NO. S-243258
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

LAW SOCIETY OF BRITISH COLUMBIA

PLAINTIFF

AND:

HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA and the ATTORNEY GENERAL OF BRITISH COLUMBIA

DEFENDANTS

WRITTEN SUBMISSIONS OF THE LAW SOCIETY OF BRITISH COLUMBIA
(Application for Interlocutory Injunctive Relief)

LAWSON LUNDELL LLP
1600 – 925 West Georgia Street
Vancouver, B.C. V6C 3L2
T: 604.685.3456
E: cferris@lawsonlundell.com

Craig A.B. Ferris, K.C.
Laura L. Bevan
Jonathan Andrews

COUNSEL FOR THE PLAINTIFF LAW SOCIETY OF BRITISH COLUMBIA

MINISTRY OF ATTORNEY GENERAL
1301 – 865 Hornby Street
Vancouver, B.C. V6Z 2G3
T: 604.660.6795
E: emily.lapper@gov.bc.ca

Emily Lapper
Trevor Bant
Karin Kotliarsky

COUNSEL FOR THE DEFENDANTS

TABLE OF CONTENTS

I. INTRODUCTION 3
A. Overview 3
B. The Law Society of British Columbia 4
C. Bill 21 6
i. Bill 21 eliminates the Law Society and the Benchers 7
ii. The transition provisions end self-regulation of lawyers in British Columbia 8
D. The Law Society considers self-governance and self-regulation essential to the independence of lawyers 9
E. Chronology of events leading to Bill 21 9
II. LAW AND ARGUMENT 12
A. Injunctive relief is available in constitutional cases 12
B. The Law Society's claim raises a serious question as to the constitutionality of Bill 21 .. 13
i. Independence of the bar is a constitutional imperative 13
ii. Independence of the bar requires both individual and institutional independence 18
iii. Bill 21 is inconsistent with the independence of the bar and unconstitutional as a result 25
iv. Conclusion on serious question to be tried 31
C. The implementation of Bill 21 will cause irreparable harm 31
i. This application is not premature 33
ii. The Law Society's continued existence is in doubt, and its administrative programs will be irreparably interrupted 36
iii. The Law Society will be forced to discharge a duty that does not uphold and protect the public interest in the administration of justice 37
iv. The Law Society will suffer irreparable monetary loss 38
v. Public confidence in the administration of justice will be shaken 39
vi. Bill 21 will effect irreversible financial changes 40
D. The balance of convenience favours granting the injunction 40
i. The injunction will protect the public interest in the administration of justice 41
ii. No real harm arising from the injunction 42
iii. The injunction will preserve the longstanding status quo 43
iv. Conclusion on balance of convenience 44
III. CONCLUSION 44

I. INTRODUCTION

A. Overview

1. On May 16, 2024, the British Columbia legislature enacted the *Legal Professions Act*, S.B.C. 2024, c. 26 (**Bill 21**). Bill 21 creates a new single regulator of legal professions in British Columbia – Legal Professions British Columbia (**LPBC**) – to regulate lawyers, notaries public, and certain paralegals practicing in the province, as well as new classes of government-created legal professionals that may be created and governed by Cabinet regulation.

2. On May 17, 2024, the Law Society filed a Notice of Civil Claim alleging that Bill 21 is inconsistent with the independence of the bar and unconstitutional as a result.[1]

3. The practice of law is, and must continue to be, an independent and self-regulating profession. In every province and territory in Canada, self-regulated societies govern the professional bar for the purposes of upholding and protecting the public interest in the administration of justice. The Law Society fulfills its obligation to regulate lawyers practicing in British Columbia in the public interest by, among other things, preserving and protecting the rights and freedoms of all persons, and ensuring the independence, integrity, honour and competence of lawyers. The fundamental obligation on the professional bar to self-regulate lawyers in the public interest is reflected in s. 3 of the *Legal Profession Act*, S.B.C. 1998, c. 9 (***LPA***).

4. Bill 21 ends self-governance and self-regulation of lawyers in British Columbia and compromises the independence of the bar. In this application, the Law Society seeks the injunctive relief required to prevent Bill 21 from causing immediate and irreparable harm to the public interest in the administration of justice. In particular, the Law Society seeks an order:

    a. suspending the operation of sections 215 and 223-229 of Bill 21; and

    b. enjoining the Lieutenant Governor in Council (**LGIC**) from bringing sections 1-214, 216-222, 230-310, and 315-316 of Bill 21 into force until the determination by this Court of the claims in the Law Society's Notice of Civil Claim.

5. Sections 215 and 223-229 are the transitional governance provisions of Bill 21 that came into force on Royal Assent. They compel the Law Society to facilitate the implementation of an unconstitutional governance model, and to create rules and process that weaken and inhibit the independence of the bar. In short, they require the Law Society to cooperate in

[1] Notice of Civil Claim of the Law Society of British Columbia, filed May 17, 2024.

fundamentally altering the *status quo* under which lawyers have self-governed their profession for over 150 years, and to take its first formal steps in doing so by **July 16, 2024**.

6. The coming into force of sections 1-214, 216-222, 230-310, and 315-316 conclude the unconstitutional transition and also the 155-year history of the Law Society. Absent injunction, these provisions come into force at the discretion of the LGIC.

7. The test for interlocutory relief is clearly met in the circumstances: the Law Society has raised a serious constitutional question that strikes at the bedrock of the Canadian legal system and of the administration of justice in this province; implementing Bill 21 will irreparably harm the public interest if the legislation is ultimately determined to be inconsistent with Canada's constitution; and the balance of convenience favours maintaining the *status quo* of independent, effective regulation of lawyers in the public interest under the *LPA*.

B. The Law Society of British Columbia

8. The Law Society is the body through which lawyers exercise self-government and self-regulation in British Columbia. The Law Society is an independent non-profit society continued by s. 2(1) of the *LPA* to govern the professional bar for the purposes of upholding and protecting the public interest in the administration of justice.[2]

A brief history of the Law Society

9. The law society first formed in 1869 as an association of lawyers admitted to practice law on what was then described as Vancouver's Island and the Colony of British Columbia.[3] At that time, pursuant to an 1858 order of Justice Begbie[4] (then the first and only justice of the colony of British Columbia), and later the first *Legal Professions Act* of 1863, the judges of the Supreme Court were the disciplinary authority of the profession.[5]

10. The law society continued as an association until 1874, when a new *Legal Professions Act* provided for a legal entity entitled "The Incorporated Law Society of British Columbia". The entity was maintained until 1884 when a new *Legal Professions Act* ("motivated by the then Benchers and drafted by two Benchers") was enacted, that provided for elected Benchers: "The persons who shall be elected Benchers – shall be a body politic and

[2] Affidavit #1 of Brook Greenberg, K.C. at para. 13 [Greenberg Affidavit #1].
[3] Alfred Watts, Q.C, History of the Legal Profession in British Columbia, 1869-1984 (Law Society of British Columbia, 1984) [Watts] at p. 4.
[4] Affidavit #1 of Patti Lewis made May 24, 2024 [Affidavit #1 of Patti Lewis], Ex. M.
[5] Watts, at p. 3.

corporate under the name of 'The Law Society of British Columbia' and as such shall have continued succession and a common seal."[6]

11. In 1987, 103 years after the first statutory recognition of the Law Society, the legislature enacted a new *Legal Profession Act*. It replaced what was then termed the *Barristers and Solicitors Act*, and formally recognized the existing duty of the Law Society 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.[7]

12. The 1987 Act represented a significant consensus among the British Columbia and the Canadian bar about how the Law Society should govern the profession and protect the public interest.[8]

13. The *LPA* was enacted in 1998. In 2018, further amendments to the *LPA* were enacted by way of the *Attorney General Statutes Amendment Act, 2018*, S.B.C. 2018, c. 49. The amendments provided for the regulation by the Law Society of licensed paralegals. These provisions have never been brought into force.

The current Legal Profession Act

14. Section 3 of the *LPA* continues to recognize and affirm the Law Society's public interest mandate (emphasis added):

> **Object and duty of society**
>
> **3** It is the object and duty of the society to uphold and protect the public interest in the administration of justice by
>
> (a) preserving and protecting the rights and freedoms of all persons,
>
> (b) ensuring the independence, integrity, honour and competence of lawyers,
>
> (c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,
>
> (d) regulating the practice of law, and

---

[6] *Ibid*, at p. 5. Courthouse Libraries BC maintains a legislative history of the Legal Profession Acts: see Lewis Affidavit #1, Ex. L.
[7] *Legal Profession Act*, S.B.C. 1987, c. 25, s. 3.
[8] Affidavit #1 of Gregory Berry, Ex. B, p. 5.

(e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

15. The Law Society is governed by the Benchers under s. 4 of the *LPA*. The *LPA* does not prescribe the composition of the Benchers, except to provide that the benchers include the Attorney General, up to six persons appointed by the LGIC under s. 5(1) of the *LPA*, the lawyers elected under s. 7 of the *LPA*, and the president, first vice-president and second-vice president.[9]

16. One of the core functions of the Benchers is rule-making. The Benchers make rules for the governing of the society, lawyers, law firms, articled students and applicants, and for the carrying out of the duties and powers under the *LPA*.[10] The Rules govern all aspects of the day-to-day practice of law, and are binding on the Law Society, lawyers, law firms, the Benchers, articled students, applicants, and others authorized to practice law in British Columbia.

17. The Rules specifically address membership and admission into the Law Society and the authority to practice law; processes for protection of the public through the investigation of complaints, promoting the mental and physical health of lawyers, maintaining practice standards, and continuing education of lawyers; and discipline of lawyers who are alleged to have breached the Rules.[11]

18. The Benchers also maintain the Code.[12] The Code is an expression of the Benchers' views on the special ethical responsibility that comes with the lawyer's role, and forms an integral part of independent self-regulation of lawyers in the public interest. The Code is significantly related to the Federation of Law Societies' *Model Code of Professional Conduct*, which ensures pan-Canadian standards for the practice of law.

19. The Benchers also oversee the implementation and administration of the Law Society's many programs to promote and protect the public interest in the administration of justice.

C. Bill 21

20. The Law Society supports regulatory modernization, and the "single regulator" model of regulation of legal professions in British Columbia. The Law Society supports licensing paralegals, and prioritizing reconciliation with Indigenous peoples, access to justice and

---

[9] Legal Profession Act, S.B.C. 1998, c. 9, ss. 4-7 (bound separately).
[10] *Ibid*, s. 11.
[11] Greenberg Affidavit #1, Ex. 1 (bound separately).
[12] *Ibid*, Ex. 2 (bound separately) (**BC Code**).

diversity in the legal professions. The Law Society has been working towards those regulatory objectives as part of its public interest mandate for many years.[13]

21. Bill eliminates effective self-governance and self-regulation, and therefore fails to maintain independence of the bar.

i. Bill 21 eliminates the Law Society and the Benchers

22. Bill 21 amalgamates the Law Society with the SNPBC. The Law Society will no longer exist on the amalgamation date (s. 5 of Bill 21), which date is to be set by the LGIC. On the amalgamation date, the Benchers of the Law Society, whether elected by the lawyers in the province or appointed by the LGIC, will cease to hold any office (s. 230(a) of Bill 21).

23. Unless the relief sought by the Law Society is granted, on the amalgamation date, there simply will be no regulatory body to act to protect the public interest in self-governed, self-regulated lawyers in the province, because it will have been legislated away.

24. The transition provisions effect an immediate and irreversible "transition" to an unconstitutional regulatory regime. The Law Society is conscripted, by a statutory duty imposed by s. 223(7) of Bill 21, to "cooperate" in the transition to this unconstitutional regime.

25. The statutory duty to "cooperate" in the transition imposed by s. 223(7) of Bill 21 plunges the Law Society into direct conflict with its duties as recognized and affirmed by s. 3 of the *LPA*: to protect the public interest in the administration of justice by protecting and preserving the rights and freedoms of all persons, and to ensure the independence of lawyers, including and especially against government incursion.

26. In place of the elected and appointed Benchers, the government has created two bodies that are established now to carry out the transitional work[14]:

    (a) A 7-person transitional board (the **Transitional Board**), being 4 members appointed by the Benchers, one member appointed by the directors of SNPBC, one member appointed by the BC Paralegal Association, and one member appointed by the LGIC[15]; and

---

[13] *Ibid* at para. 74. See, for example, Exs. 61-69.

[14] The transition provisions also create a 4-person advisory committee (comprised of the Executive Directors of the Law Society, SNP, and the Law Foundation, and an employee of government) to advise the Transitional Board and the Transitional IC on the transition to the Bill 21 regime, and on the first rules of the board. However, the advisory committee will be dissolved on the amalgamation date and there is no further role for the advisory committee after its dissolution.

[15] Legal Professions Act, S.B.C. 2024, c. 26 [Bill 21], s. 223.

(b) A 5- or 6-person transitional Indigenous council (the **Transitional IC**),[16] consisting of 3 members appointed by the BC First Nations Justice Council, a member appointed by Métis Nation British Columbia, and 1 or 2 members of the Transitional Board appointed by the Transitional Board. The Transitional IC will become the first Indigenous council (the **IC**) of the LPBC on the amalgamation date.[17]

27. The Transitional Board will become the first board of LPBC on the amalgamation date.[18]

28. Within six (6) months, the first board of LPBC must hold elections to elect five (5) directors from among lawyers, two (2) directors from among notaries, and either elect two (2) directors from among paralegals or appoint two further directors.[19] The LGIC must also appoint three (3) directors, of whom at least one must be an individual of a First Nation.[20]

29. Under s. 8(1)(e) of Bill 21, a further five (5) directors must be appointed, "after a merit-based process, by a majority of the other directors holding office", of whom four (4) must be lawyers.

30. Lawyers do not form the majority of the 12 "other directors holding office" who appoint the additional five directors, including the four additional lawyers. Elected lawyers make up five of these 12 directors, and so may be outvoted.

ii. The transition provisions end self-regulation of lawyers in British Columbia

31. Section 226 of Bill 21 – already in force by Royal Assent - ends self-regulation of lawyers in British Columbia. The first rules of the board of LPBC, which will govern all aspects of the practice of law in British Columbia, are subject to the approval of the Transitional IC: no rules may be made "without first" obtaining the approval of the Transitional IC.[21] The first rules of the board come into force on the amalgamation date.[22]

32. Lawyers do not form a majority of either the Transitional IC, or of the combined Transitional IC and Transitional Board.

---

[16] *Ibid*, s. 226.
[17] *Ibid*, s. 232(1).
[18] *Ibid*, s. 230(2).
[19] *Ibid*, s. 230(6).
[20] "First Nation" means a First Nation whose traditional territory includes land within the boundaries of British Columbia: Bill 21, *supra* note 1, s. 1.
[21] Bill 21, s. 266(2)(b).
[22] *Ibid*, s. 226(3).

D. The Law Society considers self-governance and self-regulation essential to the independence of lawyers

33. The Law Society recognizes self-governance by lawyers, and self-regulation by lawyers, are necessary conditions of an independent bar in British Columbia, and that maintenance of lawyer independence is essential to protecting the rule of law and democracy in Canada.

34. In 2005, the Benchers of the Law Society established the Independence and Self-Governance Committee, chaired by Gordon Turriff, K.C., to examine and evaluate the role of self-governance in promoting lawyer independence. In its report to the Benchers dated March 20, 2008, the Committee concluded that "independent lawyers are… necessary to preserve a fundamental principle of the Canadian constitution", and that self-governance is a necessary condition of independence because it "most clearly distances the profession from the state, thereby assuring the public of lawyers' independence and freedom from conflicts with the state."[23]

35. As part of its public interest mandate, the Law Society communicates to the public, both within British Columbia and outside of British Columbia, that self-governance and self-regulation are necessary to preserve independence, and ultimately to properly serve clients' interests in accordance with the duties of undivided loyalty and solicitor-client privilege.[24]

36. Protection of the independence of lawyers and their regulator from undue government interference is identified as a regulatory priority of the Law Society in its public communications, including on its website and publications.[25]

37. The Law Society's articulation of the concept of independence aligns with international standards applicable to lawyers. The UN Human Rights Commission's declaration on the Basic Principles on the Role of Lawyers says the following:

> 24. 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.[26]

E. Chronology of events leading to Bill 21

38. The Law Society carries out periodic reviews of its governance structure, to inform how the Benchers may carry out their public interest mandate as an independent regulator, and in alignment with the Law Society's commitment to transparency and good governance. In

---

[23] Greenberg Affidavit #1, Ex. 20, p. 4.
[24] *Ibid*, Ex. 22.
[25] *Ibid*, Ex. 21.
[26] Affidavit #1 of Patti Lewis, Ex. O.

2021, the Law Society engaged an external consultant, Harry Cayton, to carry out one such review. The Law Society received Mr. Cayton's report in December 2021.[27]

39. The Benchers again discussed Mr. Cayton's report and the potential implementation of certain recommendations at their meeting of January 28, 2022, with a goal of making decisions by the Bencher's meeting in April 2022.[28]

40. On March 1, 2022, the Attorney General wrote to the Law Society and the Society of Notaries Public of British Columbia (SNPBC) regarding the government's intention to change the regulatory model governing lawyers in British Columbia, and to seek the Law Society and SNPBC's involvement in the process.[29]

41. On September 14, 2022, the Ministry of Attorney General released an Intentions Paper on Legal Professions Regulatory Modernization. The Intentions Paper did not communicate the details of the government's proposed legislation.[30]

42. The Law Society issued a response to the Intentions Paper on November 16, 2022.[31] While the Law Society agreed with the Ministry's emphasis on access to justice and some of the steps as outlined in the Intentions Paper (such as licensing paralegals), the Law Society also expressed concerns that the Intentions Paper did not make clear how the government intended to preserve independence of the bar. The Law Society asserted that an independent bar requires self-governance by a regulatory board on which lawyers are in the majority; that a reduction in the size of the governing board would undermine diversity on the board; that defining the regulated scope of practice for paralegals would create an unnecessary barrier to their entry into practice; and that the public interest is best served by legislation that enables, rather than constrains, an independent regulator.

43. The Canadian Bar Association and others issued responses to the Intentions Paper highlighting similar concerns about the lack of clarity around the government's intention to protect the independence of the bar.[32]

44. The government issued a "What We Heard" report detailing the responses to the Intentions Paper in May 2023.[33]

45. In January 2024, the Federation of Law Societies of Canada wrote to the Attorney General to request the opportunity to review the government's proposed draft single regulator

---

[27] Greenberg Affidavit #1 at para. 30, Exs. 8, 9, 10.
[28] *Ibid* at para. 31.
[29] *Ibid* at para. 33.
[30] *Ibid* at para. 77, Ex. 23.
[31] *Ibid* at para. 78, Ex. 25.
[32] *Ibid* at paras. 79-80, Exs. 28-30.
[33] *Ibid* at para. 81, Ex. 31.

legislation, and provide feedback from its perspective. The Attorney General did not respond to the request.[34]

46. The Attorney General released a public update in March 2024. The Law Society again publicly responded to express the concern that there had not been sufficient recognition of the necessary independence of a new legal regulator from government. The Law Society encouraged the government to address the Law Society's concerns about the degree of a mandated direction and prescription the proposed legislation was expected to contain.

47. The Trial Lawyers' Association of BC and 11 other organizations from across Canada wrote an open letter to the Attorney General on March 25, 2024 voicing concern about the proposed legislation, which had not been shared publicly with stakeholders. TLABC and others noted that an independent bar is "critical to the integrity of the legal system and a properly functioning democratic society. The bar can only be independent if it is self-governed and self-regulated.."[35]

48. The text of Bill 21 was made available publicly for the first time when it was introduced in the Legislature for first reading on April 10, 2024.[36]

49. The Law Society issued a response to Bill 21 on the same day. It noted that the public interest required the public's trust that that the legal regulator is independent of government influence. The Law Society noted that should Bill 21 be passed and enacted, the Law Society had instructed counsel to challenge the constitutionality of the bill.[37]

50. TLABC issued its own statement in opposition to Bill 21 on April 10, 2024.[38]

51. At a CBABC conference on April 12, 2024, the President of the Law Society, Jeevyn Dhaliwal, K.C., again publicly urged the Attorney General to pause the enactment of Bill 21 and engage in further consultation to build consensus with the legal community on protection of the independence of the bar and of the regulator.[39]

52. On April 26, 2024, the Benchers wrote to the Attorney General to urge the government to reconsider proceeding with Bill 21 without significant amendment.[40]

53. The government moved to close the debate on Bill 21 on May 15, 2024, though Bill 21 remained in Committee Stage at that time. On the same day, counsel for the Law Society

---

[34] *Ibid*, at para. 82, Ex. 32.
[35] *Ibid* at para. 97, Ex. 44.
[36] *Ibid* at para. 85.
[37] *Ibid* at paras. 87-89.
[38] *Ibid* at para. 98, Ex. 48.
[39] *Ibid* at para. 90.
[40] *Ibid* at para. 91, Ex. 38.

wrote to the Attorney General to provide formal notice of the Law Society's impending challenge to Bill 21.[41]

54. Bill 21 received third reading on May 15, 2024, and royal assent after 4:00 p.m. on May 16, 2024. The Law Society commenced this proceeding on May 17, 2024. This action was filed the same day.

II. LAW AND ARGUMENT

A. Injunctive relief is available in constitutional cases

55. An injunction may be granted by an interlocutory order of this Court in all cases in which it appears to the court to be just or convenient that the order should be made.[42] This Court has the jurisdiction to grant interlocutory injunctive relief against the Crown in constitutional cases.[43]

56. The applicable test is the three-part test set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*.[44] The applicant must establish that:

(a) there is a serious question to be tried;

(b) the applicant will suffer irreparable harm if the injunction is not granted; and

(c) the balance of convenience favours the granting of the injunction.[45]

57. These three considerations are not a checklist but rather a guide for considering the fundamental question of whether granting an injunction is just and equitable in all the circumstances of the case.[46]

58. The Law Society meets each part of the test. Injunctive relief to pause the transition to the Bill 21 regime is not only just and equitable in the circumstances of this case, but also imperative to preserve the rule of law and to protect the administration of justice in this province.

---

[41] *Ibid* at para. 93, Ex. 40.
[42] Law and Equity Act, R.S.B.C. 1996, c. 253, s. 39(1).
[43] *Harm Reduction Nurses Association v British Columbia (Attorney General)*, 2023 BCSC 2290 at paras. 31-34; leave to appeal dismissed: 2024 BCCA 87.
[44] *Ibid* at paras. 35-37; *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311.
[45] *RJR-MacDonald Inc v Canada (Attorney General)* at 342-344.
[46] *Federation of Law Societies of Canada v Canada (Attorney General)*, 2023 BCSC 2068, para. 22.

B. The Law Society's claim raises a serious question as to the constitutionality of Bill 21

59. On the first stage of the *RJR MacDonald* test, the Law Society need only establish that its claim is not frivolous or vexatious.[47] This is a low bar, to be determined on the basis of common sense and an extremely limited review of the case on the merits.[48] There is no higher standard that applies in constitutional cases, and the chambers judge should not reach conclusions on the outcome of the issues that stand to be decided at trial.[49]

60. The Law Society's claim that Bill 21 is inconsistent with the independence of the bar, and is unconstitutional as a result, raises a serious question to be tried. Each of the following propositions raised by the Law Society's claim are clearly arguable:

(a) Independence of the bar is a constitutional imperative;

(b) Independence of the bar requires both individual and institutional independence; and

(c) Bill 21 is inconsistent with the institutional dimension of the independence of the bar.

61. These propositions are discussed below.

i. Independence of the bar is a constitutional imperative

62. The province cannot legislate away the independent bar. Our constitutional structure cannot permit the elimination of one of the cornerstones of our legal system. The SCC's commentary as to the importance of the independence of the bar leaves no room for doubt in this regard. For example:

(a) "The independence of the bar from the state in all its pervasive manifestations is one of the hallmarks of a free society… 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."[50]

(b) "It is incontestable that the legal profession plays a very significant – in fact, a fundamentally important – role in the administration of justice, both in the criminal and the civil law… [I]n the absence of an independent legal profession, skilled and

---

[47] *Harm Reduction Nurses Association v British Columbia (Attorney General)* at para. 35.
[48] *RJR-MacDonald Inc v Canada (Attorney General)* at 348; *Harm Reduction Nurses Association v British Columbia (Attorney General)* at para. 35.
[49] *Harm Reduction Nurses Association v British Columbia (Attorney General)* at para. 48
[50] *AG Can v Law Society of BC*, [1982] 2 SCR 307 at 335-336.

qualified to play its part in the administration of justice and the judicial process, the whole legal system would be in a parlous state."[51]

(c) "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."[52]

(d) "[T]here is overwhelming evidence of a strong and widespread consensus concerning the fundamental importance in democratic states of protection against state interference with the lawyer's commitment to his or her client's cause."[53]

(e) "Committed and zealous advocacy for clients' rights and interests and a strong and independent defence bar are essential in an adversarial system of justice."[54]

Independence of the bar is an unwritten constitutional principle

63. Our Court of Appeal has concluded that the independence of the bar is a principle of fundamental justice.[55] The Law Society says that it must also be an unwritten constitutional principle.

64. Like federalism, the rule of law, democracy, and judicial independence, the independence of the bar is one of the "vital unstated assumptions upon which the text [of the Constitution] is based".[56] It is an assumption that "underlie[s] the text and the manner in which the constitutional provisions are intended to interact with one another".[57] The passages from the SCC above support this conclusion.

65. Independence of the bar is also a "requirement that flows by necessary implication"[58] from numerous express constitutional terms. In particular, from the preamble to and ss. 96-101

---

[51] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 187-188, Reasons of McIntyre J, dissenting in part, quoted and endorsed in *Law Society of British Columbia v Mangat*, 2001 SCC 67, [2001] 3 SCR 113 at para. 43; *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7, at para. 97.
[52] *Finney v Barreau du Québec*, 2004 SCC 36, [2004] 2 SCR 17 at para. 1
[53] *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7, at para. 102.
[54] *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*, 2017 SCC 26, [2017] 1 SCR 478 at para. 32.
[55] *Federation of Law Societies of Canada v Canada (Attorney General)*, 2013 BCCA 147 at paras. 105-114.
[56] *Reference re Secession of Quebec*, [1998] 2 SCR 217, para. 49.
[57] *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704, para. 26.
[58] *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 SCR 31, para. 26; *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34, paras. 71-72.

of the *Constitution Act, 1867* and sections 7, 10(b), and 11(d) of the *Charter of Rights and Freedoms* (***Charter***):[59]

(a) The preamble: As explained by the Court in the *Provincial Judges Reference*, "by its reference to 'a Constitution similar in Principle to that of the United Kingdom', the preamble indicates that the legal and institutional structure of constitutional democracy in Canada should be similar to that of the legal regime out of which the Canadian Constitution emerged."[60] The courts of the United Kingdom recognize the "principle of 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."[61]

(b) The judicature provisions of ss. 96-101: These provisions expressly provide for the appointment of the judiciary to our superior courts, and necessarily imply the attendant judicial independence.[62] These provisions also explicitly provide that the superior court judges shall be selected from the respective bars of those provinces, and the independence of those bars is necessarily implied. As explained by C. McKinnon J. of the Ontario Superior Court of Justice: "[t]he lawyers of the independent bar have been the constant source of the judges who comprise the independent judiciary in English common law history. The "habit" of independence is nurtured by the bar. An independent judiciary without an independent bar would be akin to having a frame without a picture."[63] Moreover, as discussed below, lawyers play an essential role in defending the independent judiciary.

(c) Sections 7, 10(b), and (11d) of the *Charter*: Each provision requires the availability and assistance of independent and impartial lawyers. More specifically:

(i) The s. 7 the right to life, liberty, and security of the person requires the effective assistance of counsel in some circumstances. This has been recognized by the SCC on at least one occasion.[64]

---

[59]Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5; Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 91(24); Roy Millen, "The independence of the bar: An unwritten constitutional principle" (2005) 84 Can. Bar Rev. 107.

[60] *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 SCR 3, para. 96.

[61] Lumsdon & Ors v General Council of the Bar & Ors, [2014] EWCA Civ 1276 at para. 14.

[62] See, for example, *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI* at paras. 83-84.

[63] *LaBelle v Law Society of Upper Canada* (2001), 52 OR (3d) 398 (Sup Ct J), para. 38

[64] *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46.

(ii) The s. 10(b) right "to retain and instruct counsel" would be illusory without an independent bar.

(iii) The s. 11(d) right to a "fair and public hearing by an independent and impartial tribunal" at times can only find expression with the participation of counsel.[65]

66. The principle of independence of the bar plainly has a "strong textual basis" in these provisions.[66]

67. The principle of independence of the bar is a necessary condition of a constitutionally-entrenched charter of rights:

> The principle of an independent bar, like the principle of an independent judiciary, is an idea that has a fundamental constitutional character. This is so because where it is interfered with all other constitutional rights including the rule of law itself are placed in jeopardy.
>
> It is simply inconceivable that a constitution which guarantees fundamental human rights and freedoms would not first 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.[67]

68. Independence of the bar is also inextricably linked with, and necessary to, the independence of the judiciary and the rule of law, each unwritten constitutional principles in their own right.[68] This is consistent with the SCC's explanation that these unwritten principles function in symbiosis and cannot be defined in isolation.[69]

The province's legislative authority must be interpreted in a manner consistent with the independence of the bar

69. The Constitution must be read as a unified whole.[70] The individual elements of the Constitution are linked to each other, and must be interpreted by reference to the structure

---

[65] See, for example, *R v Kahsai*, 2023 SCC 20, para. 36.
[66] *Toronto (City) v Ontario (Attorney General)*, para. 50.
[67] Jack Giles, "The Independence of the Bar" (2001) 59:4 Advocate (Vancouver) 549. See also Roy Millen, "The independence of the bar: An unwritten constitutional principle" (2005) 84 Can. Bar Rev. 107; Patrick J Monahan, "The Independence of the Bar as a Constitutional Principle in Canada" in In the Public Interest: 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: Law Society of Upper Canada, Irwin Law, 2007) 117-149; W. Wesley Pue, "Death Squads and 'Directions over Lunch': A Comparative Review of the Independence of the Bar" in LSUC Report 83-115; Alice Woolley, Rhetoric and Realities: What Independence of the Bar Requires of Lawyer Regulation, 2012 45-1 UBC Law Review 145, 2012 CanLIIDocs 766; Alice Woolley, "Lawyers and the Rule of Law: Independence of the Bar, the Canadian Constitution, and the law governing lawyers" (2015) N.J.C.L. 49 at 4.
[68] See, for example, *Toronto (City) v Ontario (Attorney General)*.
[69] *Reference re Secession of Quebec*, para. 49.
[70] *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, para 107.

of the Constitution as a whole.[71] The Constitution's written provisions establish the basic constitutional structure.[72] Its unwritten principles infuse this structure and "breathe life into it"; they represent the general principles "within which our constitutional order operates and, therefore, by which the Constitution's written terms… are to be given effect."[73]

70. Unwritten constitutional principles serve two distinct but related purposes. First, they can be used in the interpretation of constitutional provisions.[74] Second, unwritten principles can be used to develop structural doctrines necessary for the coherence of the constitutional architecture.[75]

71. In their interpretive role, unwritten constitutional principles have full and substantive legal force.[76] Legislation must conform not only to the express terms of our Constitution but also to the requirements that flow by necessary implication from those terms.[77] Thus while unwritten constitutional principles cannot serve as an independent basis to invalidate legislation, they can play a critical role in the interpretation of legislative authority and the determination that legislation is invalid.

72. The interpretive role of unwritten constitutional principles was recently addressed by the SCC in *Toronto (City)*. The Court canvassed its previous jurisprudence in this regard at length, explaining, for example that:

(d) In the *Provincial Court Judges Reference* the Court found that the principle of judicial independence "emerged from the reading together of s. 11(d) of the *Charter*, and the preamble and ss. 96 to 100 of the *Constitution Act, 1867*" and then used this principle "to guide [its] interpretation of the scope of provincial authority under s. 92(14) of the *Constitution Act, 1867* and to fill a gap where provincial courts dealing with non-criminal matters were concerned."[78] (Emphasis added.)

(e) In *Trial Lawyers* the Court used the rule of law "as an interpretive aid to s. 96, which in turn was used to narrow provincial legislative authority under s. 92(14)."

73. The Court in *Toronto (City)* considered whether the unwritten constitutional principle of democracy could be applied to "narrow provincial legislative authority over municipal institutions" but ultimately concluded that it could not, ruling: "[t]he structure of neither

---

[71] *Reference re Secession of Quebec*, para. 50.
[72] *Toronto (City) v Ontario (Attorney General)*, paras. 49-53.
[73] *Ibid*, paras. 49-53. See also *Reference re Secession of Quebec*, para 50.
[74] *Toronto (City) v Ontario (Attorney General)*, para. 55.
[75] *Ibid* at para. 56.
[76] *Ibid*, para. 56, 75.
[77] *Ibid*, paras. 74-75.
[78] *Ibid*, para. 64-66.

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."[79]

74. The same analytical approach applies to the case at bar. The province regulates the legal profession under sections 92(13) and (14) of the *Constitution Act, 1867*,[80] but this authority must be exercised in manner that conforms with – and does not undermine – the other express terms of the constitution and the unwritten principles that flow by necessary implication from those terms. More specifically, provincial authority under ss. 92(13) and (14) must be interpreted in a manner consistent with the preamble to and ss. 96-101 of the *Constitution Act, 1867,* and sections 7, 10(b), and 11(d) of the *Charter*, and the independence of the bar. As a result, provincial legislation regulating the legal profession that is inconsistent with the independence of the bar is *ultra vires* provincial authority and must be struck down.

ii. Independence of the bar requires both individual and institutional independence

75. A lawyer is a "minister of justice, an officer of the courts, a client's advocate and a member of an ancient, honourable and learned profession."[81] The principle of independence of the bar must have both *individual* and *institutional* dimensions, so as to protect lawyers' performance of their multi-faceted role in our legal system, including their duties to their clients, the court, and the administration of justice.

Lawyers' duty to their clients

76. A core component of lawyers' duty to their clients is the duty to keep clients' confidences, which includes both the legal duty to preserve solicitor-client privilege and the professional and ethical obligation to preserve confidential information.[82] The rationale for this duty was explained as follows by Woolley, Devlin, Cotter, and Law in *Lawyers' Ethics and Professional Regulation*:

> From the lawyer's point of view, comprehensive and candid information about the client's situation is often critical to the lawyer's ability to adequately advise the client and provide appropriate representation of the client's interests. From the client's perspective, it is difficult to share information — which is often highly personal and capable of exposing a

---

[79] *Ibid*, paras. 13 and 79.
[80] See *Law Society of British Columbia v Mangat* at para. 46; *Krieger v Law Society of Alberta*, 2002 SCC 65, [2002] 3 SCR 372, para. 33.
[81] Greenberg Affidavit #2, Ex. 2 (bound separately), Law Society of British Columbia, Code of Professional Conduct for British Columbia [BC Code], c.2.1.
[82] Alice Woolley, Richard Devlin, Brent Cotter, & John M. Law, Lawyers' Ethics and Professional Regulation, 4th ed. (Markham: LexisNexis Canada Inc., 2021), c. 3.1. See also BC Code, c. 3.3.

> client to significant vulnerability — without great confidence that the information will be closely guarded and not disclosed without the client's permission. From the perspective of the legal profession as a whole, and the justice system itself, it is essential not only that any individual be able to trust in the confidentiality of a particular lawyer but more generally — systemically — that the general public knows that information shared with lawyers within the lawyer-client relationship will be vigorously protected.
>
> For these reasons, communications and information covered by a lawyer's duty of confidentiality and the common law doctrine of solicitor-client privilege are among the most highly-protected communications and information in law. [83]

77. The BC Code also explains that the duty to a client extends beyond privileged information to "all information concerning the business and affairs of a client acquired in the course of the professional relationship."[84]

78. Lawyers' duty to their clients also includes the fiduciary duty of loyalty. This duty has three aspects: the duty to avoid conflicting interests, the duty of commitment to the client's cause; and the duty of candour.[85]

79. The lawyer's duty to avoid conflicting interests serves to prevent the misuse of confidential information and to ensure effective representation.[86] Effective representation may be threatened in situations where a lawyer is tempted to prefer other interests over those of their client: the lawyer's own interests, those of a current client, of a former client, or of a third person.[87] A lawyer must refrain from being in a position where it will be systematically unclear whether they performed their fiduciary duty to act in what they perceived to be the best interests of their client.[88]

80. Where a lawyer's conduct fails to meet the requirements of the duty to avoid conflicting interests, the lawyer may be disqualified (1) to avoid the risk of improper use of confidential information; (2) to avoid the risk of impaired representation; and/or (3) to maintain the repute of the administration of justice.[89]

---

[83] *Ibid* (emphasis added). See also BC Code, c. 3.3; *R v McClure*, 2001 SCC 14, [2001] 1 SCR 445.
[84] BC Code, c. 3.3-1.
[85] See, for example, *R v Neil*, 2002 SCC 70, [2002] 3 SCR 631, para. 19; *Canadian National Railway Co v McKercher LLP*, 2013 SCC 39, [2013] 2 SCR 649, paras. 19-47; *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7,.
[86] *Canadian National Railway Co v McKercher LLP*, para. 23. See also BC Code, c. 3.4.
[87] *Canadian National Railway Co v McKercher LLP* at para. 26.
[88] *Ibid* at para. 24, citing D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (4th ed. 2012), at p. 968.
[89] *Ibid* at paras. 61-63.

81. The lawyer's duty of commitment to the client's cause helps ensure that divided loyalty does not cause the lawyer to 'soft peddle' his or her representation of a client.[90] In this context, the SCC has endorsed the proposition that lawyers must be "free to represent citizens without fear or favour in the protection of individual rights and civil liberties against incursions from any source, including the state."[91]

82. As the Court explained in *Canada (Attorney General) v. Federation of Law Societies of Canada*:

> Clients — and the broader public — must justifiably feel confident that lawyers are committed to serving their clients' legitimate interests free of other obligations that might interfere with that duty. Otherwise, the lawyer's ability to do so may be compromised and the trust and confidence necessary for the solicitor-client relationship may be undermined.[92]

83. A key component of the lawyer's duty of commitment to the client's cause is the duty of resolute advocacy.[93] In *Groia v. Law Society of Upper Canada*, the Court described resolute advocacy as a vital ingredient in our adversarial justice system, and emphasized the need for lawyers to advance their clients' position without fear of reprisal:

> Resolute advocacy requires lawyers to "raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case": Federation of Law Societies of Canada, *Model Code of Professional Conduct* (online), r. 5.1-1 commentary 1. This is no small order. Lawyers are regularly called on to make submissions on behalf of their clients that are unpopular and at times uncomfortable. These submissions can be met with harsh criticism — from the public, the bar, and even the court. Lawyers must stand resolute in the face of this adversity by continuing to advocate on their clients' behalf, despite popular opinion to the contrary.[94]

84. This jurisprudence makes clear that lawyers must be both independent and impartial in order to perform their duty to clients. Independence and impartiality are closely related and function in tandem.[95] The requirement for both independence and impartiality in the lawyer's role is reflected in the oft-cited passage from the Supreme Court of Canada's decision in *Attorney General of Canada v. Law Society of B.C.*:

---

[90] *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7,, para. 103.
[91] *Ibid*, para. 99 (emphasis added).
[92] *Ibid* at para. 96 (emphasis added).
[93] *Groia v Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 SCR 772, para. 72. See also BC Code at c. 5.1.
[94] *Groia v Law Society of Upper Canada* at para 73 (emphasis added).
[95] *R v Edwards*, 2024 SCC 15, para. 119.

> 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.[96]

85. This jurisprudence also makes clear that the lawyer's duty to their client is concerned not only with justice for individual clients but is also essential to maintaining public confidence in the administration of justice. Clients *and the broader public* must be able to trust that the information shared with their lawyer will be vigorously protected and that their lawyer will be able to represent their interests free of other obligations that might interfere with that duty.

86. Public confidence in the administration of justice "depends not only on fact but also on reasonable perception."[97] This is why a court examining any potential interference with the lawyer's duty of commitment to the client's cause, for example, must be concerned not only with whether the duty is in fact interfered with but also with the perception of a reasonable person, fully apprised of the relevant circumstances and having thought the matter through.[98] This is the same approach as is used for examining judicial independence and impartiality.[99]

Lawyers' duty to the court

87. Lawyers are officers of the courts. The BC Code describes the lawyers' duty to courts and tribunals as follows:

> 2.1-2 To courts and tribunals
>
> (a) A lawyer's conduct should at all times be characterized by candour and fairness. The lawyer should maintain toward a court or tribunal a courteous and respectful attitude and insist on similar conduct on the part of clients, at the same time discharging professional duties to clients resolutely and with self-respecting independence.
>
> ...
>
> (c) A lawyer should not attempt to deceive a court or tribunal by offering false evidence or by misstating facts or law and should not, either in argument to the judge or in address to the jury, assert a personal belief in an accused's guilt or innocence, in the justice or merits of the client's cause or in the evidence tendered before the court.
>
> ...

---

[96] *AG Can v Law Society of BC* at 336 (emphasis added).
[97] *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7, at para. 97.
[98] *Ibid*.
[99] *R v Edwards*, paras. 84-85.

> 2.2 Integrity
>
> 2.2-1 A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.
>
> ...
>
> 5.1 The lawyer as advocate
>
> 5.1-1 When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect.[100]

88. The Court of Appeal endorsed these principles in *May v. Law Society of British Columbia*, where it described the lawyer's duty to the court as "time-tested and vital to the legal profession's role in the administration of justice.[101] To comply with this duty, lawyers must not mislead the court, and cannot permit a client to present evidence that the lawyer knows to be false.[102] The potential for tension between a lawyer's duty to their client and to the court demonstrates the need for lawyers to retain their independence, even from clients, and also the unique sensitivity of the lawyer's role.[103]

Lawyers' duty to the administration of justice

89. Lawyers have a duty to encourage public respect for and try to improve the administration of justice.[104] This obligation is "not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community."[105] By training, opportunity, and experience, lawyers are in a position to observe the workings and discover the strengths and weaknesses of laws, legal institutions and public authorities, and must act accordingly.[106]

90. This duty requires lawyers to defend the judiciary against unjust criticism and complaint, both because its members cannot defend themselves and because, in doing so, the lawyer contributes to greater public understanding and respect for the legal system.[107] The duty also

---

[100] BC Code.
[101] *May v Law Society of British Columbia*, 2023 BCCA 218, paras. 4-10.
[102] *Ibid*, paras. 5-7. See also BC Code, c. 5.1-1.
[103] See, for example, BC Code, c. 5.1-1 commentary 10.
[104] See *Ibid*, c. 5.6; Andrew Flavelle Martin, "The Lawyer's Professional Duty to Encourage Respect for - and to Improve - the Administration of Justice: Lessons from Failures by Attorneys General" (2023) 54:2 Ottawa Law Review.
[105] *Ibid.*
[106] *Ibid*,
[107] BC Code, c. 2.1-2, 5.6-1 commentary 3.

requires that lawyers lead in seeking improvements in the legal system by presenting reasonable and bona fide criticisms and proposals.[108]

91. The Law Society both ensures that lawyers comply with the individual dimension of this duty and also, itself, acts in furtherance of its collective dimension. For example, the Law Society defends the judiciary from improper criticism by prominent members of society.[109] Most recently, the Law Society issued a statement on November 27, 2023 in response to the Attorney General's public criticism of judicial training in the wake of a particular sentencing decision that had garnered significant public attention.[110]

Institutional independence is required to safeguard individual independence

92. *Institutional* independence is required to safeguard individual independence. Lawyers are part of a regulated collective. An individual lawyer cannot be independent and impartial if their regulator is not independent and impartial. Not only would such an arrangement create the continuous risk of the regulator imposing rules that interfere, as a matter of fact, with lawyers' performance of their duties, but it would also necessarily give rise to a reasonable perception that lawyers as a collective are not independent and impartial. This perception would be poisonous to the trust and confidence required for the solicitor-client relationship, and to the public confidence in the administration of justice more broadly.

93. *Institutional* independence is also required because aspects of the lawyer's role require collective action. In particular, lawyers' duty to the administration of justice cannot be performed by lawyers acting individually. Some threats to the administration of justice require an institutional response, backed by the weight and authority of lawyers' governing body. This response can be supported by the efforts of advocacy groups but cannot be replaced by those efforts.

94. Institutional independence does not mean that lawyers are above the law. Lawyers are properly subject to oversight by the courts and the legislature. Institutional independence requires that lawyers be governed by a body that is, and is perceived by the public to be:

(a) Independent, in the sense that it has immediate and functional control over the administrative decisions that bear directly on the exercise of the lawyer's role, and is capable of taking any action considered necessary in furtherance of that role; and

(b) Impartial, in the sense that when making decisions about the regulation of the profession, the governing body must have regard only to its obligation to act in the

[108] *Ibid*, c. 5.6-1 commentary 4.
[109] See Greenberg #1, para. 124, Exs. 55-57.
[110] *Ibid* at para. 124, Ex. 55.

> public interest in the administration of justice, and must not have regard for any narrower interest or partisan cause, however meritorious.

Self-governance and self-regulation ensure independence of the bar

95. The independence of the bar is maintained in Canada by self-governance and self-regulation of the legal profession.[111]

96. Self-government of the legal profession was created in the public interest,[112] and must serve the public interest in order to maintain its legitimacy. As explained by the Law Society's Independence and Self-Governance Committee in its 2008 report: "With self-regulation and self-governance, however, comes a responsibility to demonstrate that the Law Society is discharging its mandate in the public interest, rather than the interest of those it regulates."[113] The SCC's opening passage in *Finney v. Barreau du Québec* expresses a similar sentiment:

> 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. In Canada, our tradition of allowing the legal profession to regulate itself can largely be attributed to a concern for protecting that independence and to lawyers' own staunch defence of their autonomy. In return, the delegation of powers by the State imposes obligations on the governing bodies of the profession, which are then responsible for ensuring the competence and honesty of their members in their dealings with the public (see *Fortin v. Chrétien*, [2001] 2 S.C.R. 500, 2001 CSC 45, at paras. 11-18 and 52, *per* Gonthier J.).[114]

97. The courts have sometimes referred to self-government as a "privilege" or as a "choice" of the legislature, but properly understood this language does not convey any suggestion by the courts that the governance of the legal profession is at the unfettered discretion of the legislature. Provincial jurisdiction over the profession must be exercised in a manner consistent with the independence of the bar.

98. Further, the judicial reference to the "privilege" or legislative choice of self-government cannot be taken to mean that legislature *created* the self-governance of the legal profession, since that is simply incorrect. The Ontario Superior Court of Justice has written that "[s]elf-

---

[111] The provincial and territorial bars are all self-governing. Their governing bodies are each composed of a strong majority of elected lawyers, with the exception of Manitoba where 12 lawyers are elected and a further 4 are appointed by a group in which the elected 12 form a majority, producing a total of 16/25 lawyer benchers.
[112] See *Pearlman v Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869 at 887-888.
[113] Greenberg #1, Ex. 20 at p. 7.
[114] *Finney v Barreau du Québec*, para. 1. See also *Law Society of New Brunswick v Ryan*, 2003 SCC 20, [2003] 1 SCR 247, para. 36; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32, [2018] 2 SCR 293, para. 32.

government was assumed by the English Inns of Court since the fourteenth century."[115] In British Columbia, the Law Society was established in 1869 as a self-governing body with objects including "[t]he regulation of the call to the Bar and admission on the Rolls of attorneys", five years before it received its first statutory mandate by way of the *Legal Professions Act, 1874* – 150 years ago.[116]

99. The Law Society says that self-government is required in order to ensure the independence of the bar. The Supreme Court of Canada has to date declined to conclusively resolve this question, writing, for example, in *Canada (Attorney General) v. Federation of Law Societies of Canada*:

> While the Court of Appeal and the Federation place great stress on independence of the bar as it relates to self-regulation of the legal profession, I do not find it necessary or desirable in this appeal to address the extent, if at all, to which self-regulation of the legal profession is a principle of fundamental justice. As LeBel J. pointed out in *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17, self-regulation is certainly *the means* by which legislatures have chosen in this country to protect the independence of the bar: para. 1. But we do not have to decide here whether that legislative choice is in any respect constitutionally required. Nor does the appeal require us to consider whether other constitutional protections may exist in relation to the place of lawyers in the administration of justice.[117]

iii. Bill 21 is inconsistent with the independence of the bar and unconstitutional as a result

100. The following features of Bill 21, individually and as a result of their collective weight, render the legislation inconsistent with the principle of the independence of the bar.

Bill 21 ends the self-governance and self-regulation of the legal profession

101. Under Bill 21, lawyers will no longer be governed by elected lawyers. LPBC's governing board will consist of 17 directors, with 12 to be elected or appointed directly and a further 5 to be appointed by a majority of the other directors. There will only be 5 elected lawyers on the new board – just less than 30%. Further, these 5 elected lawyers do not form a majority of the 12 directly-appointed or elected directors, and there is no legislated assurance that the elected lawyer directors, and by extension lawyers more generally, will control the selection of the additional 4 lawyer directors. In fact, the numbers in s. 8 clearly

---

[115] *LaBelle v Law Society of Upper Canada*, para. 31. See also Philip Girard, "The Independence of the Bar in Historical Perspective: Comforting Myths, Troubling Realties" in in In the Public Interest: 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: Law Society of Upper Canada, Irwin Law, 2007).

[116] Watts at 4-5; Legal Professions Act, 1874, 1874 S.B.C. 71.

[117] *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7, at para. 86.

suggest the opposite. So while LPBC's board will include 9 out of 17 lawyers, a slim majority, there is no certainty that 4 of these 9 will be chosen by lawyers.

102. Contrary to the Province's suggestion, the Law Society does not misunderstand how directors will be appointed under Bill 21. The Law Society's argument is not premised on an assumption that, in the future, "the terms of all 17 directors will end and a new set of 17 directors will need to be chosen". It is premised on the text of s. 8 of Bill 21 and the clear legislative intent to remove lawyers from the driver's seat – surely 5 out of 12 is not a coincidence.

103. The Province's position, meanwhile, is premised on arguments as to how the act *might* be interpreted by its various administrative actors in a manner that alleviates (some of) the Law Society's constitutional concerns. But the legislation should be assessed as it now stands, not based on the form of some future tailoring that may or may not occur.[118] And, in any event, the Province's suggestion that the Transitional Board or board might take steps to establish a "veto" for elected lawyer directors over board-appointed directors is contrary to the clear intent of s. 8(e), and unworkable as a result.

104. Whatever the Province may argue, they cannot avoid the basic facts: s. 8 of Bill 21 provides for 5/17 elected lawyer directors (29%), provides no assurance that these 5 elected lawyers will be capable of choosing the remaining 4 lawyer directors, and counterbalances these 5 elected lawyers with 3 LGIC appointments (18%). Contrast, for example, the present scheme where 25/33 Benchers are elected lawyers (76%).

105. Bill 21's elimination of self-governance is further demonstrated and exacerbated by s. 28(2)(b), which empowers the board (which is not comprised of a majority of elected lawyers) to establish "a process for the screening of candidates in the election of directors."

106. Finally, with respect to board composition, the Province's arguments based on the UK's governance system should be disregarded entirely, for several reasons:

    a. The Province has expressly said it is not pursuing the co-regulation model implemented in the UK by way of the *Legal Services Act 2007*.[119]

    b. The constitutional structure of the legal system in the UK, and the protection for the solicitor-client relationship, is now different than in Canada. For example, the bar of the UK accepted the lawyer reporting requirements that Canadian lawyers

[118] *Harm Reduction Nurses Association v British Columbia (Attorney General)* at para. 56
[119] Greenberg Affidavit #1, Ex. 24 at 6.

challenged and the Supreme Court of Canada determined to be unconstitutional in the *Federation* decision.[120]

c. The Province's argument consists of bald assertions based entirely on inadmissible evidence appended to the exhibit of paralegal Courtney Blatchford.

d. The Province is not correct about the regulatory structure in the UK. For example, the approved regulators for barristers and solicitors are not respectively, the Bar Standards Board and Solicitors Regulation Authority; they are, respectively, the Bar Council and the Law Society.[121]

e. The Justice Committee of the UK Parliament has just concluded that "[t]he Legal Services Act 2007 does not appear to provide a stable long-term framework for the regulation of the legal professions."[122]

107. Bill 21's rejection of self-governance is further demonstrated in its provisions for rulemaking. The first rules of LPBC – which will apply to all areas of the practice of law – require the *approval* of the transitional Indigenous Council.[123] Thereafter, the board must "consult" with the Indigenous Council.[124] This is co-governance, and it further dilutes the influence of the 5 elected and 4 appointed lawyers on the board – demonstrating the degree to which the 9/17 majority touted by the Province is illusory. More fundamentally, this co-governance means that the new governing body (the Transitional Board and then the board) will not have immediate and functional control over the administrative decisions that bear directly on the exercise of the lawyer's role. It is *dependent* on the (transitional) Indigenous council.

108. Moreover, it must be emphasized that the majority of the members of the Indigenous Council will be appointed from nominees chosen by representatives of Indigenous governments, and the majority of the transitional Indigenous Council will be directly appointed by these government representatives. For example, as the Province has acknowledged, the directors of the BC First Nation Justice Council – who will select at least 50% of the members of the Transitional IC – are appointed by the BC Assembly of First Nations, the First Nations Summit, and the Union of B.C. Indian Chiefs. The Law Society recognizes and supports Indigenous governance rights and powers, which is why the Law

[120] Affidavit #1 of Patti Lewis, Ex. N at 1171-1174.
[121] Affidavit #2 of Brook Greenberg, K.C. [Greenberg Affidavit #2], Ex. "C".
[122] *Ibid*, Ex. "F".
[123] Bill 21, s. 26 and 226(2)(b).
[124] *Ibid*, s. 26.

Society says these governments cannot be directly involved in lawyer regulation. The governance of lawyers must be free of intrusion from government, *of all kinds*.[125]

109. The Province's answer to the Law Society's argument on this point is entirely unresponsive and is a tacit admission as a result. The Province does not make any argument as to how the approval requirement does not undermine the independence of the board. Instead, the Province accuses the Law Society of "insisting on remaining closed to Indigenous perspectives", which is demonstrably untrue and is contradicted by the Attorney General's statements during the legislative debates on Bill 21:

> I want to start by commending the work of the Law Society over the years. They have really put reconciliation as a focus when it comes to making sure that Indigenous voices are heard and represented, even developing a course with respect to a requirement for every lawyer to take with respect to the history of Indigenous people in the province and law.[126]

110. Further, the Province's argument that the new governing body would be incapable of making any rule that compromised the independence of lawyers, because such a rule would be invalid as a matter of administrative law, must be rejected. First, the Province misses the point that independence of the bar is a matter of both fact and perception, and so the possibility of avoiding interference *in fact* is at best only half a solution. Second, rules passed by the new board would only be required to meet the requirements for the "independence of licensees" embodied within Bill 21, *not* the requirements of the independence of the bar. The Law Society's position is that Bill 21 undermines the independence of the bar; it is therefore no answer to the Law Society's concerns to say that rules made under Bill 21 must comply with the impoverished notion of independence embodied therein.

111. Finally, Bill 21 further undermines self-governance and self-regulation by codifying key aspects of legal regulation, taking them out of the hands of the regulator. For example, Bill 21:

(a) Defines "professional misconduct" and "incompeten[ce]" where the *LPA* did not.[127] It also defines "conduct unbecoming" directly where under the *LPA* it was defined as being within the "judgment of the benchers".[128]

---

[125] See, for example, *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10, which concerned a constitutional dispute between an Indigenous government and one of its citizens.
[126] Affidavit #1 of Patti Lewis, Ex. I at 39/48.
[127] Bill 21, s. 68.
[128] *Ibid.*

(b) Mandates that the new governing body establish a *binding* code of professional conduct,[129] whereas the present code is an instructive guide.

(c) Codifies many of the present rules concerning complaints and discipline (ss. 73-92).

Bill 21 circumscribes the mandate of lawyers' governing body

112. The *object and duty* of the Law Society is codified in the *LPA* as a duty to "uphold and protect the public interest in the administration of justice", and its *means* of doing so are broad and include:

a. preserving and protecting the rights and freedoms of all persons,

b. ensuring the independence, integrity, honour and competence of lawyers,

c. establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,

d. regulating the practice of law, and

e. supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

113. Under Bill 21, LPBC's duty is not to "uphold and protect the public interest". Instead, its duties are now some, but not all of, the *means* employed by the Law Society to that end. Namely, LPBC's duties are to perform the following in the accordance with the public interest:

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.

114. The Law Society's general, singular duty is replaced by the LPBC's narrower, three-fold duty. Further, the mandate to preserve and protect the rights and freedoms of all persons has been expressly removed. These changes create a real risk that lawyers' new governing body will be unable to perform the collective dimension of the lawyers' duty to the administration of justice. For example, will its narrower mandate cause and permit LPBC to speak out against unwarranted criticism of the judiciary by, for example, senior members of government?

---

[129] *Ibid*, ss. 68, 70-71.

115. The Province says that Bill 21 does not limit the regulator's ability to act according to its own conception of the public interest because Bill 21 does not define the public interest. That submission misses the point entirely. The concern is not that Bill 21 defines the public interest, but rather that Bill 21 narrows the regulator's lens on it.

Bill 21 gives Cabinet the power to regulate lawyers

116. Bill 21 gives Cabinet (through the LGIC) the explicit authority to make regulations designating new legal professions and their scope(s) of practice (s. 4), determining the scope of practice for licensed paralegals and notaries public (s. 213), and making exceptions from the prohibition against the unauthorized practice of law (s. 212). Bill 21 also gives Cabinet the general authority to make regulations "respecting any matter for which regulations are contemplated by" the act (s. 211(1)). This general authority is expressly not limited by, and therefore must be additional to, the specific regulation-making authority established under other provisions (s.211).

117. Further, Bill 21 provides 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 – notaries' and paralegals' scopes of practice (ss. 46-48 vs. 213) and exceptions from unauthorized practice (ss. 44 vs. 212). This means that Bill 21 both contemplates other areas of conflict between Cabinet regulations and the rules, and gives Cabinet paramountcy.

118. Cabinet's general regulation-making power under s. 211(1) of Bill 21 must be examined in light of section 41 of the *Interpretation Act*, which provides in part:

> 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,
>
> (b) provide for administrative and procedural matters for which no express, or only partial, provision has been made,[130]

119. It is not clear precisely what Cabinet may legally do, or may attempt, pursuant to its general regulation-making power under Bill 21. But it is clear that this scheme creates a real potential for, and reasonable perception of, both direct and indirect regulation of lawyers by Cabinet.

---

[130] Interpretation Act, RSBC 1996, c 238.

120. As an example, one significant place in Bill 21 where there is a palpable absence of provision for administrative and procedural matters is with respect to the making of the first rules of the new governing body. The first rules are to be developed by collaboration of the Transitional Board and the Transitional IC, and "they may not be made unless they are first approved… by the transitional Indigenous council."[131] During the legislative debate, the Attorney General explained the reason for this provision as follows:

> I think it's [the Government's] view, and it certainly was the view of the First Nations Justice Council, that the establishment of the first rules provides an unprecedented opportunity to set a set of rules and guidelines that removes colonization, removes the negative impacts of the legal systems and those rules and procedures that may exist for Indigenous people and furthers the promotion of reconciliation.[132]

121. There is no provision in Bill 21 for the resolution of an impasse between the Transitional Board and the transitional Indigenous Council on the creation of the first rules (which bind the board and all lawyers after the transition period is complete and the Law Society is amalgamated).

iv. Conclusion on serious question to be tried

122. Bill 21 ends the self-governance of the legal profession, circumscribes the mandate of lawyers' governing body, and gives Cabinet the power to regulate lawyers. It is inconsistent with the independence of the bar and unconstitutional as result.

C. The implementation of Bill 21 will cause irreparable harm

123. The question at this stage is whether a refusal to grant an injunction will permit irreparable harm. That is, harm that could not be remedied in the event that this Court ultimately determines that Bill 21 is unconstitutional and thus of no force or effect.[133]

124. "Irreparable" refers to the nature of the harm suffered rather than its magnitude, and it means harm that either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.[134]

125. The Law Society says that during this interim period between the enactment of Bill 21 and the determination of this constitutional challenge – which the Law Society is committed to making as short as possible – Bill 21 will cause irreparable harm to the Law Society itself and to the public interest in the administration of justice. More specifically, the Law Society

---

[131] Bill 21, s. 226.
[132] Affidavit #1 of Patti Lewis, Ex. I at 44/48.
[133] See, for example, *RJR-MacDonald Inc v Canada (Attorney General)* at 341; *Federation of Law Societies of Canada v Canada (Attorney General)* at para. 26.
[134] *Federation of Law Societies of Canada v Canada (Attorney General)*, para 26.

says that the following irreparable harm arises from the transition provisions presently in force and the provisions to be brought into force at the LGIC's discretion:

a. The Law Society's continued existence is in doubt, and its administrative programs will be irreparably interrupted;

b. The Law Society will be forced to discharge a duty that does not uphold and protect the public interest in the administration of justice;

c. The Law Society will suffer irreparable monetary loss;

d. Public confidence in the administration of justice will be shaken; and

e. Bill 21 will effect irreversible financial changes.

126. This irreparable harm concerns both harm *in fact* and harm *in perception*, and it flows from Bill 21 as a whole. The transitional provisions are inextricably linked with those to be brought into force to conclude the transition, and so are their effects and the resultant harm. In substance, the Law Society is asking this Court for the injunctive relief necessary to prevent the harm from Bill 21 pending determination of its constitutional challenge. In form, this requires orders suspending the transition provisions and preventing the LGIC from bringing others into force.

127. The Province, in response, seeks to parse the relief sought so as to establish a higher threshold for obtaining part of it. More specifically, the Province seeks to divide the suspension of the *transition* provisions from the enjoining of the LGIC from passing the regulation(s) to *conclude the transition.* The Province submits that the former is a stay and the latter is a *quia timet* injunction. In service of this point, the Province strenuously argues for a dividing line in the effects of Bill 21 – and in the injunctive relief sought – that does not exist in substance.

128. Robert J. Sharpe describes *quia timet* injunctions as follows in *Injunctions and Specific Performance*:

> Where the harm to the plaintiff has yet to occur the problems of prediction are encountered. Here, the plaintiff sues *quia timet*—because he or she fears—and the judgment as to the propriety of injunctive relief must be made without the advantage of actual evidence as to the nature of harm inflicted on the plaintiff. The court is asked to predict that harm will occur in the future and that the harm is of a type that ought to be prevented by injunction. Thus, while all injunctions involve predicting the future, the label *quia timet* and the problem of prematurity relate to the situation where the difficulties of prediction are more acute in that the plaintiff is

> asking for injunctive relief before any of the harm to be prevented by the injunction has been suffered.[135]

129. The Law Society is not seeking injunctive relief "before any of the harm to be prevented by the injunction has been suffered" but rather to prevent harm that began on the enactment of Bill 21 – and the coming into force of the transition provisions – and that will continue and amplify absent injunction.

130. The Province points to this Court's recent decision in *Harm Reduction Nurses Association v British Columbia (Attorney General)* (***Harm Reduction***) in support of its contention that the Law Society is seeking a *quia timet* injunction.[136] But in *Harm Reduction*, Hinkson CJ applied the *quia timet* standard because the harm was entirely prospective – none of the impugned legislation was in force.[137]

131. In any event, the Law Society meets any standard that might apply. In general, an applicant for an interlocutory relief must establish that the risk of irreparable harm is real and substantial.[138] For a *quia timet* injunction, the applicant must establish "that there is an imminent threat of danger", or that "there is a high degree of probability the alleged harm will in fact occur imminently", where "imminent" does not necessary imply immediacy, but rather the virtual inevitability of an event.[139] The Law Society says that even if this Court were to conclude that the harm arising from Bill 21 can be separated as between the transitional provisions and those to be brought into force by the LGIC, then it must necessarily conclude that the harm from the latter is imminent.

132. The specific areas of irreparable harm that will be prevented by an injunction are set out below, but the Law Society will first address the Province's primary argument that this application is premature.

i. This application is not premature

133. The Province's argument that this application is premature rests on two related contentions: First, that the transition provisions have no substantive effect and nothing of significance will happen during the transitional period.[140] Second, that the remainder of Bill 21 cannot be brought into force for at least 18 to 24 months. Both points must be rejected.

---

[135] Robert J. Sharpe, Injunctions and Specific Performance, loose-leaf (Toronto: Carswell, 2023), s. 1.20 (emphasis added).
[136] Application Response of the Province filed June 7, 2024, page 9, para. 9.
[137] *Harm Reduction Nurses Association v British Columbia (Attorney General)* at paras. 2-4, 17, 26, 42.
[138] *Vancouver Aquarium Marine Science Centre v Charbonneau*, 2017 BCCA 395, paras. 59-60; *PD v British Columbia*, 2010 BCSC 290, paras. 130-131.
[139] *British Columbia (Attorney General) v Reece*, 2023 BCCA 257 at para. 93.
[140] Application Response of the Province filed June 7, 2024, page 12, para. 22.

134. First, the transition provisions have substantive effect and significant steps will be taken during the transition process. The undisputed facts admit of no other conclusion.

135. For example, Mr. Craven acknowledges that the "Transitional Provisions require the Transitional Board and the Transitional IC to collaborate in developing the first rules of the board, with input from the advisory committee and approval of the Indigenous Council."[141] Mr. Greenberg's evidence is that the development of these first rules will be a labour-intensive project requiring at least one full-time staff lawyer and secondment of additional lawyers.[142] The first rules come into force on the amalgamation date[143] and the Province has admitted that these rules will "govern all aspects of the practice of law in the province."[144] In sum, the development of the first rules is an intensive, consultative, and extremely important project that will take place entirely within the transitional period.

136. Mr. Craven's evidence provides another example:

> The transitional board, with input from the advisory committee, will also need to develop a transition plan with respect to the board's operational work which addresses items such as budget, policies, IT structures, real estate, assets, Customer Relationship Management systems, organizational structures and HR contracts, information and document transfers, and the transition of matters in progress.[145]

137. Put simply, the Province's own evidence acknowledges that the provisions presently in force carry out an extensive, far reaching, and complex *transition* from one governance regime to another. They build a bridge from the Law Society and SNPBC to LPBC, which bridge is then destroyed after it is crossed. The Province's suggestion that the transition provisions in force merely "begin a transitional planning process" is simply wrong.

138. This Court must also reject the Province's argument that no harm arises because there is "virtually no chance" of the remaining provisions being brought into force until at least 18 months from now. Bill 21 says nothing of the sort. It simply says that the remaining provisions come into force by regulation of the LGIC. Everything else is a matter of interpretation, and in this respect the evidence of Mr. Craven cannot be accepted. Extrinsic evidence as to the interpretation of legislation "must have an institutional quality – that is, it must reflect the intent of the Legislature as a whole, and not merely the motivations of individual civil servants or members of the Legislature."[146] This is because it is the statute

---

[141] Affidavit #1 of Paul Craven made June 7, 2024 at para. 18 [Craven Affidavit #1].
[142] Greenberg Affidavit #1 at para. 133(e).
[143] Bill 21 s. 226(3).
[144] Notice of Civil Claim at para. 55.
[145] Craven Affidavit #1 at para. 20.
[146] *British Columbia Teachers' Federation v Attorney General of British Columbia*, 2008 BCSC 1699 at para. 43.

alone which represents the "corporate will of the legislature."[147] Mr. Craven cannot create "conditions precedent for the *Act* to come into force" that do not exist in the statute.

139. The Province repeatedly suggests that Law Society has agreed that the transition process will take 18-24 months. That is not correct. The Law Society estimates that some of the steps that should take place during the transitional process will require 18 to 24 months.[148] The Law Society has not agreed that the LGIC must necessarily provide that period of time before bringing the remaining provisions into force. While Mr. Craven tries to suggest that such time is a certainty, he also acknowledges that Bill 21 does not establish any specific timeline for the transition, he cannot (and does not purport to) bind the government, and his speculation is of no legal consequence. If the Province wishes to establish for this Court that the LGIC will not bring the remaining provisions into force for at least 18 months, then it must consent to an order to that effect.

140. Absent injunction, the LGIC can bring the remaining provisions into force when she chooses to do so – the Law Society survives and the transition lasts only as long as the LGIC says so. While there are practical considerations that suggest that some period of time is necessary and appropriate, these are practical constraints and not legal ones. Moreover, even if the LGIC were to decide that certain steps or "conditions precedent" were necessary, the timing would be at her discretion, and there is nothing in Bill 21 to stop her from establishing a deadline and expediting the process. Indeed, that is precisely what the government did in the legislature.

141. The Province's prematurity arguments in this application echo those that were rejected by this Court in *Harm Reduction*.[149] There, as mentioned above, *none* of the impugned legislation was yet in force and there was no certainty as to when the LGIC would pass the necessary regulations,[150] and yet the Court was satisfied that the applicants had established irreparable harm.[151] This conclusion with respect to prematurity – or more accurately the lack thereof – applies with even greater force in this case, given that the transition provisions are already in force.

142. The Province seeks to distinguish *Harm Reduction*, but does so only on the basis of the particular *nature* of the harm presented by the transition provisions here versus the legislation in that case. In doing so, the Province is comparing the effect of the provisions of Bill 21 presently in force with those in *Harm Reduction* that were not, ignoring and

---

[147] *British Columbia Teachers' Federation v. Attorney General of British Columbia*, 2008 BCSC 1699 at para. 43.
[148] Greenberg Affidavit #1, para. 133.
[149] *Harm Reduction Nurses Association v British Columbia (Attorney General)* at paras. 5, 52, 62.
[150] *Ibid* at paras. 2-4, 17, 26.
[151] *Ibid* at paras. 42, 89.

undermining its own insistence on the distinction as to whether the legislation in question is in force.[152]

143. In sum, this application is not premature, it is timely. The Province's prematurity argument amounts to saying that this application should be dismissed and brought later, when the harm and threat are even greater – put another way, the Province asks this Court to let its unconstitutional train gather steam. For example, the Province goes so far as to suggest that it would be better to wait and see if the Transitional Board and transitional Indigenous Council reach an irreconcilable impasse in trying to make the first rules, with the attendant consequences for public confidence in the administration of justice, than to prevent this impasse from happening while the constitutional challenge is determined.[153]

ii. The Law Society's continued existence is in doubt, and its administrative programs will be irreparably interrupted

144. The transition provisions presently in force are the beginning of the end for the Law Society. The end will come when the LGIC brings s. 5 of Bill 21 into force, at which point the Law Society will be combined with SNPBC into LPBC, and each of the Benchers will cease to hold office.[154] That will be the end of the Law Society's 155-year history.

145. The Province does not appear to contest, and indeed there can be no doubt, that the Law Society will suffer irreparable harm in the event that it is amalgamated into LPBC and then Bill 21 is determined to be unconstitutional. Not only would it be impossible to repair the administrative and practical consequences of the amalgamation, but the courts have accepted in analogous circumstances that "the mere withdrawal of the right to govern" constitutes irreparable harm.[155]

146. However the Law Society submits that the irreparable harm in this respect will not begin on the amalgamation date, but rather has already begun as a result of Bill 21's casting the Law Society's continued existence into doubt and diverting the Law Society's focus onto the transition. In the event an injunction is not granted, the Law Society will of course continue to perform its mandate, but it cannot be reasonably suggested that its operations will be unaffected while its death knell is tolling. Nor that the administrative disruption could be cured in the event of ultimate success.[156]

147. The Law Society governs the legal profession with an eye to the present and to the future. It identifies strategic objectives and then makes multi-year plans for their

---

[152] Application Response of the Province filed June 7, 2024, page 10, paras. 14-16.
[153] *Ibid*, page 12, para. 24.
[154] Bill 21, s. 5, 230(1).
[155] See *Whitecourt Roman Catholic Separate School District No 94 v Alberta*, 1995 ABCA 260 at paras. 28-29.
[156] See *Ibid* at paras. 29-30.

accomplishment.[157] For example, the Law Society has recently studied, developed, and adopted plans for advancing reconciliation[158] and supporting lawyers' mental health.[159] Bill 21 diverts the Law Society's resources and attention away from these programs (among many others), undermines their progress as a result, and casts their worthiness into doubt. The time, progress, and impetus lost could not be recovered.[160]

148. In many ways, the development and enactment of Bill 21 is demonstrative of this issue. The government has repeatedly pointed to the report authored by Harry Cayton, dated November 25, 2021,[161] as a driving force behind Bill 21.[162] However, Mr. Cayton's report was obtained by the Law Society for the purpose of its own governance review and development, which was co-opted by the government.

149. Mr. Cayton's report was presented to the Benchers on December 3, 2021.[163] The Benchers had only just begun the process of considering Mr. Cayton's report and the potential implementation of certain of his recommendations when the Attorney General wrote to the Law Society on March 1, 2022 to advise of the Government's intention to change the regulatory model governing the legal professions in British Columbia.[164] Soon enough, as the government pushed forward with its project, the Law Society was forced to abandon its own plans to engage with those imposed by the government.[165]

iii. The Law Society will be forced to discharge a duty that does not uphold and protect the public interest in the administration of justice

150. The transition provisions of Bill 21 not only require the Law Society to appoint members to the Transitional Board (s. 223(1)) and to pay for the work of the transitional bodies (s. 228), but also explicitly provide that the "Law Society *must cooperate* with the Transitional Board in the exercise of its power and the performance of its duties" (s. 223). The legislature is forcing the Law Society to comply with its agenda.

151. The Law Society has made clear that it considers Bill 21 to be contrary to its object and duty – the public interest in the administration of justice. On April 26, 2024, while Bill 21 was being debated in the Legislative Assembly, the Benchers wrote to the Attorney General to

---

[157] See, for example, Greenberg Affidavit #1, Ex. 4.
[158] *Ibid*, paras. 146-150, Exs. 61-62.
[159] *Ibid*, paras. 146-150, Exs. 110-111.
[160] See *Whitecourt Roman Catholic Separate School District No 94 v Alberta* at paras. 29-30.
[161] Greenberg Affidavit #1, Ex. 8.
[162] See, for example, *Ibid*, Ex. 24;Affidavit #2 of Patti Lewis made June 4, 2024 [Affidavit #2 of Patti Lewis], Ex. A at 31/54; Affidavit #1 of Patti Lewis, Ex. I at 10, 13, 16, 29, 33, and 38 of 48.
[163] Greenberg Affidavit #1 at paras. 30-34.
[164] *Ibid.*
[165] *Ibid.*

express their deep concerns about the impact of the legislation on the public interest in the administration of justice, including as follows:

> We, the Benchers of the Law Society, are certain that the development of Bill 21 has failed to meet reasonable expectations that the public and legal professions be significantly involved in commenting and advising on the substance of the Bill. We are also certain that the passage of Bill 21 will disrupt and diminish the effectiveness of legal regulation in this province. And we are likewise certain that Bill 21 fails to protect the public's interest in having access to independent legal professions governed by an independent regulator which is not constrained by unnecessary government direction and intrusion.[166]

152. In the event that an injunction is not granted and the Law Society is ultimately successful in its constitutional challenge, the Law Society will have been forced to act against both the independence of the bar and its mandate. The Benchers will have been forced to act against their oaths of office.[167] This harm to the Law Society's institutional fabric and to its reputation could not be repaired.[168]

iv. The Law Society will suffer irreparable monetary loss

153. Section 228 of Bill 21 requires the Law Society and SNP to:

a. pay the operational costs incurred by the Transitional Board, the Transitional IC and the advisory committee in the exercise of their powers and the performance of their duties,
b. remunerate the members of the Transitional Board and Transitional IC and reimburse them for reasonable travel expenses and out-of-pocket expenses, and
c. remunerate the person responsible for managing the transition from the operation of the *LPA* to the operation of Bill 21.

154. The Law Society estimates these costs will likely exceed $1 million, and has no knowledge as to the portion that might be covered by the SNP.[169] The government has not prepared any estimate as to the cost.[170] Mr. Craven's expectation, though, is that these costs will begin to flow in short order.[171]

---

[166] Greenberg Affidavit #1, Ex. 38.
[167] *Ibid* at para 21.
[168] See *Whitecourt Roman Catholic Separate School District No 94 v Alberta* at paras. 28-29. See also *PT v Alberta*, 2019 ABCA 158 at para. 68.
[169] Greenberg Affidavit #1 at paras. 132-134.
[170] Affidavit #1 of Patti Lewis, Ex. G at 50/53.
[171] Craven Affidavit #1 at paras. 16-20

155. Even if the Law Society is ultimately successful in its constitutional challenge, it has no clear right of action against the Crown or the members of the governing bodies of LPBC to recover the funds expended. It is settled law that monetary loss of this nature constitutes irreparable harm.[172]

156. The Province's only answer to this point is to suggest that the money lost by the Law Society would be "modest", "trivial", and "not material", and cannot constitute irreparable harm as a result. The Province reaches this conclusion by assuming the cost will be approximately $1 million (though the Law Society's evidence is that it will "likely exceed" that amount), assuming that the Law Society will pay the costs in their entirety, and then dividing that cost amongst the practicing lawyers in the Province to reach $70 per lawyer. This argument is without merit. Indeed, if the Province's logic were correct, then when seeking an interlocutory injunction of its own the Province would not be able to establish irreparable harm on its part arising from the irrecoverable loss of approximately $350 million (5 million British Columbians x $70 per person = $350 million). That cannot be correct.

157. The Province may be willing to dismiss the irreparable financial harm that Bill 21 will cause the Law Society and, by extension, the province's lawyers, but there is no basis for this Court to do so.

v. Public confidence in the administration of justice will be shaken

158. Public confidence in the administration of justice depends "not only on fact but also on reasonable perception."[173] This Court must be concerned not only with the factual consequences of the implementation of Bill 21 during this interim stage, but also the perception of a reasonable person, fully apprised of the relevant circumstances and having thought the matter through.[174]

159. In the event the Law Society is ultimately successful in demonstrating that Bill 21 is inconsistent with the independence of the bar and unconstitutional as a result, a reasonable and informed person will have witnessed the government's concerted and determined efforts to implement a governance scheme that undermines the independence of the bar, not only in the face of opposition by the Law Society, CBABC, TLABC, Lawyers' Rights Watch Canada, and others,[175] but also by forcing the Law Society to cooperate in the process. This bell could not be un-rung.[176]

---

[172] See, for example, *RJR-MacDonald Inc v Canada (Attorney General)* at 341-342.
[173] *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7, at para. 97.
[174] *Ibid.*
[175] Greenberg Affidavit #1, paras. 96-99.
[176] See, for example, *Law Society of British Columbia v Canada (Attorney General)*, 2001 BCSC 1593 at para. 82; *Federation of Law Societies of Canada v Canada (Attorney General)* at para. 35.

vi. Bill 21 will effect irreversible financial changes

160. Sections 216-219 and 242-246 of Bill 21 will come into force by regulation. These sections provide for the continuation of assets and liabilities of the Law Society and SNP as assets and liabilities of LPBC, and for the vesting of assets and assumption of liabilities of the Notary Foundation in the Law Foundation. Once these financial changes are made, they will be difficult or impossible to properly unwind if Bill 21 is found to be unconstitutional. This introduces destabilizing financial risk to the Law Society in its continued operations, and harms the public interest.[177]

D. The balance of convenience favours granting the injunction

161. This stage of the test generally requires a determination of which party will suffer the greater harm from the granting or refusal of the injunction.[178] This is often the determinative stage in constitutional cases.[179]

162. The factors to be considered in assessing the "balance of inconvenience" are numerous and will vary in each case.[180] In constitutional cases the public interest is a special factor weighing in the balance, and one which takes the enquiry beyond the harm directly suffered by the parties.[181] Both the applicant and the government may seek to rely on consideration of the public interest.[182]

163. An applicant for an interlocutory injunction against the enforcement of legislation must establish a "clear case" for injunctive relief.[183] There can be no doubt that the Law Society has done so here. The Law Society is advancing a serious constitutional question that strikes at the bedrock of the Canadian legal system and of the administration of justice in this province. Bill 21 is a radical departure from the longstanding status quo of legal governance in this province and across the country, and the Law Society has demonstrated that it poses a real and imminent risk of irreparable harm to both the Law Society itself and to the public interest in the administration of justice. The Law Society asks this Court to enjoin the implementation of Bill 21 for the period necessary for this foundational constitutional question to be decided.

---

[177] *RJR-MacDonald Inc v Canada (Attorney General)* at 342, 350.
[178] *Ibid* at 342.
[179] *Ibid*.
[180] *Ibid* at 342-344.
[181] *Ibid*.
[182] *Ibid* at 343-344.
[183] *Harper v Canada (Attorney General)*, 2000 SCC 57, [2000] 2 SCR 764 at para. 9. The Province repeatedly states the "clearest of cases" is required, relying on the statement from Milman J in *Shrieves v British Columbia (Attorney General)*, 2024 BCSC 889 at para. 29. However Justice Milman was clearly intending to quote from *Harper* and to refer to the "clear case" standard, and not intending to establish a new and higher standard as the Province appears to suggest.

164. For its part, the most the Province can say is that the public might be briefly deprived of the benefit of Bill 21 at some point of time in the future. Surely that is not enough to tip the balance in the Province's favour.

i. The injunction will protect the public interest in the administration of justice

165. In assessing the balance of convenience in a constitutional challenge to legislation, the court should proceed on the assumption that the law is directed to the public good and that its enforcement is in the public interest.[184] There is no requirement for the government to provide proof.

166. The assumed public interest in the enforcement of duly-enacted legislation can weigh heavily in the balance of convenience.[185] However, the government does not have a monopoly on the public interest, which includes both the concerns of society generally and the particular interests of identifiable groups.[186] The public interest is not unequivocal or asymmetrical in constitutional litigation, and the Attorney General is not the representative of a monolithic "public" in disputes of this nature.[187]

167. An applicant can also claim to represent one vision of the "public interest", and can overcome the public interest presumption by demonstrating that the issuance of the injunction would itself provide a public benefit or serve a valuable public purpose.[188] This principle must carry particular force where the applicant is a public body such as the Law Society, with a mandate to uphold and protect the *public interest* in the administration of justice. As the Supreme Court of Canada explained in the *Law Society of British Columbia v. Trinity Western University*:

> As the governing body of a self-regulating profession, the LSBC's determination of the manner in which its broad public interest mandate will best be furthered is entitled to deference. The public interest is a broad concept and what it requires will depend on the particular context.[189]

168. The Law Society has brought this constitutional challenge to protect the independence of the bar, and says that an injunction is required to protect public confidence in the

---

[184] *Ibid*; *Harm Reduction Nurses Association v British Columbia (Attorney General)*, para. 44.
[185] *Harper v Canada (Attorney General)*, para. 9.
[186] *RJR-MacDonald Inc v Canada (Attorney General)* at 343.
[187] *Ibid*.
[188] *Ibid* at 343-344, 349; *Harper v Canada (Attorney General)*, para. 9; *Cambie Surgeries Corporation v British Columbia (Attorney General)*, 2018 BCSC 2084, leave application dismissed 2019 BCCA 29, at para. 144. See also *Harm Reduction Nurses Association v British Columbia (Attorney General)*, para. 95; *Federation of Law Societies of Canada v Canada (Attorney General)*, para 45.
[189] *Law Society of British Columbia v Trinity Western University*, para. 34.

administration of justice in the interim. This is an assessment that lies at the heart of the Law Society's mandate, and in which it is entitled to deference.

169. More broadly, once a serious question has been raised as to the constitutionality of the scheme that will govern the legal profession, there must surely be a public interest in the resolution of the question before any additional steps are taken in furtherance of its implementation.

170. To be clear, and contrary to the Province's suggestion, the Law Society is not asking this Court to determine whether the government is governing well, or to inquire into the effectiveness of government action. Nor does the Law Society resist the presumption that Bill 21 serves a public interest. The Law Society's argument is that there is a countervailing, distinct, and significant public interest in an injunction pending determination of this critical constitutional question.

ii. No real harm arising from the injunction

171. Not only is the *presumptive* harm to the public interest overcome in this case, but there is also no *real* harm arising from the injunction that need concern this Court.

172. The Law Society says that there is no risk to the public interest in the administration of justice if the injunction is granted, and the *status quo* maintained. The Law Society ensures robust, visible and professional regulation of lawyers, in the public interest under the *LPA*, the Rules, and the Code.[190] The Attorney General repeatedly praised the work of the Law Society during the legislative debate on Bill 21,[191] and did not suggest that the Law Society was failing to deliver on its mandate.

173. During the period of any injunction, the work of the Law Society's committees and task forces, including its work to implement the Truth and Reconciliation Action Plan, the Indigenous Framework, and the recommendations of the Mental Health Task Force, among many other initiatives and innovations, will continue uninterrupted.[192] Protected by the injunction, the Law Society's service of the public interest will not change while its challenge to Bill 21 is heard in the courts.

174. Further, there are many other ways in which the goal of access to justice can or will be advanced during the period of any injunction. The Law Society's efforts will continue in this regard. The LGIC could bring into force the provisions of the *Attorney General Statutes Amendment Act, 2018* so as to permit the practice of licensed paralegals. And the

---

[190] Greenberg Affidavit #1 at para. 35.
[191] See, for example, Affidavit #1 of Patti Lewis, Ex. G at 23, 30, 36, and 47 of 53.
[192] Greenberg Affidavit #1, para. 156.

Government could redirect some portion of the hundreds of millions of dollars it obtains each year from the PST on legal services towards legal aid.

175. Finally, it bears repeating that the Law Society has committed to an expeditious determination of this constitutional challenge.

iii. The injunction will preserve the longstanding status quo

176. As the Attorney General acknowledged in the Legislative Assembly in the course of the debates over Bill 21, the intention of the impugned legislation "is to change the *status quo*".[193] The Law Society agrees, but puts the point more strongly: Bill 21 is a fundamental change to the *status quo* for the regulation of lawyers in this province that has endured for well over a century. The Law Society is seeking "extraordinary" relief, but this is doubtlessly an extraordinary case.

177. In these circumstances, with so much hanging in the balance, it will be "a counsel of prudence to preserve the status quo", to echo the language of Lord Diplock in the seminal case of *American Cyanamid Co v Ethicon Ltd.*[194] Lord Diplock explained this principle as follows:

> If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark on a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.[195]

178. The maintenance of the *status quo* weighs in favour of the issuance of the injunction. This is not the type of case referred to by the Court in *RJR-MacDonald*, where the constitutional challenge seeks to *change* the status quo and the preservation of this status quo carries no weight in the face of the "alleged violation of fundamental rights".[196] Here it is the government that has acted to alter the status quo, in an attempt to do something that it has never done before, and it is this action that is alleged to have caused the violation of fundamental rights.

---

[193] Affidavit #2 of Patti Lewis, Ex. A at 31/54.
[194] *Pacific Northwest Enterprises Inc v Ian Downs & Associates Ltd* (1982), 42 BCLR 126, citing Diplock LJ in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, [1975] 1 All E.R. 504.
[195] *Ibid.*
[196] *RJR-MacDonald Inc v Canada (Attorney General).*

iv. Conclusion on balance of convenience

179. This is a clear case for injunctive relief. Bill 21 implements a radical and historic transformation from the longstanding status quo of legal governance in this province. Surely it is better to determine whether this transformation is constitutional before it is further implemented. In these extraordinary circumstances, the public interest, and the balance of convenience, must weigh in favour of the issuance of injunction.

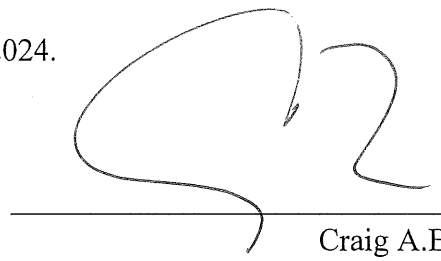
III. CONCLUSION

180. The Law Society submits that the injunctive relief sought is just and equitable in the circumstances of this case, and asks this Court to grant the relief sought:

a. suspending the operation of sections 215 and 223-229 of Bill 21; and

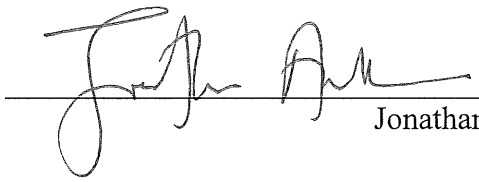
b. enjoining the LGIC from bringing sections 1-214, 216-222, 230-310, and 315-316 of Bill 21 into force until the determination by this Court of the claims in the Law Society's Notice of Civil Claim.

All of this is respectfully submitted on June 17, 2024.



Craig A.B. Ferris, K.C.

Laura L. Bevan



Jonathan Andrews