature of the unwritten principles makes them susceptible to be interpreted so as to render many of our written constitutional rights redundant and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers. Accordingly, there is good reason to insist that protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box.[517]

423. The Court also noted that unwritten principles are equivocal in the sense that, even where legislation may be in tension with one principle, other principles like constitutionalism and the rule of law always "strongly favour *upholding* the validity of

[517] *Toronto* at paras. 57-59 (internal punctuation and citations omitted).

legislation that conforms to the text of the Constitution".[518] It would be arbitrary to favour one principle over another.

424. On the second argument (using the principle of democracy to read down provincial legislative competence over municipalities under s. 92(8) of the *Constitution Act* to invalidate the legislation indirectly), the Court said this:

> The structure of neither the *Constitution Act, 1867* nor the *Constitution Act, 1982* requires by necessary implication the circumscription of provincial lawmaking authority under s. 92(8) in the manner proposed. Subject to the *Charter*, the province has absolute and unfettered legal power to legislate with respect to municipalities. And this Court cannot grant constitutional status to a third order of government where the words of the Constitution read in context do not do so.
>
> Indeed, the City's submissions neglect the fact, recognized in the passage from *Imperial Tobacco*, at para. 66, cited above, that unwritten constitutional principles other than the rule of law that have been recognized by this Court, including democracy and constitutionalism, strongly favour *upholding* the validity of legislation that conforms to the text of the Constitution. It follows that the unwritten constitutional principle of democracy cannot be used to narrow legislative competence under s. 92(8); as this Court has recognized, the provinces have plenary jurisdiction under this head of power, unrestricted by any constitutional principle.

425. The Law Society submits that this passage should be confined to its facts, i.e., read as holding only that the unwritten principle of democracy cannot be used to read down provincial legislative competence over municipalities under s. 92(8) of the *Constitution Act, 1867*. The Law Society says *Toronto* is not a general holding about the methodology of using unwritten principles to read down s. 92 of the *Constitution Act, 1867*.[519]

426. However, in *Mercer*, a case the Law Society does not acknowledge, the Court of Appeal of Yukon was correct to interpret this passage of *Toronto* as a general holding that unwritten constitutional principles cannot be used to read down the heads of legislative competence in ss. 91 and 92. The concerns about the separation of powers and rule of law identified in *Toronto*, which led the Court to hold that unwritten principles cannot be

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[518] *Toronto* at para. 80.
[519] Law Society written submissions at paras. 128-129.

used to invalidate legislation, continue to apply even if another step is added to the analysis, namely, using principles to read down ss. 91 or 92 and invalidate legislation indirectly.

427. The arguments in *Mercer* were very similar to the arguments being made by the Law Society here:

> [Mr. Mercer] says *City of Toronto* is distinguishable because it was concerned with the position of municipalities within the constitutional structure. As creations of provincial legislation, municipalities have "no constitutional status". Relying on this distinction, he suggests the Court's statements in *City of Toronto* about the use that can be made of UCP do not have direct application when considering the constitutionality of *CEMA*. As I understand his argument, this is because *CEMA* directly affects the relationship between and functioning of the Legislature, the executive, and the courts—what Mr. Mercer calls "the structure of government mandated by the text of the *Yukon Act* and the Constitution"—such that UCP can properly inform consideration of the constitutionality of *CEMA*. Mr. Mercer argues his use of UCP in challenging the constitutionality of CEMA is thus "tethered" to the text of the Constitution. […]
>
> Mr. Mercer's suggestion that the crux of the reasoning in *City of Toronto* "is that it is impossible to call upon UCP to constrain the ability of a legislature to enact laws that affect municipalities" is, as the judge stated, a misreading of that decision. Contrary to Mr. Mercer's submission, in *City of Toronto*, the Court engaged in a detailed consideration of the proper role played by UCP in challenges to the validity of legislation generally.[520]

428. The Court in *Mercer* held that the concerns expressed in *Toronto* about the separation of powers and legitimacy of judicial review apply to any attempted use of unwritten principles to invalidate legislation, whether direct or indirect. Adding extra steps to the analysis, in an attempt to make the use of the unwritten principle less transparent, does not avoid these concerns:

> Mr. Mercer's argument on appeal that a proper consideration of UCP leads to a conclusion that *CEMA* upsets the important constitutional norm of "discussion and debate in the Legislature", which he says is essential for the government's law-making authority, is similarly flawed. The suggestion UCP can be used to delineate a "core competence" of the Legislature, which in turn becomes a basis for

[520] *Mercer* at paras. 42-43 (emphasis added).

> finding legislation invalid, is still attempting to use the vague, abstract content of UCP to invalidate legislation—it merely adds an extra step. The "fatal" deficiencies identified in *City of Toronto* therefore apply with equal force to this argument as well.[521]

429. This reasoning applies equally to any attempt to use a standalone unwritten principle to read down s. 92(13) and (14). The use of the unwritten principle is less direct, but it is still being used to invalidate legislation, raising the concerns about the separation of powers and legitimacy of judicial review highlighted in *Toronto*.

430. The Law Society seizes on a line of *Toronto* that "it is inconceivable that legislation which is repugnant to our basic constitutional structure would not infringe the Constitution".[522] The Law Society takes this line to mean that legislation which is inconsistent with the structure of the constitution may, for that reason, be declared to be of no force or effect.[523] In fact, the Court meant precisely the opposite.

431. The Court was responding to the dissenting justice, who expressed concern about potential rare cases in which legislation is inconsistent with the structure of the constitution but not contrary to any provision of the constitution.[524] It was in that context that the majority described it as "it is inconceivable that legislation which is repugnant to our basic constitutional structure would not infringe the Constitution", i.e., that if legislation is genuinely inconsistent with the structure of the constitution, it will surely be inconsistent with one or more written provisions of the Constitution and can be dealt with on that basis:

> The structure of our Constitution is identified by way of its actual provisions, recorded in its text. This is why our colleague can offer no example of legislation that would undermine the structure of the Constitution that cannot be addressed as we propose, which is via purposive textual interpretation. It is also why, once "constitutional structure" is properly understood, it becomes clear that, when our colleague invokes "constitutional structure", she is in substance inviting judicial invalidation of legislation in a manner that is wholly untethered from that structure.[525]

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[521] *Mercer* at para. 48.
[522] *Toronto* at para. 52 (internal quotation marks omitted), cited in Law Society written submissions at para. 130.
[523] Law Society written submissions at para. 131.
[524] *Toronto* at para. 170, *per* Abella J., dissenting.
[525] *Toronto* at para. 53. See also *Mercer* at para. 49.

432. In short, *Toronto* forecloses the Law Society's legal theory on the judicature provisions. If there were any ambiguity in *Toronto*, which there is not, it would be resolved by *Mercer*.

(d) Sections 7, 10(b), and 11(d) of the *Charter* do not imply any particular regulatory model for lawyers

433. It is fair to interpret ss. 7 and 10(b) of the *Charter* as requiring that lawyers be independent in the sense of being free from improper interference with their advice or advocacy. This is how the Supreme Court has defined the right to an independent lawyer protected by s. 7.[526] Given the judicial emphasis on lawyer independence in a criminal context,[527] it is reasonable to assume that a co-extensive right is protected by s. 10(b), in situations where that provision applies. The Law Society also invokes s. 11(d), but its trial fairness component is co-extensive with s. 7.[528]

434. As described in Part 4 below, the *Act* preserves lawyer independence as that principle of fundamental justice is understood and protected under the *Charter.* However, the plaintiffs' conception of absolute independence goes far beyond what ss. 7 and 10(b) of the *Charter* can reasonably be interpreted to require.

435. Section 10(b) of the *Charter* provides that a person who has been arrested or detained has the right "to retain and instruct counsel without delay and to be informed of that right". Section 7 does not refer expressly to lawyers, but the principles of fundamental justice require the state to fund counsel in certain circumstances.[529]

436. For the right to counsel in ss. 7 and 10(b) of the *Charter* to be meaningful, counsel must be capable of fulfilling the purposes of these provisions. The purpose of the right to counsel component of s. 7 is to ensure procedural fairness.[530] The purpose of s. 10(b) is "to allow the detainee not only to be informed of his rights and obligations under the law

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[526] *Federation* at paras. 83-84., 97-103 See also *Jabour* at pp. 335-336;
[527] *Federation* at para. 98 citing *Jabour* at pp. 335-336.
[528] *J.J.* at paras. 113-114.
[529] See e.g. *Rowbotham*; *J.G.*
[530] *J.G.* at paras. 80-82.

but, equally if not more important, to obtain advice as to how to exercise those rights".[531] These purposes would not be fulfilled if, for example, a lawyer's advice or advocacy were incompetent, or influenced by the lawyer's own economic interests, or chilled by a reasonable fear of being sanctioned improperly for representing an unpopular client.

437. To this extent, ss. 7 and 10(b) of the *Charter* guarantee the continued existence of lawyers who are independent in the sense of being free from interference that would compromise their advice or advocacy. Improper interference with lawyers' advice or advocacy would effectively deny the right to counsel under ss. 7 or 10(b) by making it impossible for counsel to provide the kind of independent advice and zealous advocacy that ss. 7 and 10(b) are intended to protect.

438. But it is quite a leap to suggest, as the Law Society does, that ss. 7 and 10(b) of the *Charter* therefore require lawyers to be self-governing and self-regulating (as the Law Society defines those concepts). This argument assumes that lawyers cannot be independent unless they are absolutely self-governing and self-regulating, which is factually inaccurate. Sections 7 and 10(b) require the continued existence of independent lawyers, but do not require a particular regulatory model for lawyers. Any regulatory model in which lawyers remain capable of discharging the purposes of ss. 7 and 10(b) is compatible with the *Charter*.

PART 4: THE ACT PRESERVES LAWYER INDEPENDENCE

The *Act* preserves lawyer independence and is constitutional

I. Overview

439. As set out above, the Law Society's conception of absolute lawyer independence finds no expression in Canadian law.

440. This section explains how the *Act* preserves lawyer independence, as that concept is defined and protected by the Constitution. While the Attorney General's position is that

[531] *R. v. Sinclair*, 2010 SCC 35.

this analysis should be done under ss. 7 and 10(b) of the *Charter,* the analysis applies equally to other legal theories of lawyer independence advanced in this litigation—whether based on unwritten constitutional principles, the judicature provisions, or other provisions of the *Charter*.

II. Electoral self-governance and pure self-regulation are not the only way to preserve lawyer independence

(a) Overview

441. At the heart of the plaintiffs' argument is a factual assertion: if lawyers are not self-governing and self-regulating (as the plaintiffs expansively define those concepts), lawyers will cease to be independent. That is a factual claim. Despite it being a factual claim, the plaintiffs have not tendered any evidence that would tend to support it. In this sense, the plaintiffs' cases amount to pure speculation.

442. Many democracies worldwide have reformed their models of lawyer regulation. Evidence from Québec, Australia, and New Zealand shows that a variety of different regulatory models can ensure lawyer independence.

443. The Law Society does not claim that lawyers in these jurisdictions lack independence. The Trial Lawyers apparently do claim that New Zealand lawyers lack independence, an absurd suggestion dealt with below. The fact is that lawyers are independent under these other regulatory models, which disproves the plaintiffs' factual assertion that public access to independent advice and advocacy from lawyers depends on lawyers being entirely self-governing and self-regulating (as the plaintiffs define those terms).

(b) Other jurisdictions cannot be ignored

444. Recognizing that evidence from other jurisdictions is fatal to their case, the plaintiffs attempt to distinguish all other jurisdictions as somehow irrelevant. Their 'BC exceptionalism' approach should not be adopted.

445. The Law Society dismisses Québec on the grounds that Québec private law is civilian and the constitutionality of the Québec legislation has not been tested.[532] It is of no moment that Québec private law is civilian, given that the need for independence from the state is most pronounced in public law. And although it is true the constitutionality of the Québec legislation has not been tested, the Law Society does not claim—nor could it be claimed—that Québec lawyers lack independence.[533] In fact, the Law Society admits that they are independent.[534] On what basis, then, could the Québec legislation possibly be unconstitutional for reasons relating to independence?

446. The Trial Lawyers dismiss Australia and New Zealand because these countries have different constitutions than Canada.[535] This submission reflects a misunderstanding. The point is not that certain regulatory models are constitutional in Australia and New Zealand, so they must be constitutional here. What is constitutional in Australia and New Zealand may not be constitutional here, and *vice versa*. The point is that evidence from Australia and New Zealand, which have made major changes to how they regulate lawyers, is probative of whether electoral self-governance and self-regulation are necessary components of lawyer independence as the plaintiffs contend.

447. This case is atypical in that most of the *Act* is not yet in force. In most constitutional litigation, the court makes findings of fact about the (past) effects of the impugned legislation. Most of the *Act* has not yet had any effects. The Court must make findings of fact about the effects the *Act* is likely to have in the future. The plaintiffs say the *Act* will erode lawyer independence because electoral self-governance and self-regulation are necessary components of lawyer independence. The Attorney General says the *Act* will make no difference to lawyer independence. The best available evidence on this point is evidence about what has happened to lawyer independence in jurisdictions that have moved away from electoral self-governance and self-regulation.

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[532] Law Society written submissions at paras. 236-240
[533] Greenberg XFD, Qs. 173-181; 192-195 and responses to requests 19 and 20.
[534] Law Society written submissions at para. 193.
[535] Trial Lawyers written submissions at paras. 142-143.

448. Evidence from other jurisdictions is often considered in constitutional litigation, for example in the minimal impairment analysis under s. 1 of the *Charter*.[536] Minimal impairment asks, in essence, whether there are alternatives to the impugned legislation that, if adopted, would achieve the same legislative objective while interfering less with *Charter*-protected interests. To answer that question, courts often consider evidence from other jurisdictions that have adopted other models. As this Court explained in *McLeod*:

> The purpose of looking to practices in other jurisdictions is to assess the range of policy responses that might be effective in achieving the legislative objective. This can be relevant to the application of the minimal impairment criterion under s. 1 of the Charter. This purpose does not require a comparison of constitutional systems as it is not a comparison of such but rather a matter of looking to other implementations of policies to assist in assessing such in Canada.[537]

449. *Carter* is a good example. Minimal impairment was one of the main issues: are there alternatives to an absolute prohibition on physician-assisted dying that would achieve the legislative objective of preventing vulnerable persons from being induced to commit suicide at times of weakness? Canada argued that any derogation from an absolute prohibition would cause harm to vulnerable persons. To evaluate that argument, Justice L. Smith of this Court made findings of fact about the effects of other legislative models in Oregon, Washington, Montana, the Netherlands, Belgium, Switzerland, Luxembourg, and Colombia.[538] On the basis of those findings, she concluded that adopting a less restrictive model in Canada would not have the effects that Canada alleged.[539]

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[536] See, for example, *Carter v. Canada (Attorney General),* 2015 SCC 5 at paras. 104–105 [*Carter*]; *Canada (Attorney General) v. JTI-Macdonald Corp*., 2007 SCC 30 at para. 138; *Charkaoui v. Canada (Citizenship and Immigration),* 2007 SCC 9 at paras. 81-84; *Lavoie v. Canada*, 2002 SCC 23 at paras. 66–67; *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2020 BCSC 1310 [*Cambie*], 2022 BCCA 245, leave to appeal ref'd 2023 CanLII 26745 (SCC); *Bedford v. Canada (Attorney General)*, 2010 ONSC 4264 [Bedford], var'd 2012 ONCA 187, var'd 2013 SCC 72; *Truchon c. Procureur général du Canada*, 2019 QCCS 3792.

[537] *McLeod v. British Columbia (Superintendent of Motor Vehicles),* 2023 BCSC 325 at para. 165.

[538] *Carter v. Canada (Attorney General)*, 2012 BCSC 886 at paras. 389-620, aff'd 2015 SCC 5.

[539] *Carter* (BCSC) at paras. 1238-1242.

450. Similarly, in *R. v. Granados-Arana,* the Ontario Superior Court found international legislation and jurisprudence to "usefully provide a broader, comparative perspective through which to consider the constitutional validity of s. 745.51 of the *Criminal Code*".[540] The Court reviewed the use of life-long sentences in the United States, the United Kingdom, Australia, and New Zealand and relied on the evidence from these foreign jurisdictions to uphold the constitutional validity of s. 745.51 of the *Criminal Code* and find it did not amount to "cruel and unusual punishment" under s. 12 of the *Charter*.[541]

451. The Court should adopt a similar approach here. Evidence from Québec, Australia, and New Zealand is probative of whether, as the plaintiffs allege, public access to independent advice and advocacy from lawyers depends on lawyers being entirely self-governing and self-regulating. That is a factual allegation that must be tested against the evidence. The evidence shows that lawyers in these jurisdictions remain independent under different regulatory models. This fact strongly suggests that the electoral model in the *Act* (a minor change compared to what has been done in Québec, Australia, and New Zealand) will not have the effect of diminishing the independence of lawyers in British Columbia.

(c) **Québec**

452. The Law Society's summary of the legislative scheme in Québec is fair and accurate, although incomplete: it covers rule-making, but omits investigations (including prosecutorial discretion) and discipline adjudication.[542]

453. Québec lawyers are subject to the same statutory scheme that applies to all other regulated professionals in that province, and the Barreau du Québec is merely one of many "professional orders". In this regulatory scheme, the professional orders, the Office des professions, the Interprofessional Council, and Cabinet each play a role.[543]

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[540] *R. v. Granados-Arana,* 2017 ONSC 6785 at para. 77 [*Granados-Arana*].
[541] *R. v. Granados-Arana* at paras. 77-140.
[542] Law Society written submissions at paras. 233-235.
[543] Adamski Report at p. 5.

454. The overarching function of the Office des professions (the "**Office**") is to ensure that each of the professional orders is protecting the public.[544] The Office has seven members, all of whom are appointed by the government.[545]

455. Rule-making authority (including for the code of professional conduct) is shared between the relevant professional order, the Office, and Cabinet. An order (such as the Barreau) may propose rules, but proposed rules must be approved by both the Office and Cabinet before they take effect, and both the Office and Cabinet can amend the order's proposals. The Office can also require an order to draft rules the Office considers to be appropriate. If the order fails to do so, such rules can, on the recommendation of the Office, be made by Cabinet.[546] The plaintiffs do not dispute any of this.

456. Investigative authority and prosecutorial discretion for each profession are vested in a "syndic". The syndic is appointed by the order but must act independently of the order.[547]

457. Disciplinary authority rests at first instance with a tribunal called the disciplinary council. Hearing panels consist of three persons: two members of the profession appointed by the order and a chair appointed by the government.[548] Most decisions of the disciplinary council are appealable to another tribunal called the Professions Tribunal, whose members are judges of the Court of Québec.[549] Decisions of the Professions Tribunal are subject to judicial review in the Superior Court of Québec.

458. If this model can be described as self-regulation at all, it is a limited form of self-regulation. The Barreau plays a role in rule-making but is subject to the oversight of the Office and Cabinet in the sense of being unable to make rules (or amend the code of professional conduct) without their approval. Cabinet can make rules for lawyers over the

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[544] Adamski Report at p. 6; *Québec Professional Code*, s. 12.
[545] Adamski Report at p. 6; *Québec Professional Code,* s. 4.
[546] Adamski Report at pp. 6-7; *Québec Professional Code,* ss. 12, 95-95.4, 183; Law Society written submissions at para. 233-234.
[547] Adamski Report at pp. 11-12.
[548] Adamski Report at pp. 12-13.
[549] Adamski Report at p. 13.

objection of the Barreau. The Barreau does not control investigations nor decide who will and will not be charged with misconduct. The Barreau plays no role in discipline.

459. As the Law Society concedes, with some understatement, “the legal profession is subject to greater government oversight in Québec than in other Canadian jurisdictions”.[550] It is difficult to conceive of how Canada’s constitutional structure could require self-regulation and self-governance, or that lawyers be free from influence from any source, when Québec has regulated lawyers with a significant role for government oversight for the last five decades. Yet, the Law Society admits that Québec lawyers remain independent.[551]

460. The Law Society allows Québec lawyers to practise law temporarily in BC.[552] The Law Society is not aware of any concerns about the professional standards of Québec lawyers.[553] To the best of the Law Society’s knowledge, there has never been any discussion among the Federation of Law Societies that any of its current members (such as the Barreau) may not be independent from government.[554]

461. Québec disproves the plaintiffs’ factual allegation that public access to independent advice and advocacy from lawyers depends on lawyers being entirely self-governing and self-regulating. The Law Society’s admission that lawyers in Québec remain independent should be dispositive of the Law Society’s claim.

(d) **Australia**

462. In the 1980s and 1990s, most Australian states changed their models of lawyer regulation to address concerns about consumer protection and anti-competitive practices.[555] The states removed many regulatory functions from the profession and

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[550] Law Society written submissions at para. 235.
[551] Law Society written submissions at para. 193: “Independence of the Bar protected by self-governance and self-regulation, has existed and still exists in every province and territory and Canada”.
[552] Greenberg XFD response to request 19 (Lever #1, Ex. O at p. 380).
[553] Greenberg XFD at Q. 174-176.
[554] Greenberg XFD at Q. 191-195, response to request 20 (Lever #1, Ex. O at p. 380).
[555] Expert report of Dr. Christine Parker dated December 2, 2024 ("**Parker Report**") at para. 41.

delegated them to independent statutory bodies, which are discussed below.[556] The reforms also included: (1) lay members on disciplinary tribunals; (2) legislative definitions of conduct that could lead to professional discipline; and (3) more powers to disciplinary tribunals.[557] Although lawyers expressed concern about the proposed changes before they happened, once the changes occurred, lawyers generally accepted them.[558]

463. Australia's regulatory models do not undermine lawyers' independence from the state.[559] Rather, Australia's regulatory models reflect a concern for consumer issues, access to justice, and competition in the market for legal services.[560] Specifically, the introduction of statutory regulators for complaints handling and disciplinary investigations reflects the governments' concern with public confidence in the legal profession and the administration of justice, and is not a threat to lawyer independence.[561]

464. In Australia, lawyers in the six states are co-regulated by the profession, courts and statutory bodies.[562] Three of the six states opted into the Legal Profession Uniform Law System, which harmonizes the regulation of the legal profession (the "**Uniform States**").[563]

465. The co-regulatory systems in Australian states generally operate as follows:

a. **Supreme courts:** (1) control lawyer admission,[564] (2) maintain the roll of practitioners,[565] (3) hear appeals and judicial reviews from disciplinary matters,[566] and (4) retain inherent jurisdiction to hear conduct cases against

[556] Parker Report at para. 41.
[557] Parker Report at para. 41.
[558] Parker Report at para. 258.
[559] Parker Report at para. 255.
[560] Parker Report at para. 255.
[561] Parker Report at para. 259.
[562] Parker Report at para. 44.
[563] Parker Report at paras. 24-29. The Uniform States are New South Wales, Victoria, and Western Australia.
[564] Parker Report at para. 44.
[565] Parker Report at para. 48.
[566] Parker Report at para. 45.

lawyers and permanently remove a lawyer's name from the roll of practitioners.[567]

b. **Professional associations:** (1) develop conduct rules and continuing professional development rules; and (2) largely manage the issuance, renewal and suspension of practicing certificates.[568]

c. **Statutory legal services commissioners or boards**: (1) handle complaints and investigations; and (2) institute disciplinary proceedings.[569]

d. **Disciplinary tribunals:** hear conduct matters against lawyers.[570]

466. In most states the government appoints: (1) the legal services commissioner or board,[571] and (2) disciplinary tribunal members.[572]

i. **Rule making in Australia**

467. In the Uniform States, the professional associations are empowered to develop legal practice rules, conduct rules and continuing professional development rules.[573] However, the Standing Committee of Attorney Generals – made up of the Attorneys General of each of the three states – must either approve or, under certain circumstances, veto the proposed rules. [574]

468. In South Australia, the Minister can make conduct rules by regulation.[575]

469. The Supreme Courts, in cooperation with the profession and legal educational institutions, develop admission rules.[576]

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[567] Parker Report at para. 45.
[568] Parker Report at para. 44.
[569] Parker Report at para. 44.
[570] Parker Report at para. 44.
[571] Parker Report tables 4 and 5 at 35-39.
[572] Parker Report at table 1 at 21-24.
[573] Parker Report at para. 108.
[574] Parker Report, table 8 on p. 56, and para. 210.
[575] Parker Report at para. 127
[576] Parker Report at para. 210.

470. In principle, a state government can make rules by legislation, usually in response to specific issues.[577] For example, in Queensland, the government legislated rules about how costs should be communicated to clients and what costs agreements could entail.[578]

ii. **Investigations of misconduct in Australia**

471. In general, statutory legal services commissioners or boards handle complaints and investigations, and institute disciplinary proceedings.[579]

472. The composition and appointment of the statutory commissioners or boards differ from state to state. In most states, the government appoints at least some of the members.[580] In four states, the commissioner need not be a legal practitioner.[581]

473. The investigatory process is similar in all six states. The statutory commissioner or board:

a. receives all complaints;

b. decides whether the complaint should be treated as a consumer matter, a disciplinary matter, or both;

c. handles less serious complaints;

d. investigates disciplinary matters; and

e. starts disciplinary proceedings at the disciplinary tribunal if certain evidentiary standards are met.[582]

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[577] Parker Report at para. 132.
[578] Parker Report at para. 132.
[579] Parker Report at para. 44.
[580] Parker Report at tables 4 and 5 at pp. 35-39.
[581] In New South Wales, Victoria, Queensland, South Australia. See tables 4 and 5 at pp. 35-39.
[582] Parker Report at paras. 166-173. In New South Wales and Queensland, the designated local authority may delegate investigations to the relevant legal professional association. In Victoria, the Board previously delegated some matters concerning barristers to the Victorian Bar but ceased doing so in response to a recommendation of a Royal Commission into the Management of Police Informants in Victoria because the police used a criminal defense barrister as an informant.

iii. **Discipline adjudication in Australia**

474. Each state has legislated disciplinary tribunals to hear conduct matters against lawyers.[583] The government appoints tribunal members.[584]

475. Appeals and judicial reviews are available to the Supreme Court in each state, which also retains its inherent jurisdiction to strike practitioners off the roll due to professional misconduct.[585]

(e) **New Zealand**

476. New Zealand regulates lawyers through a co-regulatory model that is governed by the *Lawyers and Conveyancers Act 2006.*[586] New Zealand's co-regulatory model, which has been in place for nearly 20 years, does not undermine lawyers' independence from the state.[587] While the system in New Zealand may not be perfect, there is a healthy respect for the rule of law.[588] In particular, lawyers do not hesitate to challenge government action and policy in courts and tribunals.[589]

477. The key regulatory entities in New Zealand are:

a. **The New Zealand Law Society**: A national body governed primarily by elected lawyers.[590] It has dual functions: regulating lawyers and advocating on their behalf. While licensed lawyers must be covered by the regulatory functions of the society, they can choose not to participate in the representative functions.[591]

b. **The Lawyers Complaints Service**: The primary disciplinary adjudicators are three independent entities: (1) the Standards Committees which consist

[583] Parker Report at para. 56.
[584] Parker Report at table 1 at pp. 21-24.
[585] Parker Report at paras. 168, 172.
[586] Expert report of Dr. Selene Mize dated December 3, 2024 at para. 5 ("**Mize Report**").
[587] Mize Report at paras. 1, 54.
[588] Mize Report at paras. 2-4, 55.
[589] Mize Report at paras. 54.
[590] Mize Report at para. 7.
[591] Mize Report at paras. 11-13.

of lawyers appointed by the New Zealand Law Society but independent from it, who manage initial complaints;[592] (2) the Legal Complaints Review Officers appointed by the Minister of Justice, who review Standards Committees' determinations;[593] and (3) the Disciplinary Tribunal administered by the Department of Justice (although some appointees are from the New Zealand Law Society) which hears serious disciplinary appeals such as denials of practicing certificates.[594]

c. **The Council of Legal Education:** A body of representatives from the judiciary, the profession, academia, students, and the public who are appointed primarily by the Governor-General on the advice of the Attorney-General. The council sets admission requirements and prescribes educational requirements.[595]

d. **Courts:** Judges, appointed by the Governor General on advice by the Attorney-General, have final authority on admissions and disciplinary appeals.[596]

e. **Government Actors:** Parliament, the Minister of Justice, and the Attorney-General all play roles in enacting legislation, making rules, and making appointments to the various regulatory bodies.[597]

i. **Rule making in New Zealand**

478. The Law Society generates the rules that govern the behaviour of lawyers.[598]

479. The Minister of Justice must approve the rules. In doing so, the Minister must consider whether it is necessary to impose duties or restrictions on lawyers for consumer

[592] Mize Report at paras. 14-15, 43-45.
[593] Mize Report at paras. 16, 46.
[594] Mize Report at paras. 17, 31, 47.
[595] Mize Report at paras. 18–19
[596] Mize Report at paras. 20–21.
[597] Mize Report at paras. 22-24.
[598] Mize Report at para. 33-34.

protection purposes.[599] The Minister of Justice may also amend the professional code if the Minister considers any rules to be deficient in any respect but must consult with the Law Society Council.[600]

480. The New Zealand Council of Legal Education sets the requirements for admission to the profession and prescribes educational requirements.[601]

ii. **Lawyer discipline in New Zealand**

481. There are 20 Standards Committees set up by the Law Society that are tasked with:

a. handling all initial complaints and most disciplinary proceedings; and

b. laying charges and prosecuting cases before the Disciplinary Tribunal.[602]

482. While the Law Society appoints members to the Standards Committee,[603] the members must be independent of the Law Society because of their quasi-judicial role.[604] At least one of three members must be a lay person.[605]

483. The Legal Complaints Review Officer reviews determinations of the Standards Committee.[606] Review Officers are appointed by the Minister of Justice and cannot be practicing lawyers—they are typically former lawyers.[607] They have the power to: (1) make any orders the Standards Committee could make; (2) refer the matter back to the Standards Committee for reconsideration; and (3) refer the matter to the Disciplinary Tribunal.[608]

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[599] Mize Report at para. 34.
[600] Mize Report at para. 36.
[601] Mize Report at para. 18
[602] Mize Report at para. 14-15, 45.
[603] Mize Report at para. 15
[604] Mize Report at para. 45.
[605] Mize Report at para. 15.
[606] Mize Report at para. 46.
[607] Mize Report at para. 16.
[608] Mize Report at para. 46.

484. The Disciplinary Tribunal: (1) decides applications to suspend lawyers; (2) determines applications to restore lawyers; and (3) hears appeals from denials or refusals of practicing certificates.[609]

485. The Department of Justice administers the Disciplinary Tribunal, which consists of seven to 15 lawyers (appointed by the New Zealand Law Society) and seven to 15 lay members (appointed by the Governor-General).[610] The chair and deputy chair of the Discipline Tribunal cannot be lawyers and are appointed by the Governor-General.[611]

486. There is a right of appeal to the High Court from Disciplinary Tribunal decisions.[612] Additionally, judicial review is available for any disciplinary decision of the Standards Committee, Review Officers, and Disciplinary Tribunal.[613]

487. Courts also have direct discipline powers: courts may disqualify lawyers from cases and strike lawyers off the roll.[614]

iii. **Investigations of misconduct in New Zealand**

488. The Standards Committee:

a. investigates all complaints and handles most of the disciplinary proceedings;[615] and

b. lays and prosecutes cases before the New Zealand Lawyers and Conveyancers Disciplinary tribunal ("**Disciplinary Tribunal**").[616]

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[609] Mize Report at para. 47.
[610] Mize Report at para. 17.
[611] Mize Report at para. 17. The chair and deputy chair must have had at least seven years of practice experience as a lawyer.
[612] Mize Report at para. 49.
[613] Mize Report at para. 48.
[614] Mize Report at paras. 50-52.
[615] Mize Report at para. 14.
[616] Mize Report at para. 45.

489. While the Law Society Council appoints members to the Standards Committee,[617] the members must be independent of the Law Society Council because of their quasi-judicial role.[618] At least one of three members must be a lay person.[619]

490. Complainants, lawyers who are the subject of the complaint, and the Law Society may apply to the Legal Complaints Review Officers ("**Review Officers**") to review the determinations of the Standards Committee.[620]

491. The Minister appoints the Review Officers, who cannot be practicing lawyers.[621]

492. The Review Officers have the power to: (1) make any orders the Standards Committee could make; (2) refer the matter back to the Standards Committee for reconsideration; and (3) refer the matter to the Disciplinary Tribunal.[622]

iv. **Discipline adjudication in New Zealand**

493. The Disciplinary Tribunal: (1) determines charges and applications to suspend lawyers; (2) determines applications to restore persons to the roll of practitioners; and (3) hears and decides appeals.[623]

494. The Department of Justice administers the Disciplinary Tribunal, which consists of seven to 15 lawyers and seven to 15 lay members.[624]

495. The Law Society Council appoints the lawyer members while the Governor-General appoints the lay members.[625]

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[617] Mize Report at para. 15
[618] Mize Report at para. 45.
[619] Mize Report at para. 15.
[620] Mize Report at para. 46.
[621] Mize Report at para. 16.
[622] Mize Report at para. 46.
[623] Mize Report at para. 47.
[624] Mize Report at para. 17.
[625] Mize Report at para. 17.

496. The chair and deputy chair of the Discipline Tribunal cannot be lawyers and are appointed by the Governor-General.[626]

497. There is a right of appeal to the High Court from Disciplinary Tribunal decisions.[627] Further, judicial review is available for any disciplinary decision of the Standards Committee, Review Officers, and Disciplinary Tribunal.[628]

498. Courts also have direct discipline powers: courts may disqualify lawyers from cases and strike lawyers off the roll.[629]

III. The *Act* preserves lawyer independence

499. The *Act* preserves lawyer independence, properly understood as freedom from improper interference with lawyers' advice or advocacy. Each of the plaintiffs' arguments is addressed in turn below.

(a) Statutory mandate (s. 6)

500. The Law Society says the mandate in s. 6 is unconstitutional because it does not contain an obligation, as exists in the Current Act, for the regulator to "protect the public interest in the administration of justice" including by "preserving and protecting the rights and freedoms of all persons".[630]

501. This phrase is not a magical incantation that must be included as part of the statutory mandate of every regulator of lawyers. It is not literal: the Law Society does not protect anyone's rights or freedoms, at least not in any direct sense. This language in the Current Act dates only to 1987 and exists in only one other province or territory: New Brunswick, where it dates to 1996.[631] It is hard to see how statutory language that exists

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[626] Mize Report at para. 17. The chair and deputy chair must have had at least seven years of practice experience as a lawyer.
[627] Mize Report at para. 49.
[628] Mize Report at para. 48.
[629] Mize Report at paras. 50-52.
[630] Law Society written submissions at para. 371.
[631] *1987 Act*, s. 3; *New Brunswick Act*, s. 2. *Nova Scotia Act*, s. 4(2)(d).

only in two provinces, and in those provinces dates only to 1987 and 1996, could be constitutionally required.

502. The reality is that the language that the Law Society argues is constitutionally required is a rarity in Canada. There are only two other jurisdictions in Canada that have had a statutory mandate requiring the provincial law society to protect the public interest in the administration of justice by preserving and protecting the rights and freedoms of all persons: New Brunswick and Yukon.

503. New Brunswick still retains that language, which was introduced in 1996.[632]

504. Yukon's statute had similar language between 2004 and 2017. At the time, the statute read in part:

> 3. It is the object and duty of the society
>
> > (a) to uphold and protect the public interest in the administration of justice by
> >
> > > (i) preserving and protecting the rights and freedoms of all persons, […][633]

505. In 2017, Yukon significantly amended its *Legal Profession Act* and removed the requirement for the society to uphold the public interest in the administration of justice or to preserve and protect the rights and freedoms of all persons.[634]

506. A 2011 policy paper written by the Law Society of Yukon sheds some light into Yukon's change to the mandate. In the policy paper the Law Society of Yukon notes the "wide variation of purposes" within Canadian legal regulation statutes.[635] The paper also notes that a mandate "should not be excessively broad so as to exceed the Society's resources and capabilities" and, more specifically, the Law Society of Yukon concedes

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[632] *New Brunswick Act*, s. 5(a)-(b).
[633] *Act to Amend the Legal Profession Act,* SY 2004, c. 14.
[634] *Yukon Act*, s. 3.
[635] McDonald #1, Ex. N at p. 650.

that it “does not believe it is possible for it to ‘preserve and protect the rights and freedoms of all persons’”.[636]

507. Even in British Columbia, it was not until 1987 that the Law Society had any sort of public interest mandate in the legislation. At the time, it was a dual mandate: protect the public interest, as well as members' interests.[637] That dual mandate was removed in 2012, when the Law Society was directed to consider only the public interest.[638]

508. For ease of reference, here is the mandate in s. 6 of the *Act* again:

> (1) The regulator has the following duties:
>
> (a) to regulate the practice of law in British Columbia;
>
> (b) to establish standards and programs for the education, training, competence, practice and conduct of applicants, trainees, licensees and law firms;
>
> (c) to ensure the independence of licensees.
>
> (2) The regulator must exercise its powers and perform its duties under this Act in the public interest.[639]

509. This plain language mandate is similar to the mandates of law societies in other provinces, including Saskatchewan,[640] Ontario,[641] Nova Scotia,[642] and Manitoba (which is excerpted below) :

> The purpose of the society is to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence.[643]

510. Saskatchewan is another comparator:

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[636] McDonald #1, Ex. N at p. 651-652.
[637] *1987 Act*, s. 3.
[638] *Legal Profession Amendment Act, 2012,* S.B.C. 2012, c. 16, s. 3.
[639] *Act*, s. 6.
[640] *Saskatchewan Act*, ss. 3.1-3.2.
[641] *Manitoba Act*, s. 3(1).
[642] *Nova Scotia Act*, s. 4.
[643] *Manitoba Act*, s. 3(1).

> In the exercise of its powers and the discharge of its responsibilities, it is the duty of the society, at all times:
>
> (a) to act in the public interest;
>
> (b) to regulate the profession and to govern the members in accordance with this Act and the rules; and
>
> (c)to protect the public by assuring the integrity, knowledge, skill, proficiency and competence of members.[644]

511. The Law Society does not claim that the intervener LSM and Law Society of Saskatchewan lack independence because their statutory mandates do not require them to "protect the public interest in the administration of justice" including by "preserving and protecting the rights and freedoms of all persons".

512. It is hard to see how a statutory mandate that exists only in BC and New Brunswick, and dates only to 1987 (or in its current form, to 2012) could be constitutionally required. It is even harder to see how a statutory mandate that is similar to longstanding mandates in Saskatchewan,[645] Ontario,[646] Manitoba,[647] and Nova Scotia[648] could be constitutionally prohibited.

513. Nothing about the mandate in s. 6 of the *Act* compromises lawyer independence.

(b) **Number of elected lawyers on board (s. 8(1)(a))**

514. The plaintiffs and allied interveners challenge the number of elected lawyers on the board in s. 8(1)(a) of the *Act*, arguing that elected lawyers must constitute a "strong" or "substantial" majority.

515. For the Law Society this is a major change in position. In its response to the Intentions Paper, the Law Society said "self-regulation of the legal profession requires that a majority of the board that governs lawyers are themselves lawyers and a majority of the

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[644] *Saskatchewan Act*, ss. 3.1-3.2.
[645] *Saskatchewan Act*, ss. 3.1-3.2.
[646] *Manitoba Act*, s. 3(1).
[647] *Ontario Act*, ss. 4.1-4.2.
[648] *Nova Scotia Act*, s. 4.

lawyer directors are elected".[649] The board composition in the *Act* meets both criteria: a majority of the board are lawyers (9/17), and a majority of the lawyer directors are elected (5/9).

516. It is also a change in position for the CBA. In its response to the Intentions Paper, the CBA recommended a board of 19 persons: 11 lawyers, two notaries, two paralegals, and four members of the public.[650] Even assuming it meant that all 11 lawyers should be elected, which is not entirely clear, 11/19, or 58%, is hard to characterize as a "strong" or "substantial" majority.

517. In any case, the plaintiffs and allied interveners make four main arguments for their position that lawyer independence requires a strong majority of elected lawyers on the board of the regulator. Each is covered in turn below.

i. Elections are not the only way of ensuring independence from state

518. The first argument is that "there is simply no other means of ensuring that directors of a governing body are not influenced by outside parties".[651] That is a factual allegation, but the plaintiffs and allied interveners do not cite any evidence in support of it. The only authority cited in support is the *obiter* from the Superior Court decision in *LaBelle* that was rejected by the Ontario Court of Appeal.[652]

519. The evidence does not establish that elections are uniquely capable of ensuring independence from the state. The plaintiffs have not led any evidence from any jurisdiction, such as England and Wales, in which lawyers are regulated by entities with boards of directors in which elected lawyers are not the majority. By contrast, evidence from the LSM and the Law Society's admissions on discovery about appointed lay benchers confirm that appointed directors can be just as independent as elected directors.

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[649] Law Society Response to the Ministry of Attorney General's Intentions Paper (Greenberg #1, Ex. 25 at p. 690).
[650] CBA Response to Intentions Paper (Greenberg #1, Ex. 28 at pp. 724-725).
[651] Law Society written submissions at para. 112.
[652] Law Society written submissions at para. 113, citing *LaBelle*.

520. The evidence from the intervener LSM confirms that a majority of elected lawyers is not necessary to ensure independence. Of its 25 benchers, only 12 (48%) are lawyers elected by lawyers. Its other benchers are an articling student elected by articling students, four lawyers appointed by the benchers, the immediate past president of the LSM, the Dean of the Faculty of Law at the University of Manitoba, and six members of the public appointed by a committee chaired by the Chief Justice.[653] And yet the evidence from the LSM's CEO is unequivocal that it is independent:

> In my time as a senior executive, the LSM has acted independently of government consistent with its designation as the regulator of the practice of law for the purpose of upholding and protecting "the public interest in the delivery of legal services with competence, integrity and independence". In my experience, despite being a creature of statute the LSM has operated, and continues to operate, without direction or interference from the government of the day. That is to say, consistent with its statutory designation as the regulator of the practice of law in Manitoba the LSM acts independently.[654]

521. Neither the plaintiffs nor CBA challenge this evidence, while the Law Society admits that lawyers in Manitoba are independent.[655]

522. There have been appointed lay benchers for decades in BC and other provinces. There is no evidence that even a single appointed bencher has ever lacked independence or served as a vehicle for state or other interference with lawyers. The Law Society's evidence was that "we benefit immensely from the appointed benchers".[656] And this is for benchers who are members of the public appointed by the government. The plaintiffs' main concern appears to be with the five lawyers and other legal professionals who will be appointed by the board under s. 8(1)(e). It is quite a leap, unsupported by any evidence or logic, to conclude that lawyers and other legal professionals who are appointed by the board will be *less* independent than lay benchers who have been appointed by the government.

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[653] *Manitoba Act*, s. 5; Affidavit #1 of Leah Kosokowsky made November 22, 2024 at paras. 4-5.
[654] Kosokowsky #2 at para. 16.
[655] Law Society written submissions at para. 193.
[656] Greenberg XFD at Q. 43. See also Turriff, "Self-Governance" (Greenberg #1, Ex 22 at p. 646).

523. In short, the evidence about decades of experience of appointed lay benchers and the LSM disproves the plaintiffs' factual allegation that only boards with strong majorities of elected lawyers can ensure independence from the state. Appointed benchers/directors can be just as independent from the state.

ii. Control by lawyers or control by government is a false dichotomy

524. The second argument made by the plaintiffs and allied interveners is less of an argument and more of a bare assertion that "the regulator of lawyers in Canada be controlled by—and answerable to—lawyers".[657] To the limited extent any justification is given for this assertion, it is the claim that, if the regulator is not controlled by lawyers, it will be controlled by the government.[658]

525. That is a false dichotomy. Control by lawyers or control by the government are not the only possibilities.

526. The Court should reject the notion that lawyers' regulator must be controlled by lawyers. Mr. Cayton put it well: "Regulatory boards should not be beholden to the profession they regulate but to the public they serve".[659] The board should be independent from the government of the day, but it should also independent from—not captured by—the lawyers it regulates. The Attorney General refers to this as "dual independence".

527. Dual independence is particularly important for a regulator, like Legal Professions BC, that will regulate different categories of professionals who will compete against each

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[657] CBA written submissions at para. 75. See also Law Society written submissions at paras. 112 ("lawyers' governing body must be directly representative of and accountable to the Bar"), 381 ("elected lawyers do not control the composition of the board"); Trial Lawyers written submissions at paras. 32 ("elected lawyers no longer have majority control of and oversight over the legal profession"), 33(c) (the regulator "is not made up of and controlled by lawyers"), 176 (the regulator "is not functionally controlled by lawyers").

[658] See e.g. Law Society written submissions at para. 94 ("Without self-governance and self-regulation, it is open to the government to dictate the individuals or groups that may regulate lawyers (or the government may regulate them directly), the manner in which lawyers are regulated, and ultimately the manner in which lawyers carry out their duties to clients, courts and the administration of justice").

[659] Cayton Report at para. 4.12 (Greenberg #1, Ex 8 at pp. 486-487).

other in some segments of the market. If lawyers completely dominated the regulator, the risk is that they would, for anti-competitive reasons, use that control to impose burdensome requirements on notaries and regulated paralegals or cut standards for lawyers in areas of competition.[660] Mitigating this risk is one of the main rationales for a single regulator in the first place, as the Law Society's Legal Service Providers Task Force has recognized:

> a single regulator model would be able to avoid competing standards being set for similar types of services that might be common to more than one group of professionals. The Task Force was concerned that the possibility of competing regulatory frameworks created too much of a risk of driving standards down in order to gain competitive advantages for particular professional groups, a result that would not be in the public interest.[661]

528. It would defeat the purpose of a single regulator if lawyers completely dominated the regulator and could distort its regulatory powers to insulate lawyers from competition from notaries and paralegals.

529. The CBA takes this argument even further and alleges that the *Act* "eliminates tools for democratic participation by lawyers in their governance", including by removing members' resolutions and the ability of lawyers to initiate referenda that bind the benchers.[662] The CBA's fixation on the accountability of the regulator to *lawyers* is in direct tension with the CBA's acknowledgement that lawyer independence is not for the benefit of lawyers, but for the benefit of the public that lawyers serve.[663] Moreover, the provisions in the Current Act that provide "lawyer accountability" mechanisms have no parallel in any other province except Alberta: BC and Alberta are the only jurisdictions in which the profession is empowered to vote on resolutions that bind the benders.[664] The CEO of the LSM's evidence on this point is as follows: "In Manitoba, there is not and has never been

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[660] See e.g. *Law Society of New Brunswick v. FCT Insurance Company*, 2009 NBCA 22 (quashing a law society rule on the ground that it had been made for the unauthorized purpose of insulating lawyers from economic competition).
[661] LSBC, Final Report of Legal Service Providers Task Force (2013) (Greenberg #1, Ex. 64 at p. 1145.
[662] CBA written submissions at para. 88. The provisions in the *Current Act* are s. 11-13.
[663] CBA written submissions at para. 44.
[664] Current Act, ss. 12-13; *Alberta Act*, ss. 29-29.

provision for governance by referendum nor would the LSM support such a thing".[665] It is difficult to understand how continuing to provide lawyers with the ability to vote on issues and bind their regulator, as only BC and Alberta currently do, could be constitutionally required.

iii. **No evidence that board will appoint 'wrong' lawyers as directors**

530. The third argument made by the plaintiffs and allied interveners relates specifically to the five directors (four lawyers and one notary) who will be appointed by the board pursuant to s. 8(1)(e). They express concern that, when the board makes these appointments, elected lawyers (or lawyers generally) might not constitute a majority of the board.[666]

531. The plaintiffs seem to think it is self-evident that this possibility is a problem. Only the CBA makes an argument as to why it is problematic. The CBA says that the board-appointed directors will be "accountable to non-lawyers, rather than lawyers" which somehow means they will be "not sufficiently autonomous from other board members, government, and political influence to be classed as independent".[667] Similarly, the LSM, in the single brief paragraph of its submissions it dedicates to its unique board composition, says that its "appointed lawyer benchers are appointed by the balance of the benchers who have been duly elected".[668] It does not say why that matters.

532. To the extent there is an argument here, it depends on the same false dichotomy between elected lawyers and government addressed above. The CBA is saying that, unless elected lawyers are a majority of the group that selects the board-appointed directors, those directors will somehow be accountable to the government. But the group that selects the board-appointed directors is not the government and does not contain any representatives of the government. It consists of lawyers, notaries, regulated paralegals, and members of the public appointed by Cabinet in the same manner as lay benchers.

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[665] Kosokowsky #2 at para. 28.
[666] See, Law Society submissions at para. 379.
[667] CBA written submissions at paras. 69-70.
[668] Law Society of Manitoba written submissions at para. 62.

Notaries, regulated paralegals, and members of the public are not lawyers, but neither are they the government.

533. There is no evidence that, unless elected lawyers are a majority of the group that selects the five board-appointed directors, those directors will lack independence from the state. Four of them must be lawyers. Any lawyer will understand the importance of insulating lawyers' advice and advocacy from improper interference.

534. There is evidence that board-appointed directors are likely to be more independent than elected directors from the professionals they regulate. The board-appointed directors will be insulated from the distorting pressures of having electors who differ from their constituency. As noted above, after the 2018 AGM, some benchers were worried that the "membership may react negatively" if they acted in accordance with their view of the public interest.[669] Board-appointed directors will not be subject to this same kind of pressure, resulting in a board with greater dual independence.

535. It is fair to observe that board-appointed directors, if they wish to be re-appointed, have an incentive to get along well with the rest of the board. That is a disadvantage of the model in the *Act*. But the legislature is weighing that disadvantage against the disadvantages of elections, along with their respective advantages. The legislature has concluded that the best model is a mixed model that retains a significant role for elections, but balances them with board-appointed directors who should be less susceptible to regulatory capture.

iv. **Electoral model undermines, rather than enhances, public confidence**

536. The next argument is made only by the CBA and is essentially that public confidence depends on the lawyers' regulator being controlled by lawyers.[670]

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[669] Greenberg #1 at paras. 153-155; LSBC, Bencher Meeting Minutes (*in camera*) (January 25, 2019) (Lever #2, Ex. A at pp. 2-3).
[670] CBA written submissions at para. 75.

537. With respect, this is the kind of assertion about public confidence that only a lawyers' advocacy group could make. When a regulator is controlled by lawyers, that does not engender public confidence that the regulator is focused on client interests; it engenders public mistrust and reasonable concern that the regulator is focused on lawyers' interests.

538. There is no evidence whatsoever to support the CBA's position. The uncontradicted evidence is that the public is rightly skeptical of the current electoral model, in which law societies are governed by lawyers who often appeal to lawyers' interests in their electoral campaigns. One finds media headlines like "Should Nova Scotia lawyers really be allowed to regulate themselves?"[671] and "Alberta's Lawyers Police Their Own. The Process is Brutal and Broken".[672] The CBA's *own* Futures Initiative has found, the current electoral model "lends some truth to the perception that self-regulation may tend to protect the interests of the profession".[673] Mr. Cayton, whose opinions are not admissible for the truth of their contents but are evidence of the perceptions of an informed member of the public, expressed his concerns as follows:

> The substantial majority of policy issues discussed by Benchers relate to professional interests not the public interest. Through their control of the Society through elections and resolutions at the AGM members often thwart regulation in the public interest. The Society's active responsiveness to the profession is in start contrast with its lack of engagement with the public or legal clients. Some Benchers suggested to me that the Society should consult the profession even more regularly and widely. I take the view that the Society engages inappropriately with the profession.[674]

539. A purely electoral model creates an appearance (and sometimes reality) of regulatory capture that undermines public confidence in the regulation of the practice of law.

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[671] Lever #1, Ex L.
[672] Lever #1, Ex M.
[673] CBA Futures Initiative (2014) (Lever #1, Ex A at p. 21).
[674] Cayton Report at para. 6.10 (Greenberg #1, Ex. 8 at p. 500).

v. **Board composition secures independence**

540. It is the Attorney General's position that there are many conceivable board structures and compositions that can ensure independence. However, the narrow question presented by these proceedings is whether *this* board composition undermines lawyer independence, properly understood. It does not.

541. As the LSM and decades of experience with appointed lay bencher show, boards with a majority of elected lawyers are not uniquely capable of ensuring independence from the state. Moreover, appointed directors can be just as independent from the state. Elected benchers can lack independence, in both reasonable perception and reality, from the lawyers they regulate. Appointed directors are likely to be *more* independent from licensees than elected directors, in the sense of being freer and more likely to do what they regard to be in the public interest even if it is unpopular with licensees.

542. At the end of the day, the *Act* retains a lawyer majority in the board. Additionally, 14 of the 17 directors must be practising legal professionals. There is no evidence that the board-appointed legal professionals will be any less independent than the elected legal professionals. The remaining three directors will be similar to lay benchers. There are no government representatives. This is not a board that somehow invites state interference with how lawyers advise and represent their clients.

(c) **Indigenous council (s. 29) and transitional Indigenous council (s. 224)**

543. The plaintiffs object to the existence and role of the Indigenous council and transitional Indigenous council on two main grounds. The Law Society argues that:

a. the inclusion of the transitional Indigenous Council and Indigenous Council in the *Act* results in "a model of co-governance";[675] and

[675] Law Society written submissions at para. 396.

b. a “statutory requirement for the approval of rules that govern lawyers by any body other than a majority-elected board impairs self-regulation, and the independence of the Bar”.[676]

544. The transitional Indigenous council and Indigenous council do not create a model of co-governance. As the Indigenous Bar Association identifies, the powers and role of the transitional Indigenous council and Indigenous council prescribed by the *Act* are limited in scope.[677] Specifically, under the *Act*:

a. The transitional Indigenous council must approve the first rules of the board.[678] However, the board may then amend the first rules without approval from the Indigenous council.[679]

b. If the board decides to make rules respecting the use of alternative resolution process, and those rules reflect or are influenced by Indigenous practices, then those rules must be approved by the Indigenous council.[680]

c. In making tribunal rules, the tribunal must make rules that are designed to meet the specific needs of Indigenous persons who are parties to, or witnesses in, a proceeding before the tribunal, which rules must be approved by the Indigenous council.[681]

545. First, the transitional Indigenous council’s involvement in, and approval of the first rules ensures that the lived experience of Indigenous persons is considered when creating the first rules and helps to counteract their historic exclusion and ongoing underrepresentation in the profession. However, as the Indigenous Bar Association notes, if the new board considers it advisable or necessary to subsequently amend the rules to

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[676] Law Society written submissions at para. 401.
[677] Indigenous Bar Association written submissions at para. 7.
[678] *Act,* s. 226(2)(b).
[679] *Act,* s. 27.
[680] *Act,* s. 94(3).
[681] *Act,* s. 131(6).

ensure the independence of licensees, then it may do so without needing the consent of the Indigenous council.[682] This does not offend lawyer independence.

546. Second, having the Indigenous council approve rules regarding Indigenous practices and the needs of Indigenous persons who participate in proceedings before the tribunal does not undermine lawyer independence. It honours the principle "nothing about us without us" and acknowledges the diversity of Indigenous peoples in British Columbia and their distinct customs, practices, and lived experience. Additionally, as detailed in a prior section, nine jurisdictions in Canada have a role for external bodies in the creation of rules and regulations about the practice of law. The Law Society admits that all of them maintain lawyer independence.[683]

547. Third, the board is not required to pass any rules it considers contrary to its duties, including its duty to ensure the independence of licensees.[684] In fact, if the board were to pass rules that compromised the independence of licensees, those rules would be *ultra vires* for being contrary to the intent of the *Act*.[685] In practice, if the Indigenous council does not approve a rule (where their approval is required), it would simply mean the rule is not made. The Indigenous council does not have an independent power to make rules.

548. The Law Society also takes issue with the transitional board's decisions to: (1) include the transitional Indigenous council in all of its meetings;[686] and (2) have the transitional Indigenous council approve the replacement code of conduct.[687]

549. It is open to the Law Society to judicially review the transitional board's decisions, but these decisions are not required by the *Act* and do not properly form part of this constitutional challenge to the *Act*.

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[682] Indigenous Bar Association written submissions at para. 25.
[683] Law Society written submissions at para. 193.
[684] *Act,* s. 6(c).
[685] See for example *Grace v. British Columbia (Lieutenant Governor in Council),* 2000 BCSC 923 at para. 103 [*Grace*].
[686] Law Society written submissions at para. 397.
[687] Law Society written submissions at para. 397.

550. The Law Society also notes that the members of the Indigenous council and transitional Indigenous council do not need to be lawyers.[688] That is true but unproblematic. As developed at length above, public access to independent advice and advocacy from lawyers does not require lawyers to have an absolute monopoly in determining every aspect of how they are regulated, to the exclusion of all other perspectives. The members of the Indigenous council and transitional Indigenous council need not be lawyers, but that is not a reason to dismiss their perspectives, let alone to fear that their perspectives will somehow be dangerous. While some members of the Indigenous council and transitional Indigenous council may be lawyers, it should also be remembered (and the Law Society itself has acknowledged) that systemic discrimination long deprived Indigenous individuals of a fair opportunity to become lawyers.

551. Finally, the Law Society argues that the creation of the Indigenous council and transitional Indigenous council "reflects the implementation of government policy", specifically the BC First Nations Justice Strategy.[689] The Law Society does not suggest there is anything objectionable about the content of the BC First Nations Justice Strategy. There is not. Its foundational objective is to reverse the current reality of Indigenous persons being overrepresented in the criminal justice system and underrepresented as actors with roles and responsibilities within the system (e.g. as lawyers and judges).[690]

552. The Law Society's argument is essentially this: the Indigenous council and transitional Indigenous council might help reduce barriers to Indigenous individuals, but that is a goal of government policy, so the existence of these bodies is unconstitutional. However, nothing about the goal of reducing barriers to Indigenous individuals becoming lawyers and judges could possibly have any negative effects on the public or the public's access to independent legal advice and zealous advocacy from lawyers. Indeed, the Law Society's own Truth and Reconciliation Advisory Committee has, as part of its mandate,

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[688] Law Society written submissions at paras. 396-401.
[689] Law Society written submissions at paras. 402-403.
[690] BC First Nations Justice Strategy (Affidavit #1 of Thomas Spraggs ("**Spraggs #1**") made April 3, 2025, Ex. F at p. 18).

making "recommendations on how the Law Society can support the advancement of the principles set out in the […] First Nations Justice Strategy".[691]

553. To be clear, it is not the Attorney General's position that any and all governmental or legislative policy objectives can be imposed on the lawyers' regulator. That is not at issue in this litigation. The Attorney General's position is that there is nothing problematic about the BC First Nations Justice Strategy, i.e., nothing within it that interferes with lawyers' ability to provide independent legal advice and zealous advocacy.

554. In any case, the role of the Indigenous council and transitional Indigenous council is not to implement the BC First Nations Justice Strategy. Their role is to act in the public interest as their members see it. These bodies will ensure that Indigenous perspectives are heard before the board makes important decisions.

(d) **Guiding principles (s. 7 of the *Act*)**

555. The plaintiffs object to the guiding principles in s. 7 on two grounds. First, they say that any legislative guiding principles are "antithetical to the concept of self-regulation".[692] That is of no moment. Public access to independent advice and advocacy from lawyers does not require lawyers to have an absolute monopoly in determining every aspect of how they are regulated, to the exclusion of any input from the public's elected representatives in the legislative assembly.

556. The plaintiffs' second argument is that recent events in the United States illustrate the risks "arising from a legislative framework that permits the government [*sic*] to set the principles that guide the regulator".[693] But the question raised by these proceedings is not whether the legislature can set any guiding principles it wishes, regardless of their content; that is *not* the Attorney General's position. The question is whether there is anything

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[691] Indeed, one of the objectives of the Law Society's Truth and Reconciliation Advisory Committee is to make recommendations "on how the Law Society can support the advancement of the principles set out in the *Declaration on the Rights of Indigenous Peoples Act (DRIPA)*, the First Nations Justice Strategy, and the Truth and Reconciliation Commission's Calls to Action": Indigenous Framework Report (2022) (Greenberg #1, Ex. 61 at p. 1070).
[692] Law Society written submissions at para. 406.
[693] Law Society written submissions at para. 408.

objectionable about *these specific principles*, i.e., anything about the principles in the text of the *Act* that inhibits lawyers from fulfilling their function of providing independent legal advice and zealous advocacy on behalf of clients. Affirming the constitutionality of these principles would not licence the legislature to enact other principles with objectionable content.

557. The plaintiffs do not allege that there is anything problematic in the content of the guiding principles, except for s. 7(b), which requires the regulator to "have regard to supporting reconciliation and the implementation of the United Nations Declaration on the Rights of Indigenous Peoples".[694] The Law Society's core argument is that requiring the regulator to support UNDRIP implementation gives it "an institutional position" on contested legal issues, thereby undermining both regulatory impartiality and the independence of lawyers who may represent clients with opposing interests in litigation.

558. This objection rests on three premises: (1) that supporting reconciliation and UNDRIP represents "government policy" rather than legal obligation; (2) that the regulator cannot support reconciliation while maintaining impartiality; and (3) that regulatory obligations somehow constrain individual lawyers. Each of these premises is flawed.

i. **Section 7(b) of the *Act* implements legal obligations, not policy preferences**

559. The Law Society's characterization of s. 7(b) of the *Act* as imposing "government policy" ignores the legal status of both reconciliation and the UN Declaration. As the Supreme Court of Canada has opined on the federal equivalent to the *Declaration Act*, “the [UN] Declaration has been incorporated into the country’s positive law”.[695] Accordingly, requiring the regulator to support the implementation of the UN Declaration is merely requiring the regulator to comply with the law i.e., the *Declaration Act*.

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[694] It makes no substantive difference if s. 7(b) is read conjunctively or disjunctively, i.e., as one principle of supporting reconciliation and the implementation of the UN Declaration, or as two separate principles. *Cf*. Law Society written submissions at para. 412.

[695] *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 at para. 4 [*Indigenous CYF Reference*].

560. Moreover, reconciliation itself is not policy but constitutional imperative. As the Federal Court of Appeal stated in *Coldwater,* reconciliation "invariably involves sincere acts of mutual respect, tolerance, and goodwill that serve to heal rifts [and includes] facing past evil openly, acknowledging its hurtful legacies, and affirming the common humanity of everyone involved."[696]

561. The Supreme Court in *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, explicitly endorsed legislative measures that advance reconciliation beyond constitutional minimums.[697] The Court recognized that implementing UNDRIP through legislation "advance[s] reconciliation with Indigenous peoples" and moves Canada "closer to the goal of establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples."[698]

562. Section 7(b) thus requires the regulator to operate within the existing legal framework of British Columbia – nothing more, nothing less. This is no different from current requirements that the Law Society must consider *Charter* values in carrying out its mandate[699] and must comply with legislation, such as the *Human Rights Code*.[700]

ii. **Supporting reconciliation is incumbent on all public institutions without compromising their functions**

563. The Law Society argues that the "s. 7(b) guiding principle undermines the regulator's impartiality" because reconciliation is the "subject of extensive litigation involving parties from every segment of society", and "[b]y requiring the regulator to have regard to supporting the implementation of UNDRIP… Bill 21 has given the regulator an institutional position on this issue."[701]

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[696] *Coldwater First Nation v. Canada (Attorney General)*, 2020 FCA 34 at para. 50, quoting from Mark D. Walter, "The Jurisprudence of Reconciliation: Aboriginal Rights in Canada" in Will Kymlicka and Bashir Bashir, eds, *The Politics of Reconciliation in Multicultural Societies* (Oxford: Oxford University Press, 2008) 165, p. 168).
[697] *Indigenous CYF Reference* throughout and at paras. 3-9, 17, 89.
[698] *Indigenous CYF Reference* at paras. 89-90.
[699] *Trinity Western*.
[700] *Human Rights Code,* R.S.B.C. 1996 c. 210; see e.g., *Gichuru v. The Law Society of British Columbia*, 2013 BCSC 1325 for an example of the *Human Rights Code* applying to the Law Society.
[701] Law Society written submissions at para. 430.

564. This argument must be rejected because:

a. supporting reconciliation and the implementation of UNDRIP does not compromise the function of the regulator to ensure lawyers advocate zealously for their clients; and

b. the Law Society currently implements reconciliation measures (including the Truth and Reconciliation Commission's Calls to Action), so by its own admission, it has taken "an institutional position on this issue".

565. In *Servatius,* the Court of Appeal emphasized that all Canadian institutions need to be involved in advancing reconciliation.[702]

566. Critically, *Servatius* demonstrates that institutions can participate in reconciliation while maintaining their core functions and neutrality. This case involved a claim by Ms. Servatius that her s. 2(a) *Charter* rights were breached when her children's school hosted two demonstrations of Indigenous cultural practices.[703] The Court found that Indigenous perspectives and worldviews could be incorporated into the curriculum while maintaining the school's duty of neutrality.[704] This demonstrates that embracing reconciliation as a framework principle does not compromise institutional neutrality in individual cases.

567. In the context of legal institutions, the courts provide the most compelling example of how reconciliation can be advanced without compromising institutional independence. Canadian courts have participated in the implementation of extensive reconciliation measures, including working with Indigenous communities to open and operate Indigenous courts (also known as First Nations or Gladue courts) and accommodating Indigenous prayers, smudging ceremonies and other Indigenous protocols in court proceedings. The BC Supreme Court and Court of Appeal established reconciliation working groups in 2024 and 2022 respectively, to consider steps the courts can take to

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[702] *Servatius v. Alberni School District No. 70*, 2022 BCCA 421 at paras. 105-107 [*Servatius*]
[703] *Servatius* at paras. 1-3.
[704] *Servatius* throughout.

advance reconciliation.[705] None of this substantial work has been suggested to compromise judicial independence or the courts' ability to adjudicate impartially between parties. To the contrary, Chief Justice Finch and Chief Justice Bauman have written emphatically about "our duty to learn" and "our duty to act"[706] to advance reconciliation and support the implementation of the UN Declaration. If the judiciary – the very embodiment of independence in our constitutional order – can embrace reconciliation while maintaining independence, the suggestion that a legal regulator cannot do likewise is untenable.

568. Reconciliation "does not, in the abstract, mandate a particular content for aboriginal rights. However, the only fair and just reconciliation is… one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each".[707] Reconciliation thus requires institutions to engage respectfully with Indigenous peoples and consider their perspectives – precisely what enhances, rather than undermines, public confidence in the justice system.

569. Public confidence in the administration of justice, particularly among Indigenous peoples who have historically faced discrimination within the legal system, requires visible institutional commitment to reconciliation.[708] A regulator that claimed neutrality on reconciliation would signal indifference to systemic injustices, undermining the very legitimacy it seeks to protect.

iii. **The regulator's obligations do not constrain individual lawyers**

570. The Law Society conflates institutional obligations with individual practice, creating confusion where none should exist. Section 7(b) governs the regulator's approach to its public interest mandate. It does not – and cannot – affect lawyers' duties to their clients.

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[705] Annual Report of the Court of Appeal for British Columbia (2024); Annual Report of the Supreme Court of British Columbia (2024).
[706] Hon. Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (2012); Hon. Bauman, "A Duty to Act" (2021).
[707] *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 50.
[708] See e.g., *R. v.* Gladue, 1999 CanLII 679 (SCC); *Gibbon v. Justice of the Peace Review Council*, 2023 ONSC 5797 at paras. 47.

571. Section 6(1)(c) of the *Act* expressly requires the regulator to "ensure the independence of licensees". This provision directly addresses the Law Society's concern. A lawyer representing a client whose interests conflict with reconciliation objectives or the UN Declaration remains bound to that client. The regulator's institutional commitment to reconciliation no more restricts that lawyer than the Law Society's current commitment to reconciliation prevents counsel from advancing arguments on the constitutionality of the *Declaration Act*.[709]

572. This distinction is already reflected in existing practice. The Law Society has long maintained institutional commitments to reconciliation—through its Truth and Reconciliation Advisory Committee and related initiatives—without impairing members' ability to zealously represent clients holding opposing views. Lawyers routinely act for clients: (1) adverse in interest to Indigenous people; or (2) challenging Indigenous rights, while their regulator continues to endorse reconciliation at an institutional level.

573. The Law Society attempts to distinguish between reconciliation measures it voluntarily adopts and those imposed by statute, suggesting the former preserves independence while the latter undermines it. That distinction has no principled foundation.

574. Independence means freedom from improper interference in advice and advocacy to clients, not immunity from statutory obligations. All regulators operate within legislative frameworks that define their mandates and objectives. The Supreme Court has confirmed that professional regulation is a delegated governmental function.[710]

575. If supporting reconciliation compromised independence or created conflicts, those problems would already exist under the Law Society's current initiatives. The fact that the Law Society has pursued reconciliation while maintaining lawyer independence demonstrates that pursuing reconciliation does not undermine lawyer independence. The

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[709] There is an ongoing challenge to the constitutionality of the *Declaration Act*: *Pender Harbour and Area Residents Association v. Attorney General of British Columbia et al*, S.C.B.C. Vancouver Registry No. S-246285.
[710] *Mangat* at paras. 38 and 42; *Pearlman* at 886-888.

source of the obligation—voluntary or legislative—is irrelevant to independence and the public's perception.

576. Section 7(b) of the *Act* requires nothing more than that the legal regulator operate within British Columbia's legal framework, which includes reconciliation and the *Declaration Act*, as matters of law, not policy. All public institutions share this obligation without compromising their essential functions. The distinction between institutional principles and individual practice, combined with the *Act's* explicit protection of licensee independence, fully addresses any concern about lawyer independence or regulatory impartiality. The Law Society's objection amounts to claiming that what it already does voluntarily becomes unconstitutional if required by law – a position that cannot withstand scrutiny.

(e) Cabinet's power to make regulations designating professions, and excepting persons from prohibition on unlicensed practice (ss. 3(d), 4(3), 38(1)(i), 212)

577. The Law Society challenges ss. 3(d) and 4(3), which empower Cabinet to make regulations designating additional professions for the purposes of the *Act* and defining their permitted scopes of practice. The Law Society also challenges ss. 38(1)(i) and 212, which empower Cabinet to make regulations exempting classes of persons from the prohibition on unlicensed practice. These provisions provide two ways of allowing some kinds of non-lawyer legal professionals to provide certain legal services.

578. The Law Society says these provisions give "the executive unlimited power to directly regulate the practice of law in the province".[711] They do not. The executive will not regulate anyone. If Cabinet designates an additional profession, that profession will be regulated by the regulator; if Cabinet exempts a class of persons from the prohibition on unlicensed practice, those persons will be unregulated.[712]

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[711] Law Society written submissions at para. 440.

[712] The Law Society suggests Cabinet might do both of these things, i.e., designate a profession for the purposes of the *Act*, but then exempt the members of that profession from the prohibition on unlicensed practice: Law Society written submissions at para. 438. It would make little sense for Cabinet to make a profession eligible for licenses while simultaneously exempting its members from any need to become licensed.

579. The Law Society describes these provisions as "devastating" and "a sword of Damocles",[713] but the nature of its objection is difficult to discern. It says that designating additional professions under s. 4 would "fragment the authority of the independent regulator",[714] but in fact it would consolidate the authority of the regulator by bringing any additional profession within the regulator's jurisdiction.

580. Perhaps the Law Society's concern is with the possibility of more kinds of non-lawyers being permitted to provide some legal services. If that is the Law Society's concern, it appears to arise more from the economic interests of lawyers than the public's interest in access to legal services. The Law Society has not explained how having more choices, and more affordable choices, could possibly be negative for the public or compromise lawyers' ability to provide independent advice and advocacy. Anyone who wishes to retain a lawyer will remain free to do so.

581. There is nothing novel about allowing certain non-lawyers to provide legal services within defined spheres. There have been notaries in British Columbia for at least as long as there have been lawyers (despite the Law Society's efforts to eliminate or at least marginalize the notarial profession[715]). The *Workers' Compensation Act* exempts workers' advisers, employers' advisers, and certain lay advocates from the prohibition on unlicensed practice in the Current Act.[716] Native Courtworkers, family justice counsellors, and all sorts of lay advocates employed by non-profit organizations provide legal services under the pro bono exception in the Current Act.[717] The federal *Immigration and Refugee Protection Act* empowers immigration consultants to provide certain legal services in

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[713] Law Society written submissions at paras. 438, 440.
[714] Law Society written submissions at paras. 439.
[715] See generally Brockman, "'A Cold-Blooded Effort to Bolster up the Legal Profession': The Battle between Lawyers and Notaries in British Columbia, 1871-1930" (1999) 32 Social History 209; Brockman, "'Better to Enlist Their Support Than to Suffer Their Antagonism': The Game of Monopoly Between Lawyers and Notaries in British Columbia, 1930-1981" (1997) 4:3 Intl. J. Legal Prof. 197.
[716] *Workers' Compensation Act*, R.S.B.C. 2019, c. 1, ss. 350-354.
[717] With some exceptions for suspended or disbarred lawyers, legal services undertaking without expectation of any fee or reward do not fall within the practice of law: see *Current Act*, s. 1 *sv* "practice of law" (h); *Act*, s. 38(1)(d).

immigration matters, and is paramount to that extent over the prohibition on unlicensed practice in the Current Act.[718]

582. There is also nothing novel about the executive being able to designate new professions. For example, since 2017, Yukon's Cabinet has had the power to make regulations:

a. prescribing persons and classes of persons as "Indigenous court workers" and setting out the legal services that they may provide;

b. creating new non-lawyer categories of membership in the Law Society of Yukon and setting out the legal services that they may provide; and,

c. exempting professions from the prohibition on unlicensed practice.[719]

583. Similarly:

a. In Québec, Cabinet has been able to create new classes of legal professions by regulation since 1973.[720]

b. In Nova Scotia, Cabinet can pass regulations permitting classes of persons to practice law if Cabinet "considers the carrying on of the activities to be necessary or advisable for the purposes of the government of the Province" since 2004.[721]

584. The CBA says Cabinet might designate new professions that are not needed or incompetent.[722] This is policy criticism, not constitutional argument, and it is emblematic of the kind of protectionist reaction from lawyers that the *Act* is structured to guard against. It is also another example of the plaintiffs and interveners asking this Court to assume

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[718] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 91; *Mangat*.
[719] *Yukon Act*, ss. 19, 32, 172(1)(b), 172(1)(c).
[720] *Québec Professional Code*, s. 27.
[721] *Barristers and Solicitors' Act*, R.S.N.S. 1989, c. 30; *Nova Scotia Act*, ss. 16(4)(m), 71(1)(h).
[722] CBA written submissions at para. 85.

worst case scenarios in the implementation of the *Act,* which is not how courts approach statutory interpretation.[723]

585. Cabinet cannot make a regulation designating a new profession except on the recommendation of the Attorney General following consultation with the board.[724] The Law Society expresses concern about s. 4(2)(b)(v), which requires the Attorney General to consider, before making such a recommendation, whether designating the profession "would have an undue impact on the independence of licensees". The Law Society says this assessment should be for the regulator, not the Attorney General, to make.[725]

586. It should be self-evident why the legislature would not want the regulated professions to have full control of whether new professions should be allowed to compete with them. The Law Society has recognized for two decades that licensing paralegals would likely improve access to certain kinds of legal services but failed to take tangible action. Although the new regulator is structured to be more independent from the professionals it regulates, a majority of its directors are still legal professionals elected by the regulated professions, and the board will therefore not be immune from the kinds of protectionist reactions that might thwart progress towards licensing other types of legal professionals.

587. Experience has shown that decisions about the zones of competition between different legal services providers cannot be made in the public interest by persons who are electorally accountable to the members of those professions. These decisions should instead rest with a body—Cabinet—that is electorally accountable to the public. In any case, any regulations made by Cabinet under ss. 3(d), 4(3), 38(1)(i), or 212 will be subject to judicial review on the *Auer* framework, which applies a standard of "robust reasonableness".[726] An important purpose of the *Act* is to ensure the independence of licensees, including lawyers,[727] so any regulation that compromised lawyer independence

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[723] *Slaight Communications* at 1073; *Little Sisters*; *Sullivan on the Construction of Statutes* at §16.01[3].
[724] *Act*, s. 4(1).
[725] Law Society written submissions at para. 438(b).
[726] *Auer v. Auer,* 2024 SCC 36 at paras. 26-27 [*Auer*].
[727] *Act,* s. 6.

would be *ultra vires* the *Act* (before getting to any possible constitutional issues).[728] Responsibility for making that assessment rests with the courts.

588. Nothing about ss. 3(d), 4(3), 38(1)(i), or 212 compromise lawyers' independence.

(f) Alleged Cabinet power to make regulations regulating lawyers (s. 211)

589. The Law Society says it does not argue that "s. 211 gives Cabinet the power to make regulations wherever the board can make rules".[729] Instead, the Law Society argues for an even broader interpretation of s. 211, asserting that:

a. Section 211 gives Cabinet "a broad and vague power to make regulations that supersede the board's rules".[730]

b. This broad power is "not limited by, and therefore must be additional to, the specific regulation-making authority set out in Bill 21".[731]

c. Section 211 empowers Cabinet to make regulations based on Cabinet's own assessment of what is necessary and advisable "according to its intent", which "includes curtailing lawyer independence".[732]

590. As a result, the Law Society argues that: "There is nothing to stop Cabinet from using this power to regulate lawyers".[733]

591. These arguments fail on five grounds:

a. First, a plain reading of the enabling provision–s. 211(1)–refutes the Law Society's interpretation.

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[728] *Auer* at paras. 33-34.
[729] Law Society written submissions at para. 443.
[730] Law Society written submissions at para. 443.
[731] Law Society written submissions at para. 441.
[732] Law Society written submissions at para. 443.
[733] Law Society written submissions at para. 443.

b. Second, nothing in the broader statutory scheme, including s. 214 of the *Act* or s. 41(1)(a) of the *Interpretation Act,* overrides the scope of regulation-making power granted to Cabinet under s. 211(1).

c. Third, even if the Law Society's interpretation was plausible, the presumption of constitutional compliance would require this Court to prefer a narrower interpretation that ensures constitutional compliance.

d. Fourth, the Law Society's argument erroneously assumes that the mere possibility of unconstitutional executive action renders enabling legislation unconstitutional.

e. Fifth, the purpose of the *Act* includes preserving the independence of licensees, so any regulation curtailing it would be *ultra vires* Cabinet under the *Auer* framework.

i. **The Law Society misinterprets the plain meaning of s. 211**

592. Section 211(1) of the *Act* says that Cabinet "may make regulations respecting any matter for which regulations are contemplated by this Act" (emphasis added). The Law Society's interpretation requires ignoring the underlined qualifier. This is fatal to the Law Society's argument, because as the Supreme Court held in *Auer*, when it comes to regulation-making power: "The language chosen by the legislature in an enabling statute describes the limits and contours of a delegate's authority".[734]

593. The Supreme Court in *Auer* also held that the "legislature may use precise and narrow language to delineate the power in detail, thereby tightly constraining the delegate's authority". Here, the legislature did just that. The grant of authority under s. 211(1) is precise and narrow. On a plain reading, it authorises Cabinet to make regulations only in respect of matters "for which regulations are contemplated by this Act". The *Act*

[734] *Auer* at para. 62.

currently contemplates regulations only under ss. 4, 212, and 213, which address specific, limited matters:

a. designating a profession as a legal profession (s. 4);

b. prescribing classes of persons for exceptions from the prohibition against unauthorized practice (s. 212); and

c. prescribing activities for the scopes of practice for notaries and regulated paralegals (s. 213).

594. Section 211 grants Cabinet no authority beyond these specific matters. Nothing in these provisions authorizes Cabinet to make regulations that regulate lawyers.

595. If the legislature intended to give Cabinet broad regulation-making powers as argued by the Law Society, then it would have done so explicitly. For example, s. 71(1)(k) of Nova Scotia's *Legal Profession Act* actually says what the Law Society is trying to read into s. 211(1) of the *Act*:

> 71 (1) The Governor in Council may, after consultation with the Council in the time and in the manner determined by the Governor in Council, make regulations
>
> […]
>
> (k) respecting any matter that the Governor in Council considers necessary or advisable to carry out effectively the intent and purpose of this Act.

596. The function of s. 211(1) is to enable a particular style of legislative drafting routinely used in BC statutes whereby other provisions can refer to matters "prescribed by regulation" or "designated by regulation", without separately and expressly empowering Cabinet to make regulations about those matters.[735] This function is not currently

[735] For an example, see the *Land Owner Transparency Act*, S.B.C. 2019, c. 23. The definition of "Indigenous nation" includes "a prescribed Indigenous person or entity". The legislation does not specifically empower Cabinet to make regulations prescribing Indigenous persons and entities for the purpose of the definition, but s. 97(2)(a) empowers Cabinet to make regulations "respecting any matter for which regulations are contemplated by this *Act*". Since regulations

employed in the *Act*, but s. 211(1) makes it possible to use it in future amendments. For example, s. 3(d) of the *Act* reads:

> 3 The following professions are designated as legal professions for the purposes of this Act:
>
> […]
>
> (d) a profession designated by regulation.

597. Section 3(d) of the *Act* must be read together with s. 4(1), a separate provision that expressly gives Cabinet the power to make regulations for the purposes of s. 3(d):

> 4 (1) For the purposes of section 3 (d), the Lieutenant Governor in Council may, on the recommendation of the Attorney General, make regulations designating a profession as a legal profession.

598. Section 211(1) of the *Act* is meant to cover future amendments that would result in a provision referring to regulations akin to s. 3(d), without a corresponding and express enabling provision akin to s. 4(1).

ii. **Section 214 of the *Act* does not expand Cabinet's authority**

599. The Law Society points to s. 214, arguing that it should be understood to mean that:

> […] Cabinet regulations prevail over rules made by the new governing body in all cases of conflict or inconsistency (s. 214), not just those cases that are explicitly contemplated by Bill 21's grant of overlapping regulation and rule-making power.[736]

600. The problem with this argument is that s. 214 says nothing about the scope of Cabinet's regulation-making power. Section 214 reads:

> 214 If there is a conflict or inconsistency between a regulation made by the Lieutenant Governor in Council under this Act and a rule made under this Act, the regulation prevails.

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about Indigenous persons and entities are contemplated by definition of "Indigenous nation", the general language in s. 97(2)(a) empowers Cabinet to make such regulations.

[736] Law Society written submissions at para. 441.

601. What s. 214 of the *Act* does is establish a hierarchy that applies where Cabinet makes regulations "under th[e] Act", meaning within Cabinet's regulation-making authority. Nothing about s. 214 purports to expand the scope of Cabinet's regulation-making power.

iii. **Section 41 of the *Interpretation Act* does not expand Cabinet's authority**

602. The Law Society also argues that s. 211 must "be examined in light of s. 41(1)(a) [sic] of the *Interpretation Act"*, which reads:

> 41(1) If an enactment provides that the Lieutenant Governor in Council or any other person may make regulations, the enactment must be construed as empowering the Lieutenant Governor in Council or that other person, for the purpose of carrying out the enactment according to its intent, to
>
> > (a) make regulations as are considered necessary and advisable, are ancillary to it, and are not inconsistent with it […]

603. While the Law Society submissions do not include any specific arguments or case law about s. 41(1)(a) of the *Interpretation Act*, the Law Society appears to assert that this provision does away with the meaning of s. 211(1) of the *Act*, so that s. 211(1) should be read as granting Cabinet a "broad and vague power" to make regulations additional to "the specific regulation-making authority" in the *Act* and including the power to "regulate lawyers". The Law Society also says that this broad power could be used based on Cabinet's own assessment of what is necessary and advisable "according to its intent", which "includes curtailing lawyer independence".[737]

604. The Law Society's argument fails because it requires interpreting s. 41(1)(a) of the *Interpretation Act* as granting Cabinet:

a. a regulation making power that is inconsistent with the narrow limits of s. 211(1);

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[737] *Drew v. B.C.(Attorney General of),* 1997 CanLII 2108 (B.C.S.C.) at para. 36.

b. the power to regulate lawyers by regulation, when the *Act* itself does not give Cabinet the power to regulate lawyers and expressly gives it to the regulator; and

c. the power to pass regulations to curtail lawyer independence, when the purpose of the *Act* includes protecting the independence of licensees.

605. Section 41(1)(a) of the *Interpretation Act* does not grant Cabinet "new or broader" regulation-making authority.[738] It merely affirms the common law doctrine of jurisdiction by necessary implication. As this Court held in *Vrabec:*

> [91] An administrative body obtains jurisdiction from two sources: under statute, by an express grant of jurisdiction; and at common law by application of the doctrine of jurisdiction by necessary implication. Section 41(1)(a) of the *Interpretation Act* reinforces that doctrine in this context, stating that the power to make regulations extends to such "regulations as are considered necessary and advisable, are ancillary to it and are not inconsistent with it" for the purpose of "carrying out the enactment according to its intent".[739]

606. Even if there were a conflict between s. 211(1) of the *Act* and s. 41(1)(a) of the *Interpretation Act*, the Law Society's proposed interpretation could not succeed. This is because s. 41(1)(a) of the *Interpretation Act* cannot change the express limits on Cabinet's regulation-making powers set out in s. 211(1). This is clear from *Auer*, where the Supreme Court held that in assessing the scope of Cabinet's regulation-making power, the enabling statute (in this case the *Act*) is the most "salient aspect" of the exercise.[740] Other legislation (in this case the *Interpretation Act)* does not change the limits of the delegation where the enabling statute "provides otherwise".[741]

607. Additionally, "the legislature is presumed to know its own statute book and to draft each new provision with regard to the structures, conventions, and habits of expression embodied in existing legislation".[742] In British Columbia, when the legislature intends to

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[738] *Vrabec v. College of Physicians & Surgeons (British Columbia),* 2009 BCSC 675 at para. 91 [*Vrabec*].
[739] *Vrabec* at para. 91.
[740] *Auer* at paras. 61-62.
[741] *Auer* at paras. 63.
[742] *Sullivan on the Construction of Statutes* at §13.05[1].

grant broad regulatory authority that is not limited to specific grants, it does so explicitly by stating that Cabinet "may make regulations referred to in s. 41 of the *Interpretation Act*."[743] The *Act* contains no such language. The legislature's choice to limit s. 211 to regulations "contemplated by this Act" rather than invoking the broader language of s. 41(1) must be taken as deliberate and given precedence.[744]

608. Even assuming that s. 41(1)(a) of the *Interpretation Act* overrules the express limits in s. 211(1) of the *Act*, which is denied, s. 41(1)(a) cannot give Cabinet the power to directly regulate lawyers by regulation. This is because the *Act* grants the regulator, not government, the power to regulate lawyers.[745] Therefore, allowing government to directly regulate lawyers by regulation would not be ancillary to or necessarily implied by the *Act*. Rather, it would be inconsistent with the intent of the *Act*.[746]

609. Finally, the Law Society's arguments fundamentally misstate the *Act's* purpose when suggesting the *Act's* intent "includes curtailing lawyer independence". The opposite is true. Section 6 of the *Act* expressly requires the regulator to ensure the independence of licensees. This is an operational requirement that governs how the regulator must function. The *Act* does not curtail lawyer independence; it expressly mandates its protection.

610. This commitment to independence, including specifically lawyer independence, permeates the *Act's* structure:

a. The Board maintains a majority of elected legal professionals, and a majority of lawyers.

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[743] See e.g., *Sexual Violence and Misconduct Policy Act*, SBC 2016, c. 23 s. 7; *Regulatory Reporting Act*, SBC 2011, c. 28 s. 3(1); *Eligibility to Hold Public Office Act*, SBC 2025, c. 9 s. 3; *Resort Timber Administration Act,* SBC 2006, c. 30 s. 4(1); *Justice Administration Act*, R.S.B.C. 1996, c. 243 s. 9(1); *Assistance to Shelter Act*, SBC 2009, c. 32 s. 8; *Economic Stabilization (Tariff Response) Act*, SBC 2025, c. 11 s. 19(1); *Occupiers Liability Act*, R.S.B.C. 1996, c. 337 s. 10(1).
[744] *Sullivan on the Construction of Statutes* at §13.05[2].
[745] *Act*, s. 6.
[746] *Grace* at paras. 73-74, 103.

b. The disciplinary process remains under professional control through the Tribunal system.

c. Lawyers retain their current scope of practice.

611. All these, among other features, evidence the *Act's* commitment to lawyer independence. Thus, any Cabinet regulations that compromised lawyer independence would be *ultra vires* the *Act.*[747]

iv. **The presumption of compliance supports the Attorney General's interpretation**

612. Even accepting the Law Society's broad interpretation as plausible, the presumption of constitutional compliance supports the Attorney General's narrower interpretation.[748]

613. Where two interpretations are available, courts engage in a form of interpretive reading down, where "the potential scope of legislation is narrowed to exclude applications that are grammatically possible but are considered unacceptable" because they "violate a constitutional limit or norm".[749] This form of reading down is not a remedy, but an interpretive tool that applies where a constitutionally compliant reading is available.[750] As Chief Justice McLachlin held in *Sharpe:* "If a legislative provision can be read both in a way that is constitutional and in a way that is not, the former reading should be adopted".[751]

614. The Law Society's proposed interpretation is premised on the purported vagueness of s. 211, a provision that the Law Society argues confers a "broad and vague power to make regulations" that could be used to unconstitutionally curtail lawyer independence.[752]

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[747] *Auer* at paras. 33-34.
[748] *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3 at para. 33 [*Siemens*].
[749] *Sullivan on the Construction of Statutes* at §16.02[4].
[750] *Montréal (City) v. 2952-1366 Québec Inc.,* 2005 SCC 62 at para. 34; *Sullivan on the Construction of Statutes* at §16.02[4].
[751] *R. v. Sharpe,* [2001] 1 S.C.R. 45 at para. 33.
[752] Law Society written submissions at para. 443.

Even accepting that s. 211 is vague, which is denied, the purported vagueness does not deny that the Attorney General's interpretation is at least a plausible one.

615. Therefore, should this Court conclude that both interpretations are plausible and that the Law Society's interpretation raises the prospect of unconstitutionality, this Court should apply the presumption of compliance to prefer the narrower interpretation advanced by the Attorney General.

v. **The Law Society's Position Inverts Fundamental Principles of Public Law**

616. The Law Society argues this Court should declare s. 211(1) of the *Act* invalid because: "There is nothing to stop Cabinet from using [the powers conferred under it] to regulate lawyers".[753]

617. Even if this Court accepted the Law Society's premises that:

a. it would be unconstitutional for Cabinet to regulate lawyers;[754] and

b. s. 211(1) of the *Act* gives Cabinet "broad and vague powers" that could potentially include making regulations that regulate lawyers,[755]

the Law Society's argument for declaring s. 211 invalid must fail because it inverts the presumption that executive actors will exercise their delegated authority constitutionally.[756]

618. All decision-makers, including law societies, can theoretically exercise their delegated powers to pass unconstitutional rules or regulations. The Supreme Court of Canada found the Law Society of Alberta did precisely that in *Black*.[757]

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[753] Law Society written submissions at para. 443.
[754] As noted above, Cabinet regulated lawyers for decades in Northwest Territories, and in various other provinces Cabinet continues to play a role in making rules for the practice of law.
[755] Law Society written submissions at para. 443.
[756] *Slaight Communications* at p. 1073, see also, *Little Sisters*; *Sullivan on the Construction of Statutes* at §16.01[3].
[757] *Black v. Law Society of Alberta,* [1989] 1 S.C.R. 591 [*Black*].

619. Our constitutional order does not require the legislature to draft statutes that make unconstitutional executive action impossible.[758] Any discretionary powers could potentially be exercised unconstitutionally. Our system addresses this reality not by pre-emptively invalidating the enabling provisions, but by judicially reviewing executive action that exceeds lawful authority.[759] Should Cabinet ever exceed its authority under the *Act* or act contrary to the *Act's* intent of protecting lawyer independence, that specific executive action, not the *Act* itself, would be the proper subject of judicial review.

(g) **Codification of conduct and discipline procedure (ss. 68-92)**

620. Lastly, Law Society objects to the codification of conduct and discipline procedure in ss. 68-92 of the *Act*. The Law Society does not claim there is anything problematic in the substance of what has been codified. Its sole argument, to which it dedicates a single sentence of its submissions, is that any codification is an "attack" on "both the theory and the practice of self-regulation and self-governance of lawyers".[760]

621. The relevant question is not whether ss. 68-92 are consistent with the theory and practice of self-regulation. The relevant question is whether they interfere improperly with lawyers' advice or advocacy. It is common ground that they do not.

(h) **Summary**

622. The *Act* preserves lawyer independence, properly understood as freedom from improper interference with lawyers' advice or advocacy. Since the *Act* is consistent with lawyer independence, it cannot be unconstitutional on any legal theory relating to lawyer independence.

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[758] *Brown* at paras. 61-88; see also *Slaight Communications*; *R. v. Conway,* 2010 SCC 22 at paras. 41-48.
[759] *Brown* at paras. 65-77, 80; see also *Reference re Impact Assessment Act* at para. 74; *Little Sisters* at para. 71.
[760] Law Society written submissions at para. 446.

Part 5: TRIAL LAWYERS' CHARTER ARGUMENTS ARE WITHOUT MERIT

The Trial Lawyers' s. 2(d) claim recasts the Law Society in the conflicted dual mandate the Law Society itself has rejected

623. The Trial Lawyers argue that the *Act* infringes lawyers' freedom of association under s. 2(d) of the *Charter*. In making this argument, the Trial Lawyers cast the Law Society as "a protected association" that "performs associative functions for lawyers".[761]

624. This argument has no basis. The *Act* does not infringe lawyers' s. 2(d) rights because:

a. the Law Society is not an association of lawyers of the kind protected by s. 2(d);

b. regulating and being regulated are not associational activities protected under s. 2(d); and

c. the *Act* does not, in purpose or effect, interfere with lawyers' rights under s. 2(d) to associate in pursuit of shared objectives through lawyers' associations like the Trial Lawyers and the CBA.

I. The framework of s. 2(d)

625. The purpose of s. 2(d) is to recognize the "profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of [their] ends".[762] The guarantee empowers vulnerable groups and helps them work to right imbalances in society; it protects marginalized groups and "makes possible a more equal society".[763]

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[761] Trial Lawyers written submissions at para. 155.
[762] *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 at para. 54 [*Mounted Police*].
[763] *Mounted Police* at para. 58.

626. Section 2(d) protects three classes of activities:

a. the constitutive right to join with others and form associations;

b. the derivative right to join with others in the pursuit of other constitutional rights; and

c. the purposive right to join with others to meet on more equal terms the power and strength of other groups or entities.[764]

627. To decide whether a complainant's s. 2(d) rights have been infringed, courts use the following two-step framework:[765]

a. Do the activities in question fall within the range of activities protected under the freedom of association guarantee?[766]

b. Does the legislation or government action, in purpose or effect, substantially interfere with those activities?

628. In this case, the answer to both questions is no.

II. **The Law Society is a regulator, not an association protected by s. 2(d)**

629. The Law Society is not an association of lawyers: it does not undertake representative functions, nor does it represent the interest of lawyers. Rather, the Law Society regulates lawyers in the public interest. The Law Society must act in the public interest no matter how unpopular it is with the lawyers it regulates.[767]

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[764] *Mounted Police* at para. 66.
[765] *Société des casinos du Québec inc. c. Association des cadres de la Société des casinos du Québec*, 2024 SCC 13 at paras. 5, 8, 17.
[766] *Mounted Police* at para. 47: Courts must consider the associational activity in its full context and history.
[767] *Current Act,* s. 3; Greenberg XFD at Q. 209-217.

630. This is evident from the Law Society's history:

a. In the late 1960s, the Law Society handed over most of its non-statutory duties, including representative functions, to the CBA.[768] Indeed, in this litigation, the CBA says it is "the voice of Canada's legal profession".[769]

b. The Law Society used to have a dual mandate: protect the public interest, as well as lawyers' interests.[770] That dual mandate was removed in 2012, when the Law Society was directed to consider only the public interest.[771]

631. The European Court of Human Rights has held that equivalent freedom of association protections under art. 11 of the European Convention on Human Rights do not apply to legal regulators because such regulators exercise public law functions for the protection of the public.[772] That principle applies with equal force to the Law Society.

III. **Regulating and being regulated are not associational activities protected under s. 2(d)**

632. The activities of self-regulation and self-governance do not form part of the three classes of activities protected by s. 2(d) of the *Charter*.

633. The Law Society's lack of representative function is evident in this litigation – the Law Society does not purport to bring this litigation for the benefit of lawyers. In fact, in most cases where the Law Society is involved in legal disputes, it is against lawyers, as their regulator.

634. In this litigation it is the lawyer associations like the Trial Lawyers and the CBA that are advancing lawyers' rights arguments.[773] But the Act does not impact those lawyer

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[768] Charles C. Locke, "Reflections of the Governance of the Legal Profession in the British Columbia, Part I" (2002) 60:5 Advocate 689.
[769] CBA written submissions at para. 9.
[770] *1987 Act*, s. 3.
[771] *Legal Profession Amendment Act*, 2012, SBC 2012, c. 16, s. 3.
[772] *A. and Others v. Spain,* no. 13750/88, Commission decision of 2 July 1990, D.R. No. 66, p. 193. See also *Bota v. Romania,* no. 24057/03, ECHR 2004-11.
[773] CBA written submissions at para. 87; Trial Lawyers written submissions at para.36.

associations. Nothing in the *Act* will prevent them from continuing to advocate for lawyers or from carrying out their various associational activities. This is why s. 2(d) of the *Charter* is not engaged.

IV. **The *Act* does not limit lawyers' association rights**

635. The *Act* does not, in purpose or effect, interfere with lawyers' rights under s. 2(d) to associate in pursuit of shared objectives through lawyers' associations. The *Act* is concerned with the professional regulation of lawyers, not with their associational activities.

636. Section 2(d) of the *Charter* only applies where the state precludes an activity because of its associational nature.[774] It does not apply to the provisions of the *Act*, which will be "put in place for the purpose of regulating the profession".[775]

637. Courts throughout Canada have repeatedly affirmed the principle that s. 2(d) of the *Charter* is only infringed where the state precludes an activity because of its associational nature:

a. In 2001, the New Brunswick Court of Appeal held that a cap to the number of doctors allowed to practice in each region of the Province did not infringe s. 2(d). The Court stated that "the fact that individual members of a profession are regulated by a statutory regime does not lead to the conclusion that their guarantee of freedom of association has been impaired".[776]

b. In 2014, the Nunavut Court of Justice dismissed a s. 2(d) challenge to a requirement for lawyers who were not members of the Law Society of Nunavut to obtain a restricted access certificate to practice law in Nunavut.

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[774] *Harper v. Canada (Attorney General)*, 2004 SCC 33 at para. 125. *Barber v. A.G. Canada,* 2018 ONSC 493 at para. 10.
[775] *Murtaza v. Registrar of the Association of Professional Engineers of Ontario*, 2016 ONSC 1745 at paras. 16-17 [*Murtaza*].
[776] *Rombaut v. New Brunswick (Minister of Health),* 2000 CanLII 46813 (N.B.K.B.) at paras. 97-98.

The Court held that the requirement's purpose was to regulate the legal profession, and that the requirement only incidentally precluded associational activity.[777]

c. In 2016, the Ontario Superior Court held that s. 2(d) did not apply to a requirement for admission to the engineering profession in Ontario of having at least twelve months of supervised engineering experience in Canada, which the Court described as "put in place for the purpose of regulating the profession".[778] The Court specifically relied on the principle that "s. 2(d) of the Charter will not be engaged unless the state precludes activity because of its associational nature".[779]

d. In 2016, the Ontario Superior Court held that s. 2(d) did not apply to the criminal prohibition against bookmaking.[780] The Court held that the key question under s. 2(d) is: "has the state precluded activity *because* of its associational nature, thereby discouraging the collective pursuit of common goals?".[781] The Court then held that the criminal prohibition did not target the offence of bookmaking because of its associational nature.[782]

e. In 2022, the Ontario Court of Appeal relied on this principle to hold that provisions of the *Criminal Code* that criminalized entering into cooperative arrangements with sex workers did not engage s. 2(d) because the impugned provisions "[did] not prevent individuals from joining or forming an association in the pursuit of a collective goal".[783]

638. The *Act* does not preclude any activity because of its associational nature. The purpose of the *Act* is to create a new regulatory body to regulate legal professions and

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[777] *Chwyl v. Law Society of Nunavut*, 2014 NUCJ 9 at paras. 240-241.
[778] *Murtaza* at paras. 16-17.
[779] *Murtaza* at para. 16.
[780] *R. v. Hair,* 2016 ONSC 900 [*Hair*].
[781] *Hair* at para. 125.
[782] *Hair* at para. 130.
[783] *R. v. N.S.,* 2022 ONCA 160 at para. 169.

thereby protect the best interests of the public. Likewise, the *Act* does not have the effect of preventing lawyers from associating in pursuit of shared objectives through lawyers' associations like Trial Lawyers and the CBA.

Trial Lawyers health-related s. 7 argument misinterprets the *Act* and is inconsistent with settled authority

I. **Overview**

639. The Trial Lawyers argue that ss. 68, 76-78, 88, 198, and 202 of the *Act* infringe lawyers' rights under s. 7 of the *Charter*.

640. Section 7 is not engaged. The *Act* does not force lawyers to receive medical treatment they do not want, nor exacerbate stigma about mental illness by conflating health conditions with incompetence.

641. Alternatively, and in any event, the impugned provisions are consistent with the principles of fundamental justice against arbitrariness, overbreadth, and gross disproportionality. The impugned provisions are rationally connected and proportionate to their public protection purpose.

II. **Summary of impugned provisions**

642. Importantly, the impugned provisions are not a replacement for the Law Society's successful Alternative Discipline Process. As emphasized above, the *Act* specifically empowers the regulator to enter into consent agreements with licensees and to resolve complaints through alternative resolution processes.[784] These provisions empower the regulator to continue the Alternative Discipline Process and to develop additional similar programs.

643. If a complaint is not diverted to the Alternative Discipline Process or a similar program, the regulator or tribunal may find that a licensee has practised law incompetently. One of the orders the regulator or tribunal may make on such a finding is

[784] *Act*, ss. 91-92.

an order requiring the licensee to "receive counselling or medical treatment, including treatment for a substance use problem or substance use disorder".[785] If such an order is made and the licensee declines the treatment, their licence may be suspended or cancelled.[786]

644. The primary purpose of the impugned provisions is to protect the public by helping to ensure that licensees' are not impaired by health conditions from practising law to an acceptable standard. A secondary purpose is to convey that, when a licensee's ability to practise law to an acceptable standard is impaired by a health condition, there is nothing fundamentally wrong with them; they are simply experiencing a health issue for which they need health care.

III. **Evidentiary issues**

645. The Trial Lawyers rely on expert reports from Mr. Gold and Dr. Ganesan, while the Attorney General relies on a responding report from Dr. Colleton. After cross-examinations, the Attorney General will deliver supplemental submissions on the weight that should be attributed to this expert evidence.

IV. **Framework for s. 7**

646. The Attorney General largely agrees with how the Trial Lawyers have set out the analytical framework for s. 7 of the *Charter*.[787] There are two steps. The claimant must first show that the impugned law engages their life, liberty, or security of the person as those concepts have been interpreted in the jurisprudence. If the impugned law is shown to engage life, liberty, or security of the person, the question at the second step is whether it does so in a manner that is consistent with the principles of fundamental justice. The Trial Lawyers invoke the principles against arbitrariness, overbreadth, and gross disproportionality.

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[785] *Act*, ss. 88(1)(c), 122(3)(c)(ii).
[786] *Act*, ss. 59(2), 122(3).
[787] Trial Lawyers written submissions at paras. 184-185.

V. Section 7 is not engaged

(a) The *Act* does not exacerbate stigma about mental health

647. The Trial Lawyers argue that lawyers' s. 7 liberty and security of the person interests are engaged because the *Act* conflates health conditions with incompetence, exacerbating stigma about mental health in a manner that will discourage some lawyers from seeking help.[788]

648. The Attorney General accepts that:

a. some people, including some lawyers, still hold stigmatized views about mental health;

b. mental health challenges are particularly prevalent among lawyers;

c. some people who are experiencing mental health challenges do not seek help because they fear the reactions of others who hold stigmatized views, or because they themselves hold stigmatized views; and,

d. as a matter of law, if an enactment were shown to have the effect of exacerbating stigma, thereby discouraging some people from seeking help, the enactment could conceivably engage security of the person under s. 7.

649. However, the *Act* does not exacerbate stigma nor otherwise discourage lawyers from seeking help. The *Act* does not do what the Trial Lawyers say it does.

650. The *Act* does not exacerbate stigma by conflating health conditions with incompetence. Many lawyers experience health issues that do not affect their ability to practise law to an acceptable standard. However, some health issues, in some circumstances, do affect lawyers' ability to practise law. Recognizing that reality, as other legal professions legislation and many law society publications do, is not stigmatizing.

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[788] Trial Lawyers written submissions at paras. 81, 85, 214-216, 221-225.

651. The key statutory provision here is the definition of “incompetently”, which reads in relevant part as follows:

> “incompetently”, in relation to the practice of law, means in a manner that demonstrates either of the following:
>
> […]
>
> (b) a health condition that prevents a licensee from practising law with reasonable skill and competence[.][789]

652. The Trial Lawyers say this definition conflates having a health condition with being incompetent, but it does not. The focus is on conduct, not the condition. The defined term is not the adjective “incompetent” but the adverb “incompetently”. A licensee cannot be found to be incompetent for having a health condition. A licensee can be found to have practised law incompetently if a health condition has prevented them from practising law to an acceptable standard. The Trial Lawyers dismiss this distinction as “semantics”,[790] but with respect, semantics are essential to statutory interpretation. The words of an enactment must be interpreted in context and in their grammatical and ordinary sense. It is significant to the interpretation of the *Act* that the defined term is “incompetently”, an adverb that can grammatically modify only verbs, i.e., action, conduct.

653. There is nothing stigmatizing about recognizing and stating openly in the *Act* that some health issues, in some circumstances, can affect lawyers’ ability to practise law to an acceptable standard. This reality is already widely recognized in legal professions legislation and law society publications.

654. The Ontario *Law Society Act* has long empowered the Law Society Tribunal of Ontario to order a licensee to obtain medical treatment where the licensee is found to be “incapacitated”, defined as follows:

> A licensee is incapacitated for the purposes of this *Act* if, by reason of physical or mental illness, other infirmity or addiction to or

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[789] *Act*, s. 68 *sv* “incompetently”.
[790] Trial Lawyers written submissions at para. 20.

> excessive use of alcohol or drugs, he or she is incapable of meeting any of his or her obligations as a licensee.[791]

655. This definition, the similar definitions in Newfoundland,[792] Nova Scotia,[793] Yukon,[794] and the new definition of "incompetently" in the *Act* are essentially the same. They recognize that health conditions can, but do not necessarily, interfere with a licensee's ability to practice law to an acceptable standard.

656. The Trial Lawyers ask rhetorically, if the focus is on conduct, why reference health conditions at all?[795] As the Law Society Tribunal of Ontario has held of the Ontario definition, the purpose is two-fold:

> First, it is a statutory tool which protects the public from a lawyer or paralegal who cannot meet their obligations as a licensee because of medical reasons. Second, the provision stands as a recognition that sometimes behaviours exhibited by a lawyer or paralegal, which would otherwise constitute professional misconduct, actually are the result of illness and infirmity and should be treated accordingly.[796]

657. In other words, the purpose is in part to recognize that, sometimes, when a licensee is failing to meet their obligations, it is not because there is anything fundamentally wrong with them; it is because they are experiencing health issues for which they need health care. There is nothing stigmatizing about that.

658. Many law societies' publications have acknowledged the reality that some health issues, in some circumstances, can affect lawyers' ability to practise law to an acceptable standard. For example, the report of the Law Society's Mental Health Task Force which led to the creation of the Alternative Discipline Process said this:

> Many legal regulators, including the Law Society of BC, have observed that mental health and substance use issues can be a contributing factor in some instances of lawyer misconduct. Although there is not necessarily a causal relationship between mental health or substance use issues and misconduct, untreated health

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[791] *Ontario Act*, ss. 37(1), 40(1)(2).
[792] *Newfoundland Act*, s. 41(a.1).
[793] *Nova Scotia Act,* s. 2(ga).
[794] *Yukon Act,* s. 49(1).
[795] Trial Lawyers written submissions at para. 200.
[796] *Law Society of Ontario v. Fiorillo*, 2024 ONLSTH 17 at para. 64.

> conditions can affect cognitive and other skills that are critical to a lawyer's ability to discharge their professional responsibilities.[797]

659. The Law Society of Ontario maintains a webpage, titled "Personal Management", containing this statement:

> Mental illness and addiction are serious issues which may impact the provision of legal services. Lawyers may face certain challenges or stressors unique to their work that enhance their vulnerability for mental health or wellness issues. These issues have the potential to result in significant impairment that can compromise professional conduct, client interests and the administration of justice.[798]

660. The same Law Society of Ontario webpage provides guidance to its licensees that they may have a duty to report a licensee who is experiencing health issues that are affecting their competence:

> […] physical, mental health or addiction issues may impact a lawyer or paralegal's capacity to provide competent professional services. Lawyers are required to report to the Law Society conduct that raises substantial questions about another lawyer or paralegal's competency as a licensee or capacity to provide professional services, unless to do so would be unlawful or would involve a breach of solicitor-client privilege.[799]

661. The Law Society of Alberta provides similar guidance:

> The intersection of lawyer wellness and competence is broader than impaired objectivity. Lawyers who suffer from substance abuse, mental illness, physical illness and personal problems also potentially, though not necessarily, face concerns with competence. As they cope with and address these issues in their personal lives, they must assess and reassess whether their ability to provide competent legal services is impacted. In some cases, the wellness concerns themselves arise from the stresses of practice, putting the lawyer in a trap of escalating wellness and practice concerns. In either case, lawyers must evaluate whether, at a point in time, they are competent even though they unquestionably possess the

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[797] LSBC Mental Health Task Force, "Recommendation on the Development of an Alternative Discipline Process" (September 24, 2021) (Greenberg #1, Ex 49 at p. 866).
[798] Law Society Ontario, "Personal Management" (Lever #1, Ex. E at p. 75).
[799] Law Society Ontario, "Personal Management" (Lever #1, Ex. E at p. 85).

> knowledge and skill required of either a particular matter or their practice generally.[800]

662. In short, there is nothing new or stigmatizing about the provisions of the *Act* that recognize that some health issues, in some circumstances, can affect lawyers' ability to practise law to an acceptable standard. It follows that the *Act* does not engage lawyers' s. 7 liberty and security of the person interests by exacerbating stigma that discourages some lawyers from seeking help for health challenges.

(b) Section 7 not engaged by economic consequences flowing from the exercise of medical autonomy

663. The Trial Lawyers also argue that lawyers' s. 7 liberty interest is engaged because the *Act* empowers the regulator and tribunal to order a lawyer to receive medical treatment the lawyer may not want.[801] The Trial Lawyers say that medical decisions are "fundamentally private, personal, and of utmost importance to a person's autonomy".[802] However, it is settled law that s. 7 is not engaged in the circumstances where the failure to obtain medical treatment can have significant consequences. Section 7 protects medical autonomy but does not guarantee that the exercise of medical autonomy will be free from economic consequences such as ineligibility to continue practising a profession.

664. The s. 7 liberty interest protects "the right to make fundamental personal choices free from state interference".[803] Similarly, security of the person protects "a notion of personal autonomy involving control over one's bodily integrity free from state interference".[804] Liberty and security of the person both include a right of medical self-determination,[805] which includes a right to refuse unwanted medical treatment.

665. The point the Trial Lawyers miss is that the "right of medical self-determination is not vitiated by the fact that serious risks or consequences, including death, may flow from

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[800] Law Society Alberta, "Mental Health in the Legal Profession: Your Obligations & How to Help" from website (Lever #1, Ex. F at p. 96).
[801] Trial Lawyers written submissions at paras. 201-213.
[802] Trial Lawyers written submissions at para. 213.
[803] *Carter* (SCC) at para. 64.
[804] *Carter* (SCC) at para. 64
[805] *Carter* (SCC) at para. 67.

the patient's decision".[806] In other words, s. 7 includes the right to refuse medical treatment, but s. 7 does not guarantee that refusing medical treatment will be free from consequences.

666. The Trial Lawyers cite the plurality reasons of LaForest J. in *Godbout*,[807] but the jurisprudence has developed since *Godbout* was decided in 1997. The exact argument the Trial Lawyers are making has been litigated extensively in recent years in the context of COVID-19 vaccination requirements for health care workers. Like the Trial Lawyers, some health care workers have argued that vaccine requirements engage their s. 7 liberty interest by interfering with their medical autonomy, i.e., their freedom to choose whether or not to be vaccinated. Courts have rejected that argument for reasons that apply equally to the Trial Lawyers' argument. As recently summarized by this Court in *Weisenburger*, courts "have repeatedly confirmed that a requirement to be vaccinated in order to practice one's profession does not amount to 'forced vaccination', or violate informed consent or bodily autonomy, or violate *Charter* rights".[808]

667. The Trial Lawyers attempt to distinguish the COVID cases by saying their argument is "not about a right to work as a lawyer or conditions imposed on the practice of a profession", but about "a lawyers' right to make fundamental decisions about […] whether, when and how they receive treatment".[809] With respect, that is the exact argument that

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[806] *Carter* (SCC) at para. 67; see also *Lewis v. Alberta Health Services*, 2022 ABCA 359 at para. 47, cited with approval in *Warner v. British Columbia (Provincial Health Officer)*, 2025 BCCA 21 at para. 47 [*Warner*].

[807] Trial Lawyers written submissions at paras. 190-192, citing *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844.

[808] *Weisenburger v. College of Naturopathic Physicians of British Columbia*, 2024 BCSC 1047 at para. 89 [*Weisenburger*]. See also *Hoogerbrug v. British Columbia*, 2024 BCSC 794 at paras. 276-278, appeal quashed as moot 2025 BCCA 181 *sub nom Tatlock v. British Columbia (Attorney General)* [*Hoogerbrug*]; *Warner* at paras. 43-52; *Cambie* at para. 1766; *B.C. Teachers' Federation v. School District No. 39 (Vancouver)*, 2003 BCCA 100 at paras. 203-210; *Tanase v. College of Dental Hygienists of Ontario*, 2021 ONCA 482 (five-member panel) at para. 40; *Mussani v. College of Physicians and Surgeons of Ontario*, 2004 CanLII 48653 (O.N.C.A.) at para. 41; *Ouellette v. Law Society of Alberta*, 2019 ABQB 492 at para. 52, application for leave to appeal dismissed 2021 ABCA 99; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at p. 1179, *per* Lamer J., as he then was, concurring; *Siemens* at para. 46.

[809] Trial Lawyers written submissions at para. 188.

was made and rejected in the COVID cases. For example, this is how this Court summarized the argument in *Hoogerbrug*:

> The Tatlock petitioners argued that requiring vaccination as a condition of employment infringed their s. 7 liberty right to make fundamental personal decisions without state interference[.][810]

The Court rejected that argument for the following reasons, which apply equally to the Trial Lawyers' argument:

> On the evidence, the Orders compelled none of the Tatlock petitioners to accept unwanted medical treatment. Thus, unlike *Carter*, their s. 7 rights associated with bodily integrity and medical self-determination were not engaged.
>
> Instead, they lost their jobs because they chose not to accept vaccination against a highly contagious virus which posed the risk of serious illness and death to vulnerable patients and other healthcare workers. In my view, this loss did not engage their s. 7 right to liberty because of the well-established principle that s. 7 does not protect the right to work in any specific employment or particular profession, particularly when the job-loss arises from non-compliance with its governing rules and regulations. This is not a constitutionally-protected fundamental life choice.[811]

668. Similarly, the *Act* does not compel lawyers to receive treatment they do not want. When a person is involuntarily committed in a psychiatric institution under the *Mental Health Act*, for example, that is compelled treatment engaging medical autonomy under s. 7. The *Act* does not confer this kind of authority on the regulator or tribunal. Lawyers cannot be forced to receive treatment they do not want, just as requirements for health care workers to be vaccinated did not lead to anyone holding down health care workers' arms to inject them with vaccines. If the regulator or tribunal makes an order requiring a lawyer to receive treatment, it is open to the lawyer to decline, just as it was open to health care workers to decline the COVID vaccine. There may be consequences for declining treatment: the licensee's licence may be suspended or cancelled,[812] just as some health

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[810] *Hoogerbrug* at para. 270.
[811] *Hoogerbrug* at paras. 276-277.
[812] *Act*, ss. 59(2), 122(3).

care workers lost their jobs. However, it is a matter of settled law that these kinds of economic consequences do not engage s. 7.

(c) Section 7 not engaged on any of the Trial Lawyers' alternative arguments

669. The Trial Lawyers make four further arguments that s. 7 is engaged. These arguments can be dealt with briefly.

670. First, the Trial Lawyers say lawyers' liberty interest is engaged because non-compliance with a competence order is an offence punishable by imprisonment.[813] This is another misinterpretation of the *Act*. Declining to comply with a competence order is not an offence. If a lawyer declines to comply with a competence order, the regulator may suspend or impose limits or conditions on the lawyer's licence, or apply to the tribunal for an order cancelling the lawyer's licence.[814] The Trial Lawyers cite s. 198(2)(d), which provides that a person commits an offence if the person "wilfully interferes with or obstructs another person in the exercise of a power or performance of a duty under this Act or in carrying out an order under this Act".[815] This provision captures conduct like denying the regulator entry to a law firm for the purpose of conduct an audit. The Trial Lawyers' position is inconsistent with the plain language meaning of s. 198(2)(d), in that declining to comply with a competence order does not interfere with or obstruct any person from doing anything. The Trial Lawyers' position is also inconsistent with the presumption of consistent expression. The legislature "is presumed to use language such that the same words have the same meaning both within a statute and across statutes".[816] There are nine other enactments in British Columbia containing offence provisions with substantially the same language as s. 198(2)(d).[817] Six of those enactments also make it an offence to

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[813] Trial Lawyers written submissions at para. 217.
[814] *Act*, s. 59.
[815] *Act*, s. 198(2)(d).
[816] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 44.
[817] *Animal Health Act*, S.B.C. 2014, c. 16, s. 81(3)(b); *Fish and Seafood Act*, S.B.C. 2015, c. 14, s. 54(1)(b); *Food and Agricultural Products Classification Act*, S.B.C. 2016, c. 1, s. 42(2)(b); *Laboratory Services Act*, S.B.C. 2014, c. 8, s. 64(e); *Lobbyist Transparency Act*, S.B.C. 2001, c. 42, s. 10(3.1); *Pharmaceutical Services Act*, S.B.C. 2012, c. 22, s. 51(1)(c); *Pill Press and Related Equipment Control Act*, S.B.C. 2018, c. 24, s. 22(3)(d); *Public Health Act*, S.B.C. 2008, c. 28, s. 99(4)(b); *Voluntary Blood Donations Act*, S.B.C. 2018, c 30, s. 21(3)(b).

not comply with orders (or certain kinds of orders) made pursuant to the enactment.[818] Those six provisions would be redundant, if the Trial Lawyers were correct that the language in s. 198(2)(d) made it an offence not to comply with an order.

671. Next, the Trial Lawyers say lawyers' security of the person is engaged because the *Act* does not require an order requiring treatment to be made by a medical professional or after receiving advice from a medical professional.[819] The argument seems to be that security of the person is engaged because orders might be medically unnecessary or inappropriate. A hypothetical risk of maladministration does not engage security of the person. Like the Law Society, the regulator must exercise all of its statutory powers reasonably in the administrative law sense and in accordance with the *Human Rights Code*. If a lawyer's conduct is being impaired by a health or substance use issue that constitutes a disability, the regulator must accommodate that disability to the point of undue hardship to the regulator's public interest mandate.[820] If the regulator were to exercise its authority unreasonably, or contrary to the *Human Rights Code*, remedies would be available on that specific occasion.

672. Next, the Trial Lawyers say lawyers' security of the person is engaged because the *Act* does not require health-related competence issues to be dealt with confidentially.[821] That is equally true of the Current Act. There is no authority for the proposition that regulated professionals are entitled to absolute privacy in respect of issues that may imperil their clients' interests. Rather, law societies and law society tribunals have applied the *Sherman Estate* test when deciding how to balance the public interest in transparency and lawyers' interest in confidentiality in matters raising health and medical issues.[822]

673. Finally, the Trial Lawyers say the *Act* may lead some lawyers to commit suicide.[823] The only evidence cited in support of this remarkable assertion is a paragraph from one

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[818] *Animal Health Act*, s. 81(g); *Fish and Seafood Act*, s. 54(1)(m); *Food and Agricultural Products Classification Act*, s. 42(1)(k); *Pill Press Act*, s. 22(3)(a); *Public Health Act*, ss. 99(1)(h) and (k); *Voluntary Blood Donations Act*, s. 21(3)(c).
[819] Trial Lawyers written submissions at para. 219.
[820] *Khan* at paras. 51-66; see also *Stewart*.
[821] Trial Lawyers written submissions at paras. 232-234.
[822] See e.g. *Law Society of Ontario v. Campos*, 2024 ONLSTH 142.
[823] Trial Lawyers written submissions at para. 235.

of the affidavits of Mr. Greenberg, KC, a partner of the law firm representing the Trial Lawyers, in which he deposes that "[g]iven the prevalence of suicidal ideation in the profession, Bill 21 inevitably places my colleagues and members of the profession at significant personal risk".[824] With respect, that statement constitutes inadmissible opinion and argument.

VI. In any event, the impugned provisions are consistent with the principles of fundamental justice

i. Not arbitrary or overbroad

674. The Trial Lawyers argue the impugned provisions are arbitrary and overbroad because they go beyond what is necessary to achieve their purpose and are counterproductive. If their purpose is to protect the public from licensees whose ability to practice law is impaired, the Trial Lawyers say, that purpose can be achieved by suspending such licensees: it is not necessary to require them to receive treatment they may not want. Moreover, the Trial Lawyers argue, "forced treatment" is counterproductive in the sense of being ineffective and harmful.[825]

675. When a licensee's ability to practise law to an adequate standard is being impaired by a health condition, suspending that licensee would protect their current clients from further inadequate service—but do nothing to help the licensee overcome their health issue, or learn to manage it so it no longer impairs their ability to practice law to an adequate standard. The objective is not only to protect the licensee's current clients, but to help the licensee return to being able to practice law to an adequate standard. Although it is obviously preferable for licensees who need treatment to seek out such treatment for themselves, an order requiring a licensee to receive treatment can be medically effective in some circumstances.[826]

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[824] Greenberg #3 at para. 209.
[825] Trial Lawyers written submissions at paras. 251-263.
[826] Expert report of Michael Colleton, MD, FRCPC, June 27, 2025 [Colleton Report] at paras. 9-11.

676. A law is arbitrary if its effects have no connection to its objective. A law is overbroad if it is arbitrary in part, i.e., if some of its effects have no connection to its objective.[827] Here, the relevant question is whether there is a rational connection between empowering the regulator and tribunal to require a licensee to obtain treatment when their ability to practice law is being impaired by a health condition, and the objective of protecting the public.

677. There is a rational connection. It is rational to conclude that, in some circumstances, requiring a licensee to receive treatment will help to protect the public. This rational connection is apparent from logic and common sense, the longstanding regulatory practices of the Law Society and other law societies, and the expert report of Dr. Colleton. Each of these points is developed below.

678. First, however, it should be emphasized again that the power to require a licensee to obtain treatment, backed by a potential license suspension or cancellation if they decline, is only one tool in the toolbox created by the *Act*. It is not a new tool: it already exists in BC and other provinces. It is an exceptional tool now and will remain an exceptional tool under the *Act*. It is not a replacement for the Alternative Discipline Process but a separate tool that can be used in appropriate circumstances. It must be exercised reasonably in an administrative law sense and in accordance with the *Human Rights Code*, meaning that where a health condition constitutes a disability, the regulator must accommodate that disability to the point of undue hardship to its public interest mandate.[828] These orders (when made by the regulator) are appealable to the tribunal and thence to the Court of Appeal.[829]

679. Second, a rational connection is apparent as a matter of logic and common sense. The Trial Lawyers' position is essentially that, if the regulator knows a lawyer is not practising competently, that is all the regulator needs to know; it is none of the regulator's business *why*. The regulator should not be "defining the source of that incompetency";[830]

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[827] *Bedford* at paras. 111-112.
[828] *Khan* at paras. 51-66; see also *Stewart*.
[829] *Act*, ss. 88(6), 129.
[830] Trial Lawyers written submissions 263.

it should simply suspend the lawyer and be done with it. But that approach would miss an opportunity to provide support or assistance to the lawyer to help them overcome the issue they are facing. It would also make it impossible for the regulator to assess whether the suspension can ever be lifted. If the regulator does not know what the cause of the problem was, the regulator cannot assess whether the problem has been solved or managed to an acceptable level. To use an example, a course on practice management and some training on calendar systems will help a lawyer who is missing court appearances because of disorganization but will not help a lawyer who is missing court appearances because they are experiencing acute untreated drug addiction.

680. The regulatory practices of the Law Society and other law societies confirm that the power to require licensees to obtain treatment is a rational tool for protecting the public. Beginning with BC, as noted above, the Law Society's Rules empower the Law Society's Practice Standards Committee (the body that deals with competence issues) to require a lawyer to "obtain a medical assessment or assistance, or both".[831] The benchers of the Law Society have concluded that the power to suspend is not alone sufficient to protect the public; there must also be a power to require treatment in appropriate circumstances.

681. Similarly, the Law Society Tribunal has interpreted ss. 38(5)(c) and (7) of the Current Act to empower the Tribunal to require a lawyer to receive treatment. Those provisions state that, in certain circumstances, the Tribunal may impose "conditions or limitations" on a lawyer's practice. At the urging of the Law Society, the Tribunal has held that such conditions may include treatment:

> In support of its position that the broad language of ss. 38(5)(c) and (7) permits this Panel to order medical treatment, the Law Society submits that the scheme and object of the Act requires panels to impose sanctions in the public's interest. The Law Society further submits that the public interest mandate allows panels to order conditions related to medical treatment in order to permit appropriate regulatory oversight, and to hold otherwise would be inconsistent with that public interest mandate.
>
> […]

[831] Law Society Rules, s. 3-20(e) (Greenberg #1, Ex. 1 at p. 129). The Committee must first make a recommendation, but if the lawyer does not complete the recommendation, the Committee may then make an order: see s. 3-19(1)(b)(v).

> The Panel concludes that in certain, isolated circumstances, it has the jurisdiction to order that a lawyer undergo medical therapy, even if the lawyer does not consent. We reach this conclusion due to the nature of the Act and its overarching concern with the public's interest in the administration of justice. However, this jurisdiction must not be exercised lightly and before doing so, there must be a firm, evidentiary foundation upon which to make such orders.[832]

682. In BC and other provinces, there are reported decisions in which law society tribunals have ordered a lawyer to receive medical treatment, ordered a lawyer to enter into a "medical monitoring agreement" or "medical supervision agreement" including terms relating to treatment, or made a lawyer's eligibility to practice law conditional on receiving medical treatment or demonstrating to a committee that their competence is no longer impaired by a health condition.[833] These kinds of orders are not made very often, but in the right circumstances they may be necessary to protect the public.

683. The conclusions that have been reached by law societies and law society tribunals are reinforced by the expert opinion of Dr. Colleton, a forensic psychiatrist. His medical opinion and experience is that, in some circumstances, treatment can be effective even if it is not freely chosen.

684. As Dr. Colleton explains, but Mr. Gold (who has no medical training) and Dr. Ganesan do not, some individuals' conditions impair them from realizing they have a problem or that treatment would be helpful. The medical term for this is anosognosia. He gives an example: "an individual with bipolar disorder may discontinue treatment with mood stabilizing medication, believing it is unnecessary, relapse into a state of mania, and continue working because he or she is unable to recognize that he or she is ill".[834] For a lawyer in this kind of situation, depending on the circumstances, a requirement or practice condition for the lawyer to continue taking their medication as prescribed by their

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[832] *Grewal* at paras. 81, 93.
[833] See e.g. *Seeger (Re)*, 2022 LSBC 29 at para. 55(a); *Knight (Re)*, 2021 LSBC 36 at para. 62(a); *Ahuja (Re)*, 2021 LSBC 44 at para. 59(b); *Law Society of Ontario v. Hutton*, 2023 ONLSTH 161 at para. 38, aff'd 2025 ONLSTA 6; *Law Society of Ontario v. Doucet*, 2019 ONLSTH 65 at para. 19; *Law Society of Saskatchewan v. Armitage*, 2014 SKLSS 14 at para. 13.
[834] Colleton Report at para. 44.

psychiatrist, or for the lawyer to inform the regulator if they stop taking their medication, could help to safeguard their clients' interests.

685. Even absent anosognosia, Dr. Colleton's experience has been that, in some circumstances, treatment can be effective even if it is not freely chosen:

> It is not clear to me that involuntary treatment is generally ineffective or less effective than voluntary treatment. I agree that voluntary treatment is more desirable, but some individuals are unable to see (due to their mental health condition) that they need or should have treatment and will not pursue treatment for absent external direction. Based on my experience in a variety of settings, some individuals engage and benefit from treatment, despite the involuntary nature of these settings and interventions. For example, my patients on probation often have been ordered to see a psychiatrist and to attend counselling or programming. In many cases, individuals received treatment that they might not have otherwise chosen to have. Some of these individuals, many of whom were reluctant or disinclined to treatment in the first place, improved considerably over time, and later expressed gratitude for treatment that they may not otherwise have received. These were opportunities for beneficial change that would not have come about if not for the probation order.[835]

686. In short, the impugned provisions are not arbitrary or overbroad. There is a rational connection between empowering the regulator and tribunal to require a licensee to obtain treatment when their ability to practice law is being impaired by a health condition, and the goal of protecting the public.

ii. **Not grossly disproportionate**

687. Finally, the Trial Lawyers argue the impugned provisions are grossly disproportionate because they interfere with the autonomy of "individuals who happen to practise in a profession" to no public benefit beyond that which can be achieved with suspensions.[836]

688. With respect, lawyers do not "happen to practise in a profession". A licence to practise law is a privilege, not a right, and one that carries heavy concomitant responsibilities. Just as lawyers must remain current in their knowledge of substantive and

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[835] Colleton Report at para. 11; see also paras. 43-49.
[836] Trial Lawyers written submissions at paras. 263-269.

procedural law, they need to be aware of and manage stressors and health issues that have the potential to impair their judgment or otherwise interfere with their ability to discharge their obligations to their clients. When a lawyer's ability to practice law to an adequate standard is being impaired by a health condition, that is properly the concern of their regulator.

689. Gross disproportionality means the impugned law's effects on life, liberty, or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported. The deprivation must be totally out of sync with the purposes of the impugned law.[837]

690. The impugned provisions continue the status quo: lawyers whose ability to practice is being impaired by a health condition will need to be open with their regulator about their health or substance use, and if the Alternative Discipline Process is not appropriate in the circumstances, it is possible that the regulator or tribunal may make an order requiring treatment. Such orders are appealable to the Court of Appeal. If such an order is made and upheld on appeal, but the lawyer does not want the treatment, they can decline the treatment, but they may be suspended or, in an extreme case, have their licence cancelled.

691. These effects are proportionate to (meaning, not totally out of sync with) the objective of protecting the public. Members of the public depend on lawyers to protect their most important interests in what are often moments of intense personal or professional crisis. Law is a cognitive profession, and the most valuable service a lawyer provides is often their judgment. Lawyers whose judgment is impaired can pose grave risks to the interests of their clients. As the Law Society and other law societies across Canada have long recognized, the power to suspend is not alone sufficient to protect the public; there must also be a power to require treatment in appropriate circumstances.

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[837] *Bedford* at para. 120.

Trial Lawyers' s. 8 argument attempts to re-litigate Court of Appeal authority and misunderstands application of the *Charter*

I. Overview

692. Section 78 of the *Act* establishes a reasonable and properly constrained system for investigating complaints against licensees, trainees, and law firms. These powers are not materially different from the provisions of the *Current Act* and Rules of the Law Society of British Columbia, which the Court of Appeal has found compliant with s. 8 of the *Charter*.[838] The same result is required here as a matter of *stare decisis*.

II. Section 78

693. Contrary to the Trial Lawyers' assertion, s. 78 does not authorize fishing expeditions. It authorizes the chief executive officer, for the purpose of an investigation under the *Act*, to do any of the following without a warrant:

a. during business hours, enter a business premises[839] in which a licensee, practises law;

b. inspect or examine the records, or any other thing, of a licensee that relate to the practice of law; and

c. observe the licensee's practice of law or supervision of the practice of law.[840]

694. As noted, these powers are not materially different from the provisions of the Current Act and Rules of the Law Society of British Columbia, which the Court of Appeal has found compliant with s. 8 of the *Charter*.[841]

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[838] *A Lawyer*.
[839] Except a business premises located in a licensee's residence, for which the licensee's consent or a warrant is required: *Act*, s. 78(2).
[840] The powers in s. 78 are also subject to any limits or conditions imposed by the rules set by the board under s. 84 of the *Act*.
[841] *A Lawyer*.

III. **Approach to s. 8**

695. Under s. 8 of the *Charter,* the presumption that a warrantless search or seizure is unreasonable may be rebutted where the search or seizure is: (1) authorized by law; (2) the law itself is reasonable; and (3) the manner in which the search is carried out is reasonable.[842]

696. The Trial Lawyers do not allege (nor could they allege) that any search or seizure has taken place pursuant to s. 78 of the *Act*, such that the manner of the search can be put in issue. Nor do they allege that a search under the *Act* is not authorized by law. Accordingly, the only criterion at issue is whether the law itself is reasonable.

697. Where an impugned law's purpose is regulatory and not criminal, a more flexible approach to the standard of reasonableness under s. 8 of the *Charter* will apply.[843] A court will generally consider the nature and purpose of the legislative scheme, the mechanism employed and the degree of potential intrusiveness, and the availability of judicial supervision.[844]

IV. **Section 78 is reasonable**

698. Section 78 is reasonable when considering:

a. the regulatory nature and public protection purpose of the *Act*;

b. regulated professionals' diminished expectation of privacy with respect to a search by their regulator of their place of business;

c. the availability of judicial supervision; and

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[842] *R. v. Collins*, [1987] 1 S.C.R. 265 at para. 23; *R. v. Caslake*, [1998] 1 S.C.R. 51 at paras. 10-11.
[843] *A Lawyer* at paras. 38-39; *A Lawyer* (BCSC) at para. 152. See also, *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3; *Mulgrew v. Law Society of British Columbia,* 2016 BCSC 1279.
[844] *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 at para. 57.

d. the protections afforded to solicitor client privilege in ss. 209-210 of the *Act.*[845]

699. Indeed, across Canada, provincial legislation regulating the legal profession contains provisions authorizing the warrantless inspection of lawyers' documents kept at their business premises.[846] To date, no court has found these provisions to contravene s. 8 of the *Charter*.[847]

700. In *A Lawyer,* the Court of Appeal found that an investigation into the entire law practice of the appellant lawyer pursuant to an order issued under Rule 4-55 of the *Law Society Rules* and s. 36(b) of the Current Act, did not violate s. 8 of the *Charter.* The appellant argued that s. 36 of the Current Act and Rule 4-55 permit an "untrammeled search of a law office and seizure of all its contents, including client files that are subject to solicitor-client privilege" and therefore violated s. 8.[848] The Court of Appeal rejected these arguments, finding both the Current Act and Rule 4-55 to be reasonable under s. 8.[849]

701. Similar conclusions have been reached by the appellate court in Alberta (considering a search of a lawyer's text messages and other electronic devices used for both personal and professional purposes authorized by s. 55(2)(b) of the *Alberta Legal Profession Act*)[850] and the Court of Queen's Bench of Saskatchewan (considering a search of a lawyer's office, personal residence, and accountant's office authorized by s. 63 of the *Saskatchewan Act*).

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[845] Notably, s. 209 of the *Act* mirrors the protections provided for in s. 88 of the *Current Act.*
[846] *Current Act,* ss. 26(4)(b) and 36(b); *Alberta Legal Profession Act*, s. 55(2); *Saskatchewan Act*, s. 63(1); *Manitoba Act*, s. 67; *Ontario Act*, s. 49.3(2); *Act respecting the Barreau du Québec*, C.Q.L.R. c. B-1, s. 76; *Nova Scotia Act*, s. 35A; *New Brunswick Act*, s. 17(2); *P.E.I. Act*, s. 38; *Newfoundland Act*, s. 45; *Yukon Act*, ss. 61-62; *NWT 1988*, s. 24.1; *Legal Profession Act*, R.S.N.W.T. (Nu.) 1988, c. L-2, s. 24, s. 24.
[847] See: A Lawyer*;* Mulgrew; *Greene v. Law Society of British Columbia et al.,* 2005 BCSC 390; *Law Society of Alberta v. Sidhu*, 2017 ABCA 224 [*Sidhu*]; *Law Society of Saskatchewan v. Abrametz*, 2016 SKQB 320 [*Abrametz*].
[848] *A Lawyer* at para. 38.
[849] *A Lawyer* at para. 39.
[850] *Sidhu*.

702. The Trial Lawyers attempt to distinguish this body of settled jurisprudence by alleging that cases decided under the Current Act (and presumably, the legislation in Alberta and Saskatchewan),[851] considered searches "of lawyers by lawyers", not "government searches" of lawyers.[852] This distinction is contrary to foundational principles of *Charter* analysis and fundamentally misunderstands how s. 8 operates.

703. The *Charter* only applies to government action.[853] It is well-established that professional regulatory bodies exercising statutory authority are to be considered "government" for the purpose of the application of the *Charter* under s. 32.[854] Courts have generally held that the Charter applies to law societies because they are carrying out a delegated function on behalf of the legislature.[855]

704. Accordingly, when the Court of Appeal considered whether s. 36 of the Current Act and Rule 4-55 were constitutional under s. 8 of the *Charter*, it did so because the searches conducted by the Law Society were "government action". Otherwise, s. 8 would simply not apply.

705. The Trial Lawyers are therefore correct that *who* is doing the searching matters for the purpose of s. 8, but only insofar as the *Charter* distinguishes between government and private action. It would be absurd to introduce a new component to the s. 8 analysis to consider whether it is "government" conducting the search; a *Charter* analysis only proceeds where this is already established to be the case under s. 32.

706. Trial Lawyers further allege that the breadth of the search authorized by s. 78 of the *Act* intrudes on a client's personal information and impacts the solicitor-client relationship.[856] *Skogstad* is dispositive of this argument. In *Skogstad,* the Court of Appeal

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[851] *Sidhu*; *Abrametz*.
[852] Trial Lawyers written submissions at para. 176.
[853] See s. 32 of the *Charter; R.W.D.S.U. v. Dolphin Delivery Ltd.,* [1986] 2 S.C.R. 573.
[854] *Black*; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232; *Histed v. Law Society of Manitoba,* 2007 MBCA 150 at para. 43.
[855] *Trinity Western University v. The Law Society of British Columbia*, 2016 BCCA 423, rev'd but not on this issue, 2018 SCC 32 (cited with approval in *A Lawyer*); *The Law Society of Manitoba v. Pollock*, 2007 MBQB 51, aff'd 2008 MBCA 61; *Harvey v. Law Society of Newfoundland*, 1992 CanLII 2774 (N.L.S.C.).
[856] Trial Lawyers written submissions at para. 180.

found that s. 88 of the *Legal Profession Act,* S.B.C. 1998, c. 9[857] adequately protects a client who divulges confidential information subject to solicitor-client privilege.[858] In *A Lawyer,* the Court of Appeal expressly declined the appellant's invitation to "take another look" at *Skogstad*.[859] Section 209 of the *Act* adopts the same language used in s. 88 of the Current Act.

707. In the result, the *Act* is reasonable under s. 8 of the *Charter.* Of course, a finding that the law itself is reasonable under s. 8 of the *Charter* would not authorize the regulator to conduct searches in an unreasonable manner. If the regulator were to exercise its authority in a *manner* that contravened s. 8 of the *Charter*, then a licensee could challenge that particular government action.

Section 1

708. If this Court concludes that ss. 68, 76-78, 88, 198, and/or 202 of the *Act* infringe s. 7 of the *Charter*, or that s. 78 of the *Act* is unreasonable within the meaning of s. 8 of the *Charter*, the Attorney General acknowledges these infringements are unlikely to be justified under s. 1 of the *Charter*. Sections 7 and 8 incorporate many of the elements that are considered under s. 1 for other rights.

709. However, if this Court finds the *Act* engages s. 2(d) of the *Charter,* then any limits imposed by the *Act* are reasonable limits to the associational rights of lawyers that can be demonstrably justified in a free and democratic society.

710. The objective of the *Act* is pressing and substantial: to create a new regulatory structure that jointly regulates legal professions in the public interest. The Supreme Court of Canada has held the protection of the public is the primary purpose of legislation governing professional regulation.[860] The purpose must be characterized broadly since the Trial Lawyers are impugning the entire *Act*.

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[857] Section 88 was amended in 2012 to to clarify the obligation to disclose records subject to lawyer-client privilege, but the protections over those records remained unchanged. See *Legal Profession Amendment Act, 2012,* c. 16.
[858] *Skogstad v. The Law Society of British Columbia*, 2007 BCCA 310 [*Skogstad*].
[859] *A Lawyer* at para. 40.
[860] *Pharmascience inc. c. Binet*, 2006 SCC 48 at para. 36.

711. The law is rationally connected to this objective. The *Act* creates a new regulator whose governance board reflects the various legal professions being regulated.

712. The *Act* impairs lawyers' s. 2(d) rights no more than reasonably necessary. The *Act* does not interfere with lawyers' ability to form or partake in advocacy associations in pursuit of shared objectives. Further, the board of the new regulator maintains a majority of lawyers. To the extent the Law Society currently has some associational elements, it is open to the new lawyer-led board to preserve and continue those.

713. The salutary effects outweigh any deleterious effects. In assessing the salutary effects of the law, the Court should consider the law's objective and beneficial effects. While the effects of the *Act* are unknown since the plaintiffs challenge the legislation before most provisions have been brought into force, the purposes of the *Act* are beneficial. Likewise, the extent of deleterious effects on lawyers' s. 2(d) rights are unknown. Under the *Act*, it is open to the new board to maintain the associational elements of the Law Society, so long as it is in the public interest. It is also common ground that the *Act* does not impact in any way lawyers' ability to continue to exercise associational rights through professional associations like the CBA or the Trial Lawyers. Therefore, the objective of the *Act* outweighs any marginal impact on lawyers' s. 2(d) rights.

PART 6: PROCEDURAL AND EVIDENTIARY ISSUES

Procedural issues no longer arise

714. The Attorney General has registered procedural objections to the unpleaded allegation, made in the Law Society's notice of application, that "for well over a century, in British Columbia and throughout Canada, governments have and continue to recognize […] that the legislature is constrained from exercising its jurisdiction unless alterations to the governance and regulatory structures for lawyers are generated or consented to by the bar".[861]

[861] Law Society notice of application for summary trial at paras. 17-18; Attorney General application response at paras. 10, 121.

715. This allegation was advanced in support of an argument that the public's elected representatives in the legislative assembly are somehow prohibited from enacting certain kinds of legislation without the consent of lawyers.

716. The Law Society has abandoned that allegation and argument, meaning the Attorney General's procedural objections do not need to be resolved. The Trial Lawyers make a version of this argument, framed as a novel constitutional convention, without any notice in its pleading or notice of application, but the record is adequate to resolve it on its merits.

Evidentiary Issues

717. The Attorney General has filed notices of application raising evidentiary objections to the plaintiffs' evidence. Those applications object to the admissibility of much of the evidence filed by the Law Society and Trial Lawyers. The Law Society has tacitly conceded most of those objections: its submissions cite little of the inadmissible evidence and cite it mostly for propositions that are uncontroversial (if often irrelevant). Most of the Attorney General's evidentiary objections to the Law Society's evidence therefore do not need to be resolved.

718. The Trial Lawyers continue to rely on some inadmissible evidence. Where necessary, the admissibility of evidence has been addressed in the course of these submissions.

719. Should the plaintiffs seek to rely on additional evidence in reply or oral submissions, or rely on it for new propositions, the Attorney General reserves the right to raise additional admissibility objections.[862]

[862] Notices of Application filed by the Attorney General dated September 15, 2025.

PART 7: REMEDY AND COSTS

Remedy, if any, should be tailored

720. As a starting point, the Law Society, Notaries Society, and the Attorney General all agree that the legal professions should be governed by a single legal regulator.[863] The issue is whether certain features of a statute that fulfills that shared objective are constitutional, and if not, what the appropriate remedy is.

721. The parties also agree that if certain provisions of the *Act* are unconstitutional, then the remedy should be a declaration of invalidity.[864] Where the parties part ways is on whether the Court should declare the entire *Act* unconstitutional or only the infringing provisions. Despite impugning only certain provisions of the *Act*, the Law Society argues this Court must declare the whole *Act* unconstitutional (except for three sections amending other statutes).[865] The Attorney General disagrees.

722. If this Court decides that specific provisions of the *Act* are unconstitutional, then this Court should declare those provisions invalid to the extent of the inconsistency. [866] In doing so, the Court should be specific in detailing the extent of the constitutional infirmity to facilitate a dialogue between the Court and the legislature.[867]

723. When courts invalidate legislation on constitutional grounds, they are clear and precise about the constitutional infirmity so the other branches can respond accordingly:

> In reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches. As has been pointed out, most of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives. By doing this, the legislature responds to the courts; hence the dialogue among the branches.

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[863] Law Society written submissions at paras. 351-352; Affidavit #1 of Hassan el Masri made April 25, 2025 at para. 47, 49.
[864] Law Society written submissions at paras. 449.
[865] Law Society notice of application for summary trial, Part 1.
[866] *Ontario (Attorney General) v. G*, 2020 SCC 38 at paras. 97, 108-109; *R. v. Moriarity,* 2015 SCC 55 at para. 58, citing *Schachter* at p. 702.
[867] *Vriend* at paras. 138-139.

> To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under [the notwithstanding clause in] s. 33 of the *Charter*).[868]

724. To take but one example, if this Court were to conclude that the *Act* is unconstitutional because it fails to provide for a regulator composed of a strong majority of lawyers elected by lawyers, there is no need to strike down the entirety of the *Act*; only s. 8 would be constitutionally infirm.

725. Additionally, all parties wish to ensure that regardless of the outcome of these actions, the Law Foundation's operations are not interrupted. If the actions are dismissed, no issues arise for the Law Foundation. If the court finds portions of the *Act* to be unconstitutional, the court has remedial discretion to craft a remedy that is consistent with s. 52 of the *Constitution Act, 1982*, but ensures the Law Foundation's operations are not interrupted.

No material change in circumstances that would permit another injunction application

726. The Law Society says it may seek an order enjoining the Lieutenant Governor in Council from bringing the balance of the *Act* into force until 30 days after the determination of this application.[869]

727. While the Law Society can renew its injunction application if there is a material change in circumstances, the primary reason for Justice Gropper's dismissal of the first injunction application remains unchanged. The transitional board's work plan contemplates completing the first rules between October and December 2026.[870] Cabinet cannot bring the rest of the *Act* into force until the first rules are made.[871]

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[868] *Vriend* at paras. 138-139 (internal citation omitted).
[869] Law Society notice of application for summary trial at para. 59.
[870] Spraggs #1, Ex. U at p. 449.
[871] *Act*, s. 226(2)(a).

728. If there is a material change in circumstances and the Law Society wishes to renew its application, it must deliver proper application materials.

Province should be removed as a party

729. His Majesty the King in right of the Province of British Columbia (i.e., the government[872]) should be removed as a party.[873] The proper defendant in a constitutional challenge to legislation is the Attorney General.[874]

Costs should be addressed after a decision on the merits

730. Arguments on costs should be deferred until after the Court has pronounced judgment on the merits. The Attorney General reserves the right to make submissions on costs at that time.

All of which is respectfully submitted.

Date: September 15, 2025.

Emily Lapper

Trevor Bant

Sergio Ortega

Karin Kotliarsky

Solomon Kay-Reid

Counsel to the Attorney General of British Columbia

[872] *Crown Proceeding Act,* R.S.B.C. 1996, c. 89, s. 7.
[873] See *B.C. Teachers' Fed. v. B.C.*, 1985 CanLII 304 (B.C.S.C.) at para. 16.
[874] *Allen v. British Columbia (Superintendent of Motor Vehicles)*, 1986 CanLII 1044 (B.C.S.C.), (1986) 2 B.C.L.R. (2d) 255 at paras. 14-16; *Weisenburger* at para. 129.

Legal Professions Act: Understanding the Discipline Process

SCHEDULE A

Regulator

Concern Identified

Individual makes a complaint about a licensee (**section 76**) or regulator identifies a potential concern on its own initiative (**section 77**).

Preliminary Assessment

Regulator assesses complaint to determine whether it merits investigation.

Complaint Dismissed

Regulator may dismiss complaints without investigation if frivolous, outside regulator's jurisdiction, etc. (**section 77**).

Complaint Investigated

Regulator commences investigation, investigation powers are engaged under **section 78.**

Alternative Dispute Resolution and Consent Agreements

Consent agreements (**section 91**) and alternative resolution processes (**section 92**) are available at any time until a Tribunal hearing commences.

Interim Orders

The regulator may issue interim orders (including limits, conditions or suspension, maximum three months in duration) if considered necessary in the public interest (**section 85**).

The regulator may also require a licensee to undergo a medical examination, if considered necessary in the public interest (**section 85(1)(g)**).

A licensee can appeal an interim order to the Tribunal (**section 85(9)**). The regulator can apply to the Tribunal to extend an interim order (**section 85(5)**).

No Further Action

If investigation indicates no conduct or competence concern, the regulator dismisses the complaint and no further action is taken.

Resolution by Consent

As noted above, if investigation indicates conduct or competence concern, the regulator and licensee can resolve the matter consensually.

Conduct or Competence Order Issued

If investigation indicates **less serious** conduct or competence concern and matter cannot be resolved consensually, regulator can issue a competence order (**section 86(c)(i)**) or a professional conduct order (**section 86(a)**).

Competence Order Issued

Orders can include the following:
- practice review
- education/training
- counseling/medical treatment
- limits or conditions on licence
- license suspension

Some competence orders can be appealed to the Tribunal (**section 88(6)**).

Professional Conduct Order Issued

Orders can include the following:
- reprimand
- practice review
- education/ training
- limits or conditions on licence
- fine (max $10k 1st offence, $20k 2nd offence)

Some professional conduct orders can be reviewed by the Tribunal (**section 87(6)**).

Citation Submitted to Discipline Committee

If investigation indicates serious conduct or competence concern and matter cannot be resolved consensually, regulator can submit a citation to the discipline committee (**sections 86(b)** and **(c)(ii)**).

Discipline Committee Review

Discipline committee reviews proposed citations for cases of professional misconduct, conduct unbecoming, or incompetence.

The committee either approves the citation for a hearing or sends it back to the regulator, with or without reasons (**section 90**).

Independent Tribunal
(independent of regulator)

Tribunal Review of Regulator Action

Licensees may apply for a review of some professional conduct orders and competence orders.

Licensees may also apply for a review of a interim order issued by the regulator under **section 85**.

Tribunal Hearing

Citations approved by the discipline committee are heard by the Tribunal.

Tribunal can dismiss citations or make the following orders:
- dismissal
- reprimand
- practice review
- remedial program to satisfaction of board
- counselling / medical treatment
- limits or conditions on licence
- $250k fine for licensees; $5 million for law firms
- licence suspension
- licence cancellation
- any other order the tribunal considers necessary in the public interest, including restitution

British Columbia Court of Appeal

Court of Appeal Reviews Decision

The regulator and licensees may appeal final decisions of the Tribunal to the BCCA for all questions of fact and law.