[2022] JMSC FULL 1

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. SU 2020 CV 01333

CORAM: THE HONOURABLE MR. JUSTICE LEIGHTON PUSEY
THE HONOURABLE MRS. JUSTICE LISA PALMER HAMILTON
THE HONOURABLE MS. JUSTICE CAROLE BARNABY

BETWEEN	**VAUGHN O'NEIL BIGNALL**	**CLAIMANT**
AND	**THE GENERAL LEGAL COUNCIL**	**DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**INTERESTED PARTY**

Georgia Gibson Henlin Q.C. and Lemar Neale instructed by NEA|LEX, Attorneys-at-Law for the Claimant.

Michael Hylton Q.C., Carlene Larmond Q.C. and Sundiata Gibbs instructed by Hylton Powell, Attorneys-at-Law for the Defendant.

Faith Hall and Kristina Whyte instructed by the Director of State Proceedings, Attorney-at-Law for the Interested Party.

IN OPEN COURT

Heard: 25th, 26th, 27th October 2021 and 28th January 2022

Constitutional Law - Constitution of Jamaica - Charter of Fundamental Rights and Freedoms - Sections 13 (3) (a), (c), (d), (e) and 16 (2).

The Legal Profession Act - Sections 3, 11 and 12 (7) - Legal Profession (Canons of Professional Ethics) Rules - Advertising regulations comprised in canons II (d) (ii), II(e), II (h), II (i), II (j), II(k) and II(l).

Whether the advertising regulations made by the General Legal Council for the legal profession in exercise of statutorily delegated rule making powers are demonstrably justified limitations in a free and democratic society on the rights guaranteed by sections 13 (3) (a), (c), (d), (e) and 16 (2) of the Charter of Fundamental Rights and Freedoms - Whether the proceedings before the General Legal Council in exercise of powers granted by advertising regulations breached the rights guaranteed by section 16 (2) of the Charter of Fundamental Rights and Freedoms - Whether advertising regulations and proceedings before the General Legal Council pursuant thereto were *ultra vires* the Legal Profession Act.

Crown Proceedings Act - Sections 2 and 3 - Whether constitutional claims are civil proceedings within the meaning of the Act to enable the Attorney General to be joined as a party to a constitutional claim pursuant to it.

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L. PUSEY, J

[1] I have read in draft the judgment of Barnaby J and I agree with its reasoning and conclusions.

L. PALMER HAMILTON, J

[2] I have also read in draft the judgment of Barnaby J and I agree with its reasoning and conclusions.

C. BARNABY, J

BACKGROUND TO THE CLAIM

[3] On the passing of the *Legal Profession Act, 1972* (hereinafter called "the LPA"), there existed an absolute bar against advertisement and touting by members of the legal profession, consistent with and reflective of the ethical rules which were then applicable. The prohibition was codified in the *Legal Profession (Canons of Professional Ethics) Rules, 1978* (hereinafter called "the Canons"), and operated until amendments were made to it in 1998. The Canons were again amended in 2016. It suffices to say here that canon II(d) now permits an attorney to advertise in connection with his practice, within certain limits.

[4] The Claimant is an attorney-at-law of the firm Bignall Law. He alleges that a number of the provisions of the advertising regulations of the General Legal Council (hereinafter called "the Council") and processes taken pursuant to them breached a number of the rights guaranteed to him by the *Constitution of Jamaica*, specifically the *Charter of Fundamental Rights and Freedoms,* (hereinafter called "the Charter"), and are accordingly unconstitutional and or *ultra vires* the LPA. The Council is the statutory regulator of the legal profession in Jamaica.

[5] The Attorney General is joined as a party to the proceedings as a representative of the Crown pursuant to the *Crown Proceedings Act,* on the basis that the legislative delegation of responsibilities to the Council facilitated the making of the impugned advertising regulations. The

appropriateness of the addition of the Attorney General as a party was raised *in limine* during the hearing of the claim and will be addressed subsequently.

[6] The claim follows enquiries by the Council into complaints that Bignall Law had engaged in advertising thought to be in breach of advertising regulations and a decision of the 26th September 2018 where the Council made a number of orders in respect of advertising by the legal practice. Among the orders are that the Claimant and his firm were to discontinue certain advertisements, and that the prior approval of the Council was to be sought and obtained before the publication of any further advertising. On or about the 4th December 2018, subsequent to the making of those orders by the Council, the legal practice was again advertised on Instagram and continued to be so published in July 2019 when the Council, through its Chairman, made a complaint to the Disciplinary Committee against the Claimant. It is charged that the subsequent advertising breached the order of the Council requiring the Claimant and his firm to seek and obtain prior approval before publishing any further advertising and that the publication breached a number of the advertising regulations.

SUMMARY OF THE CLAIMANT'S PLEADED CHALLENGE

[7] The Claimant challenges most of the advertising regulations and the enquiry by the Council into complaints received by it in respect of advertising by Bignall Law on the basis of unconstitutionality and also invokes the *ultra vires* doctrine. The substance of each challenge is set out below.

Unconstitutionality

[8] The Claimant contends that the challenged advertising regulations are unconstitutional in that they limit the rights guaranteed to him by the Charter, in particular, those guaranteed by sections 13 (3) (a), (c), (d) and (e) which protect the rights to life, liberty and security of the person; to freedom of expression; to seek, receive, distribute or disseminate

information opinions and ideas; and the freedom of peaceful assembly and association, respectively.

[9] It is also claimed that the Council breached his right to a fair hearing within a reasonable time by an independent and impartial court or authority established by law which is guaranteed to him by section 16(2) of the Charter on the following grounds.

(i) The requests and proceedings of the Council commencing with letter dated 27th December 2017 and ending with the decision dated 26th September 2018 infringed his right of access to a court or independent and impartial court or authority established by law and or his right to a fair trial.

(ii) The proceedings of the Council commenced by letter dated 6th March 2018 and ending with the decision dated 26th September 2018 infringed his right to a fair trial or hearing.

(iii) The proceedings of the Council commenced by letter dated 6th March 2018 and ending with the decision dated 26th September 2018 infringed his right to a fair hearing within a reasonable time before a court or an independent and impartial court or authority established by law.

(iv) The continuation of the hearing concerning Complaint No. 127 of 2019 to the Disciplinary Committee is likely to infringe his right to a fair hearing before a court or an independent and impartial court or authority established by law.

Ultra vires

[10] The Claimant also contends that the requests and proceedings of the Council commencing with letter dated 27th December 2017 and ending with its decision dated 26th September 2018 is *ultra vires*; and that proceedings before the Council in respect of the Claimant are *ultra vires* the Council, *"having regard to the provisions of the Legal Profession Act*

which constitute the General Legal Council and the Tribunal (The Disciplinary Committee of the General Legal Council)".

SUMMARY OF RELIEF SOUGHT AND SUMMARY DETERMINATION

[11] On the basis of the foregoing challenges, declarations as to unconstitutionality and *ultra vires* are sought; as well as orders to strike down the impugned canons as being null and void and of no legal effect, or in the alternative, a stay of their execution; an injunction restraining the Council, whether by itself, servants and or agents or otherwise from commencing or continuing any disciplinary proceedings of any kind against the Claimant; and costs.

[12] For the reasons which appear below, I find that the claim should be allowed in part.

CHRONOLOGY

[13] Ahead of setting out my reasons for so concluding, I believe it may be helpful to give a chronology of the interactions between the Claimant and the Council, so far as available and relevant to these proceedings. I do so in the table below.

December 27, 2017
Chairman of the Council's Advertising Committee wrote to Bignall Law, for the attention of the Claimant, indicating that advertising on social networking websites such as Instagram and Facebook, television stations and in the Gleaner newspapers published on December 17 and 24, 2017 had come to its attention; and that words in them created an unjustified expectation and were in breach of canons II(d)(ii) and (e). They were reminded of the wording of the implicated canons; the hope was expressed that immediate steps would be taken to rectify the breaches; and Claimant advised that failure to discontinue the advertisements may lead to complaints being made to the Disciplinary Committee of the General Legal Council.
The Claimant was urged to communicate with the Advertising Committee in the future for guidance as to whether any proposed advertisement offended the Canons.

January 30, 2018

The Chairman of the Council wrote to Bignall Law for the attention of the Claimant and advised that it had come to its attention that his firm had been engaged in advertising on electronic media including social media websites and television, TVJ in particular, and that the scale and intensity of the advertising had become a matter of serious concern. Advertising on TVJ during the Grammy Awards on January 28, 2018 was said to be "particularly egregious".

The Claimant was required, as principal attorney of Bignall Law, to produce to the Secretary of the General Legal Council within seven days of receipt of the letter, the record of all advertising by the practice for the preceding twelve months, including of when and where they were used, the frequency and name of the attorney responsible for the advertising, pursuant to canon II (f).

The Claimant was asked to note that failure to comply with the requirement for production of the advertising records is a specified act of professional misconduct.

February 5, 2018

The Claimant in a letter on Bignall Law's letterhead responded to the Council's letter of 30 January, 2018 indicating that the record of advertising for the preceding twelve months, being February 2017 to January 2018, were being forwarded as requested in an attached file.

The Claimant expressed that he was baffled that Council had "serious concerns" and had formed the view that the advertising during the Grammy Awards was "particularly egregious". He asked to be provided with the legal basis on which the conclusions were predicated.

March 6, 2018

The Chairman of the Council responded to the Claimant's letter of February 5, 2018 and acknowledged receipt of enclosed file including a jump drive with copies of advertisements. The Claimant was advised that the records were reviewed but were incomplete as there was failure to indicate the frequency of all advertisements and in some instances details of when and where the advertisements were used were not provided. The missing information in respect of advertising on Electronic Billboard in the Halfway Tree Park, the Grammy Awards and on Facebook and Instagram was stated and a request made for their provision.

March 29, 2018

The Principal of Calabar High School wrote to Bignall Law for the attention of the Claimant to complain about the unauthorised use of its trademark in advertisement in the edition of the Jamaica Gleaner of the said date. Bignall Law had sought to

congratulate them on a sporting win. It requested that the infringement not be repeated. The Council was copied on the said letter.

April 30, 2018

The Council under the hand of its Secretary, by way of Notice of Hearing, communicated with the Claimant and referred to the letter from the Chairman dated 6th March 2018 and its contents; advised of the failure to produce information requested by the Council within seven days of request; and that the Council had been copied on the letter from Calabar High School in respect of the alleged unauthorised use of its trademark. They were notified of the date of the hearing before the Council on the 30th May 2018, where it was proposed to determine whether an order should be made pursuant to Canon II (h) that they withdraw or discontinue their advertising. The Notice of Hearing was addressed to Bignall Law and the Claimant.

The addressees were required to submit written submissions on the matter to be filed at the Council's office and advised of the entitlement to attend and be heard.

May 3, 2018

The Claimant replied to the letter of the Council dated 6th March 2018 on Bignall Law letterhead and apologised for the delay in responding. The missing information for the Tickertape advertising was provided and its earlier omission stated as an oversight. It was also indicated that the number of billboards in the Halfway Tree Park would be confirmed with the operators in order to address the concern of the Council in that regard; and the Council was advised that copies of Facebook reports from the social media handler were requested and expected to be received in short order.

May 30, 2018

The first meeting of the Council pursuant to Notice of Meeting dated 30th April 2018. Eleven (11) members of Council were present, so too the Claimant and his Counsel Ms. Archer.

During the meeting the Chairman noted the Claimant's promise to provide further information as to the frequency of his general advertising and advertising on social media and billboard dimensions remained unfulfilled. The Claimant tendered his apologies and indicated that he had had a response from his social media handler but he had not been able to give it his attention.

The Chairman further stated that Bignall Law had *"arguably engaged in sensationalism in the ticker seen during the Grammys and that the Grammys promotional advertisements might have breached Canon II(l)."* The Claimant indicated he had been careful that his advertisements reflected the dignity of the profession and were

not vulgar and was reminded by the Chairman that that Canons were not limited to vulgar advertising but also sensationalism.

"The Chairman also expressed concern at an attorney having a Billboard in Halfway Tree." Ms. Archer on behalf of the Claimant advised the Council that no more advertisements had been placed on the billboard since the letter from Council had been received and none would be so published until the matter had been addressed by the Council. The Claimant committed to not having any billboard advertisements and advised that social media campaigns would end on May 31 and there would be no new advertisements or tickers for the time being. There was however a contractual agreement in respect of a thirty second advertisement on a programme called "Eight Degrees North" and the World Cup. The Chairman indicated there should be no ticker during the World Cup and the Claimant agreed.

"[T]he Council [had also] seen the letter from Calabar High School complaining of the unauthorised use of their trademark." The Claimant was invited to address an apology to the school and assure them that the infringement would not be repeated.

Further consideration of the matter was deferred to the Council's meeting on 27th June 2018. Ms. Archer had earlier indicated that written submissions would be provided where the information requested would be supplied by Bignall Law and the issues raised by Council addressed, prior to its next meeting.

June 27, 2018

The second meeting of the Council where advertising by Bignall Law was discussed. Eleven (11) members of Council were again present.

The Claimant's Counsel Ms. Archer indicated that the frequency of social media advertisements was set out in a document provided to the Council. In respect of the infringement of Calabar High School's trademark, the Council was advised that the congratulatory message was not done for a commercial purpose.

The Chairman requested that the Claimant send a letter to the Council setting out the size and frequency of the billboard advertising and frequency of the Grammy ticker by July 16, to write and advise if they were unable to provide the information and a decision would be taken by the Council. The information had been requested previously but not provided.

September 26, 2018

The third meeting of the Council in respect of advertising by Bignall Law. Eleven (11) members of Council were present.

A draft of the Council's decision was made available in respect of which a member had provided helpful comments.

"It was also noted that it was difficult to determine whether the advertisements could be considered to be either vulgar or sensational without having actually seen the ads. Mr. Bignall had not kept a record of the frequency of the advertisements."

The Council had not ascertained whether Calabar High School had a registered trademark or if the Claimant had written an apology as directed by the Council.

Accordingly, it was determined that Item No. 3 of the draft decision should be removed and the final document served on the Claimant and Bignall Law.

September 28, 2018

The decision of the Council dated 26th September 2018 was delivered to Bignall Law and the Claimant. The conclusions and orders of the Council in respect of the Claimant and his firm may be summarised thus.

a) That they failed to provide records of the frequency (when) of advertisements published on electronic billboard located in the Halfway Tree Park during December and January 2018, and of the size and/or dimensions of the electronic billboard which were displayed; and that the failures constituted breach of Canon II(f)(ii).

   The firm and the Claimant were ordered to discontinue any and all publications of the said advertisements on the basis of their failure to provide the stated records.

b) That they failed to provide records of the frequency (when) of their Ticker Tape Advertisement during the 2018 Grammy Awards aired on TVJ; and that the failure constituted a breach of Canon II(f)(ii).

   The Firm and the Claimant were ordered to discontinue any and all publications of the said advertisements on the basis of their failure to provide the stated records.

c) That there was late compliance with the Council's request for a complete record of advertisements on Facebook and Instagram, specifically as to the frequency (when) of those advertisements.

   The Firm and the Claimant were ordered to comply with the Canons in relation to all content on Facebook, Instagram and other social media platforms in addition to keeping a record of such advertisements inclusive of when and where published.

d) In light of the foregoing, the Claimant and his firm were ordered not to engage in any further advertisements of the type or character referred to at a) to c) above without the prior approval of the Council. They were required to provide all proposed advertisements, including proposed content, frequency, duration

and size to the Council for approval prior to their publication. This order was made pursuant to Canons II (h), (i) and (j).

The Claimant and the Firm were reminded that failure to comply with any of the orders would result in a complaint being laid to the Disciplinary Committee of the General Legal Counsel for disciplinary sanctions to be imposed.

December 2018

The Claimant and his firm published advertisement on Instagram account @bignalllaw on or about 4th December 2018.

February 21, 2019

The Chairman of the Advertising Committee of the Council wrote to Bignall Law for the attention of the Claimant to advise that it's Christmas video advertisement on Instagram and Facebook showing a motor vehicle accident was brought to its attention and had been viewed.

The Committee summarised what they had viewed in this way.

> *"[It] shows the aftermath of a motor vehicle accident between a black Honda and silver Nissan Note Hatchback after which the driver of the Nissan motor vehicle takes out a business card for Bignall Law. The advertisement continues by depicting the driver attending Bignall Law's offices following which the gavel is brought down presumably signalling a favourable verdict from a Judge for the driver. The advertisement ends with the same party going into a showroom of Audi and driving out a brand new Audi Q7 to a soundtrack "Have Yourself a Merry Little Christmas".*

The Committee concluded that *"In [their] view"*:

(i) the advertisement was in breach of Canon II(d)(ii) *"… as it is likely to create an unjustified expectation that if you sustain seemingly minor damage to your motor vehicle and retain Bignall Law you will be successful and have the money to buy a new upgraded car",* and demanded discontinuation of its use or any other advertisement in breach of the Canons; and

(ii) that it was in breach of Canon II(I) *"… in that Bignall Law has used its professional standing to advertise a product, specifically, Audi motor vehicles. The advertisement features the Audi showroom, its location and the actor leaving in an Audi Q7."*

The Advertising Committee wrote *"… we demand that you discontinue using this advertisement or any other advertisement which is in breach of the aforementioned or other Canons."*

It went further to advise that if it became aware of a further infraction in relation to that advertisement or any like advertisement, it would have no choice but to recommend that a complaint be laid before the Disciplinary Committee.

The Committee also reminded of its willingness to guide and offer advice as to the suitability of future advertisements and advised that they may be submitted prior to publication if access to the facility offered was wished.

The letter was addressed to Bignall Law for the attention of the Claimant.

March 7, 2019

By letter of 7th March 2019 the Executive Director of the Insurance Association of Jamaica (hereinafter called "the IAJ") wrote to the Chairman of the Council *"… to express their concern about a recent television advertisement put out by Bignall Law with respect to their services dealing with motor vehicle accidents Litigation matters (sic). We believe the advertisement gives the impression that someone could end up with a new car after being in an accident with a second hand car. We find it misleading and is not in the interest of all parties. We ask that you look into this matter."*

July 26, 2019

The Chairman of the Council files a Form of Application Against an Attorney-at-Law dated 25th July 2019 praying that the Claimant be required to answer the allegations contained in his affidavit accompanying the application, which was also sworn on the 25th July 2019.

The Chairman makes averments in respect of a number of matters in his affidavit which are summarised as follows.

1) That the Council had issued a decision to the Claimant (referred to as "the Respondent" in the affidavit and will be so called for the purposes of this summary) and his firm which dealt with certain advertising and had ordered them not to engage, without prior approval of the Council, in any further advertisement of the type or character referred to in the decision. The advertising referred to in the decision being that published on the Halfway Tree Park electronic billboard, tickertape advertising on TVJ and Facebook, Instagram and other social media advertisements.

2) That on or about 4th December 2018 the Respondent, without seeking permission or obtaining the prior approval from the Council, published a video advertisement to the Instagram Account @bignalllaw with the following caption *"… Have yourself a merry little # Christmas! In an accident? Not at fault? Come in and talk with us. We will assist you in making the right decisions."*

The advertisement is said to show the aftermath of a motor vehicle accident between a black Honda and silver Nissan Note Hatchback after which the driver of the Nissan motor vehicle takes out a business card for Bignall Law. The driver attends Bignall Law's offices following which the gavel is brought down presumably signalling a favourable judicial outcome for the driver. The driver who went to Bignall Law is then seen to enter the Audi show room and acquired a brand new Audi with a red ribbon.

3) The failure to comply with the Council's order of 26th September 2018 requiring the Claimant to seek and obtain prior approval for the publication of the advertising constitutes a breach of Canon II(h).

4) The advertisement published on Instagram by the Claimant on or about 4th December 2018 constitutes a breach of Canon II(d)(ii) in that it *"creates or is likely to create an unjustified expectation that if a client sustains seemingly minor damage to a motor vehicle, the Respondent will be so successful that the client will be able to obtain a new and upgraded vehicle."*

5) That in breach of Canon II (I), the Respondent used his professional standing as an attorney-at-law to advertise a product. This is on the ground that the advertisement published on Instagram by the Claimant on or about 4th December 2018 *"… promotes a specific product being Audi motor vehicles in featuring the Audi showroom, its location and an actor leaving in an Audi Q7."*

6) That up to the 25th July 2019, the date on which the Chairman of the Council swore to the affidavit, the advertisement remained published on the Respondent's Instagram page @bignalllaw, a public page accessible by any user of the Instagram platform, notwithstanding the letter of 21st February 2019 from the Chairman of the Advertising Committee.

August 12, 2019

The Claimant and Bignall Law received the Form of Compliant and Affidavit of the Chairman of the Council dated and sworn on 25th July 2019 respectively.

October 7, 2019

The Claimant was advised that the complaint laid before the Disciplinary Committee against him was to be fixed for trial. The Claimant was later advised (date not stated) that the trial was fixed for 28th March 2020 but could not proceed due to the global pandemic.

July 8, 2020

In these proceedings, the Claimant through his Attorneys-at-Law requested a copy of the transcripts or notes of the proceedings/hearings before the Council on 3rd May and

27th June 2018 which resulted in the decision of the Council rendered 26th September 2018.
July 20, 2020 The Attorneys-at-Law for the Council responded to the letter of 8th July 2020 enclosing redacted minutes of Council's meetings on 30th May 2018, 27th June 2018 and 26th September 2018.

REASONS

ADDITION OF THE ATTORNEY GENERAL AS A PARTY

[14] It was raised *in limine* on behalf of the Attorney General that the Attorney General should not be a party to the proceedings, on the ground that the Council is a limited liability company and is not a crown servant within the meaning of the *Crown Proceedings Act* (hereinafter called "the CPA"), pursuant to which the Claimant purports to join her. While there was no attempt by the Claimant to meet the objection, there was also no concession. I accordingly address the Attorney General's submission which I find to be meritorious.

[15] Pursuant to paragraph 9 of the First Schedule to the LPA, the Council is established as a body corporate, capable of suing and being sued in its own name. Section 13 (5) of the Charter states that its provisions bind natural or juristic persons if and to the extent that they are applicable, taking into account the nature of the rights and the nature of any duty imposed by them. On this horizontal application of Charter rights, a constitutional claim is maintainable against the Council in its own name.

[16] Parliament has in fact delegated authority to the Council to prescribe the standards of professional etiquette and conduct for attorneys and to make rules which direct that specified breaches constitute misconduct in a professional respect for that purpose, pursuant to section 12 (7) of the LPA. This kind of delegation is not unusual for the regulatory arm of a professional body which serves members of the public.

[17] Further, in delegating the foregoing functions to the Council, it is also expressly provided at paragraph 16 of the Second Schedule to the LPA that the offices of Chairman and members of Council are not public offices for the purposes of Chapter V of the Constitution, which makes provision for the Parliament. There is no contention that Parliament was not authorised to delegate the functions it has or that such a delegation infringed the Claimant's constitutional rights in any way.

[18] Where the challenge is that a functionary has exceeded the power given to it by statute, the supervisory jurisdiction of this Court by way of judicial review normally lies in aid. Section 3(2) of the CPA prescribes that civil proceedings against the Crown are to be instituted against the Attorney General. Such proceedings are not to be regarded as including public law claims however, having regard to the provision at section 2 of the Act. It states that '*"civil proceedings" does not include proceedings which in England would be taken on the Crown side of the Queen's Bench Division".*

[19] The CPA appears to be modelled on the 1947 UK statute of the same name which then provided at section 38 (2) that "civil proceedings" did not include proceedings on the Crown side of the King's Bench Division.

[20] As to what is meant by proceedings in England taken on the "Crown side", I found assistance in the following succinct statement by the House of Lords in **Davidson v Scottish Ministers** 2005 SC (HL) 41, para. [25]

> *… Crown side proceedings originated in the former Court of King Bench. It seems that the work in that court was divided into two sides, the Crown side and the plea side (Blackstone, Commentaries on the Laws of England, vol 3, p 42). In the fullness of time the work of the plea side became merged with the general jurisdiction of the High Court, but the jurisdiction of the Crown side remained distinct. The jurisdiction of the Crown side was both criminal and supervisory. The supervisory jurisdiction now takes the form of judicial review.*

[21] In **Gairy and another v Attorney General of Grenada** [2002] 1 AC 167, para. [21], in a highly persuasive decision of the Judicial Committee of the Privy Council, Lord Bingham in delivering the judgment of the Board remarked that

> *… since the expression "civil proceedings" probably excludes what would now be called applications for judicial review, it must be highly questionable whether it includes claims for constitutional redress which the draftsmen in the UK in 1947 and Grenada in 1959 could not have contemplated and which may fairly be regarded as sui generis*.

[22] In **Seepersad (a minor) v Ayers-Caesar and others** [2019] UKPC 7, the Board upheld the unanimous decision of the Trinidad and Tobago Court of Appeal in respect of the availability of injunctive relief against the Crown in constitutional proceedings. Though factually dissimilar to the instant case, among the reasons for the Court of Appeal's decision, which were summarised by the Board, is the fact that *the State Liability and Proceedings Act* (hereinafter called "the SLPA"), the equivalent of the CPA, was not intended to apply to judicial review or constitutional law claims. I find the summary in that regard to be useful. It is that the SLPA

> *8. (3) …was designed to provide for civil actions in contract, tort and property against the state. As Lord Nicholls pointed out in Durity v Attorney General of Trinidad and Tobago [2002] UKPC 20; [2003] 1 AC 405, para 18, it was modelled closely on the United Kingdom's Crown Proceedings Act 1947 and designed to modernise the substantive law and procedure in ordinary civil actions against the State. It did not apply to "proceedings analogous to proceedings on the Crown side of the Queen's Bench Division in England" (para 32). It was never intended to apply to public law matters, whether administrative law or constitutional law (which, as Lord Bingham remarked in Gairy v Attorney General of Grenada [2001] UKPC 30; [2002] 1 AC 167, para 21, are "fairly [to] be regarded as sui generis").*

[23] Like observations can be made of our CPA, 1959.

[24] The instant claim is within the realm of public law and on the basis of the foregoing statutory provisions and dicta, I agree with Counsel for the Attorney General that the Attorney General should not be a party to the proceedings pursuant to the CPA. Accordingly, the Attorney General is removed in that capacity. The claim being an application for relief under the Constitution however, the Attorney General was required to be served in accordance with rule 56.11 (1) of the Civil Procedure Rules (CPR). As has become customary, and I believe it to be entirely appropriate, the submissions made to this court on behalf of the Attorney General in circumstances such as these are properly to be regarded as being made in the capacity as an "Interested Party" and not as a defendant to the claim.

SCOPE OF THE ULTRA VIRES CHALLENGE AND THE POWER OF THE COUNCIL TO MAKE THE REGULATIONS

[25] The Claimant seeks two declaratory reliefs on his Amended Fixed Date Claim Form on the basis of *ultra vires*. To appreciate the scope of the challenge, the reliefs and the grounds upon which they are sought are reproduced in full. He seeks

> *…*
>
> 4. *A declaration that* ***there quests (sic) and proceedings*** *of the General Legal Council that commenced by letters dated the 27th December 2017, 6th March 2018 and ending with the decision dated the 26th September, 2018 infringed the Claimant's right of access to a court or an independent and impartial court or authority established by law and/or his right to a fair trial as guaranteed by Section 16(2) of the Charter and/or are otherwise* ultra vires.
> 5. *…*
> 8. *A declaration that* ***the proceedings*** *commenced by Notice of Hearing dated 30th April 2018* ***and the hearings*** *conducted on the 30th May 2018 and the 27th June 2018 are* ultra vires *the General Legal Council having regard to the provisions of The Legal Profession Act which constitute the General Legal Council and the*

Tribunal (The Disciplinary Committee of the General Legal Council).

[Emphasis added]

[26] Among the grounds of challenge and so far as may be regarded as implicating the doctrine of *ultra vires*, the Claimant states that

> *…*
>
> 5. *[t]he 1st Defendant caused its Advertising Committee **to issue a letters requiring** the Claimant to seek its approval for its proposed advertising notwithstanding the revocation of 1998 version of Canon II(k) of the advertising rules by the Amendment of December 16, 2016. (sic)*
> 6. *The 1st Defendant either by itself or through its advertising committee, **determined** that the advertisements by the Claimant are in breach of the Canons **without a hearing** by the Disciplinary Committee of the General Legal Council.*
> 7. *The Canon II(d)(ii), (e), (h) (j), (sic) (i) (k) and (l) gives the General Legal Council complete and/or absolute discretion over the content of the Claimant's advertisements and in some instances apply a strained meaning to the said advertisement and **such hearings are held are** **ultra vires**, unfair and unjust and designed to put forward the 1st Defendant's subjective view of the advertisements.*
> 8. *The **hearing by the General Legal Council** was unlawful and/or ultra vires its powers and/or the Legal Profession Act.*
>
> *…* **[Emphasis added]**

[27] In the Claimant's Skeleton Submissions dated and filed 20th and 22nd October 2021 respectively, he submits as follows.

> *63. By its conduct the 1st Defendant also denied the Claimant a fair hearing and right of access to the Disciplinary Committee. By convening a disciplinary or quasi-disciplinary hearing, the 1st Defendant arrogated unto itself the function of the Disciplinary Committee which is the body established by law to hear and consider breaches of the canons including the advertising regulations. The 1st Defendant actions in conducting a hearing*

and rendering the decision and orders of September 26, 2018, which said decision and orders form the basis of the Applicant's complaint, were therefore ultra vires *the Legal Profession Act and ultimately a breach of section 16(2) [of the Charter] (sic)…*

64. …

65. … the entire proceedings before the 1st Defendant that commenced with the letter dated December 27, 2017 and ending with the decision rendered on September 26, 2018 has infringed my right to a fair hearing before and (sic) independent and impartial court or authority established by law, and were ultra vires*. The actions of the 1st Defendant has (sic) effectively deprived me of access to an independent and impartial tribunal or authority established by law.*

[28] Mrs. Gibson-Henlin Q.C. argued similarly in oral submissions. In the course of response to the written submission on behalf of the Council - that the issue of bias had not been raised before it - which was in fact raised in these proceedings by the Claimant, Counsel went on to state that the Claimant's challenge was that the Council did not have the jurisdiction it purported to exercise. It was argued that the Claimant's challenge was on the basis of substantial and not procedural *ultra vires*.

[29] In that regard I observed that on my assessment of the Claimant's pleadings, there was no contention that the Council did not have the jurisdiction under the LPA to "make" the advertising regulations. In response Mrs. Gibson-Henlin Q.C. invited the court to have particular regard to paragraphs 4 and 8 of the relief sought by the Claimant, and ground 7 in the Amended Claim Form and remarked that *"it cannot be said that we didn't challenge the GLC's power to make the regulations."*

[30] As I understand it, *ultra vires* may manifest in various forms. It is therefore my view that if a party intends to challenge the exercise of a rule making power on the basis that it was not a power granted by an enabling legislation, and therefore *prima facie* outside of the jurisdiction delegated, it should be expressly stated. It is one thing to contend that the Council did not have the power to "make" the advertising regulations and quite

another to say that the "process/procedure/hearing" embarked upon by it was *ultra vires* in the substantive sense because the Council was not the entity established by law to make enquiries into and determine a particular matter. I believe the pleaded *ultra vires* challenge manifests only in the latter.

[31] If I have viewed the Claimant's pleaded *ultra vires* challenge too narrowly however, or have incorrectly made the distinction I have, I now address what I consider to be the *prima facie* jurisdiction of the Council under the LPA to make the advertising regulations. This is done before proceeding with an assessment as to their constitutionality and what I believe to be the scope of the pleaded *ultra vires* challenge - that the proceedings before the Council which sought to give effect to them are *ultra vires* in the substantive sense, on account of unconstitutionality.

[32] I find unmeritorious the submission that the Council did not have jurisdiction to "make" the advertising regulations. Mr. Hylton Q.C. in response to the Claimant's submission in this regard referenced the wide regulatory remit given to the Council pursuant to section 3 of the LPA, which Counsel contends went beyond the power to prescribe standards of professional etiquette and professional conduct for attorneys given to it by section 12 (7) of the LPA.

[33] Section 3 of the LPA is in my view a good starting point but not the end to the enquiry. It establishes the Council and prescribes its functions as follows.

> *3. (1) There shall be established for the purposes of this Act a body to be called the General Legal Council which shall be concerned with the legal profession and, in particular -*
>
> *(a) subject to the provisions of Part III, with the organization of legal education; and*
>
> *(b) with upholding standards of professional conduct.*

> *(2) The Council shall have power to do all such things as may appear to it to be necessary or desirable for carrying out its functions under this Act.*
>
> *(3) The Council shall appoint on such terms and conditions as it thinks fit a secretary and such other officers as it may think necessary for the proper carrying out of its functions under this Act.*
>
> *(4) The provisions of the First Schedule shall have effect as to the Constitution of the Council and otherwise in relation thereto.*

[34] The provision establishes a single body which has as its concern the legal profession. That body is the Council. It has the power to uphold the standards of professional conduct as prescribed in section 3 (1) (b), which power is admittedly general and wide. This delegation by Parliament to the Council represents what may be considered an end of the line succession of supervisory and disciplinary responsibilities for the legal profession in Jamaica, which was previously bound in our British colonial past, which, if I may be permitted the liberty, is briefly and by no means exhaustively described below.

[35] Prior to 1971 when the Council of Legal Education of the West Indies was established, barristers were trained and admitted to practice by the Inn they attended in England. It was also in that jurisdiction that many solicitors completed their training and were admitted to the High Court before returning to the Caribbean.[1] It was not uncommon however, certainly in Jamaica, that solicitors would be articled to local firms and admitted to practice here.

[36] The professions in England and some of its colonies had developed thus at that time.

> *By the common law of England the judges have the right to determine who shall be admitted to practise as barristers and*

[1] Karen Nunez-Tesheira, *The Legal Profession in the English-Speaking Caribbean* (first published 2001, The Caribbean Law Publishing Company) 202-203.

> *solicitors: and, as incidental thereto, the judges have the right to suspend or prohibit from practice. In England this power has for a very long time been delegated, so far as barristers are concerned, to the Inns of Court: and, for a much shorter time, so far as solicitors are concerned, to the Law Society. In the colonies the judges have retained the power in their own hands, at any rate in those colonies where the profession is "fused." The principle upon which this rests was well stated by Lord Wynford in 1830 in In re Justices of Court of Common Pleas of Antigua [(1830) 1 Knapp 267, 268]: "In the colonies there are no Inns of Court, but it is essential for the due administration of justice that some persons should have authority to determine who are fit persons to practise as advocates and attorneys there. Now advocates and attorneys have always been admitted in the Colonial Courts by the judges, and the judges only. The power of suspending from practice must, we think, be incidental to that of admitting to practise, as is the case in England with regard to attorneys. In Antigua the characters of advocates and attorneys are given to one person; the court therefore that confers both characters may for just cause take both away."* Per Lord Denning delivering the judgment of the Board in **Attorney-General of the Gambia v Pierre Sarr N'jie** *[1961] A.C. 617, 630-631.*

[37] It had earlier been stated by Lord Wright in *Myers v Elman* [1940] A.C. 282, 317 that

> *[a] solicitor (or in former days a solicitor or an attorney) was long ago held to be an officer of the Court on the Roll of which he was entered and as such to be subject to the discipline of that Court.*

[38] In a more extensive formulation, which sheds light on the scope of the court's jurisdiction to discipline for professional misconduct, Lord Atkin at 302-303 put it in this way.

> *From time immemorial judges have exercised over solicitors, using that phrase in its now extended form, a disciplinary jurisdiction in cases of misconduct. At times the misconduct is associated with the conduct of litigation proceeding in the Court itself. Rules are disobeyed, false statements are made to the Court or to the parties*

by which the course of justice is either perverted or delayed. The duty owed to the Court to conduct litigation before it with due propriety is owed by the solicitors for the respective parties whether they be carrying on the profession alone or as a firm. They cannot evade the consequences of breach of duty by showing that the performance of the particular duty of which breach is alleged was delegated by them to a clerk. Such delegation is inevitable, and there is no one in the profession, whether in practice or as a judge, who will not bear ungrudging tribute to the efficiency and integrity with which, in general, managing clerks, whether admitted or unadmitted, perform their duties. The machinery of justice would not work without them. But as far as the interests of the Court and the other litigants are concerned it is a matter of no moment whether the work is actually done by the solicitor on the record or his servant or agent. If the Court is deceived or the litigant is improperly delayed or put to unnecessary expense, the solicitor on the record will be held responsible and will be admonished or visited with such pecuniary penalty as the Court thinks necessary in the circumstances of the case. Misconduct of course may be such as to indicate personal turpitude on the part of the person committing it and to lead to the conclusion that the party committing it, if an officer of the Court, is no longer fit to act as such. Over conduct such as that, punitive jurisdiction will be exercised, but it seems hardly necessary to state that no punishment based on personal misconduct will be inflicted unless the party visited is himself proved to be personally implicated. Some confusion has, I think, arisen from the fact that charges of personal misconduct have been generally brought by a special procedure, by a rule or order to answer allegations made in an affidavit, later by a report by the Discipline Committee of the Law Society, and now since 1917 by proceedings before the Society, who themselves determine the fact and the punishment. Such cases involve personal misdoing: they are rightly termed cases of professional misconduct; but the words "professional misconduct" themselves are not necessarily confined to cases where the solicitor himself is personally guilty. After all they only mean misconduct in the exercise of the profession: and they cover cases where a duty is owed by the solicitor to the Court and

is not performed owing to the wrongdoing of the clerk to whom that duty has been entrusted.

[39] English Law has therefore long permitted the reservation of the power in a single authority to not only determine the fact of misconduct in a professional respect, but also to punish an officer of the court who is personally responsible therefore or punish him for wrongdoing by the person to whom he entrusts his professional duty.

[40] There being no Inns of Court in Jamaica at that time, the admission to practice as solicitors or barristers, and their discipline on the island was left to the judges of the Supreme Court for the most part.

[41] In the fullness of time and immediately preceding the passage of the LPA, the *Solicitor's Law* Cap. 363 and the *Bar Regulation Law*,*1960* made provision for the regulation and discipline of the two professions. The *Solicitor's Law, 1869*, Cap 363, empowered judges to admit and enrol solicitors as officers of the Supreme Court, who were then entitled to be admitted and to practice in the other courts in the island. In respect of the discipline of solicitors, the judges of the Supreme Court were empowered to appoint a Committee of seven practicing solicitors, who in addition to the Attorney-General and Crown Solicitor as *ex officio* members, were responsible for hearing and determining applications to remove or strike a solicitor's name from the roll, or require a solicitor to answer allegations contained in an affidavit. The committee so established was empowered on the hearing of such applications to make orders to remove or strike a solicitor off the roll, suspend him from practice, order the payment of costs by any party and otherwise, as they thought fit. This coexisted with the disciplinary powers exercisable by judges of the Supreme Court. Orders of the Committee were required to be filed with the Registrar of the Supreme Court and acted upon as soon as filed, and was then enforceable in the manner and to like effect as a judgment or order of the Court.

[42] Under the *Bar Regulation Law, 1960* a disciplinary committee for barristers was established which comprised the Attorney General as an *ex officio*

member and six other members who were barristers in private practice, one of whom should be Queen's Council, if available, appointed by the Governor General on the recommendation of the Bar Association. The Bar Council and any person aggrieved by an act of professional misconduct by a barrister could apply to the Disciplinary Committee of the Bar Council which was empowered to make orders to strike the name of an attorney from the roll; suspend from practice on conditions they saw fit; impose a fine; reprimand an attorney; and order the payment of costs or a sum considered a reasonable contribution towards costs. A copy of every order of the committee was to be filed with the Registrar of the Supreme Court, the Registrar of the Federal Supreme Court of the West Indies and the Under Treasurer of any Inns of Court to which the barrister the subject of the order belonged, in order to take effect and be enforced in the manner and to like effect as a judgment or order of the Supreme Court.

[43] It is against this background to the evolution of the supervision and discipline of the legal profession in Jamaica that provisions in those and other regards under the LPA are best understood. The LPA fused the legal professions of solicitor and barrister in Jamaica. Every person entered on the Roll of the *Supreme Court of Judicature (Supreme Court) Act* (hereinafter called "JSCA") came to be known as an attorney-at-law (who have and will continue to be referred to herein as "attorney"). Except for the purposes of section 23 of the JSCA, which is concerned with the Court's summary jurisdiction over its officers, an attorney who has been entered on the Roll is an officer of the Supreme Court. This is prescribed at section 5 of the LPA. A person entered on the Roll of the Supreme Court is accordingly entitled to practice in Jamaica as a lawyer, subject to being issued a practicing certificate issued by the Council.

[44] To return to the matter at hand - the jurisdiction of the Council to make the advertising regulations - the power given to the Council at section 3 (2) is admittedly wide, capturing and reposing as it does, the power of the Council to uphold the standards of professional conduct. While it is my view that this general power does not override the specific powers given

to the Council in respect of the discipline of attorneys under Part IV of the LPA, it nevertheless places the specific power in its proper context.

[45] Outside of the rule making power at section 12 (7) to which I will refer shortly, the Council is mandated under Part IV of the LPA, at section 11 (1) in particular, to

> *… appoint from among persons -*
>
> *(a) who are members, or former members, of the Council; or*
>
> *(b) who hold or have held high judicial office; or*
>
> *(c) who are attorneys who were members of a former disciplinary body; or*
>
> *(d) who are attorneys who have been in practice for not less than ten years,*
>
> *a Disciplinary Committee consisting of such number of persons, not being less than fifteen as the Council thinks fit.*

[46] Section 11 (2) prescribes that the provisions of the Third Schedule to the Act have effect for the constitution of the Disciplinary Committee appointed by the Council. The Disciplinary Committee has two core functions which are set out at sections 12 and 19 of the LPA. Under section 12 the Committee is empowered to hear and determine applications by persons, including any member of the Council,

> *12. (1) …alleging [themselves] aggrieved by an act of professional misconduct (including any default) committed an attorney … that is to say –*
>
> *(a) any misconduct in any professional respect (including conduct which, in pursuance of rules made by the Council under this Part, is to be treated as misconduct in a professional respect);*
>
> *(b) any such criminal offence as may for the purposes of this provision be prescribed in rules made by the Council under this Part.*
>
> *(2) In any matter or hearing before a court a Judge, where he considers that any act referred to in sub-*

paragraph (a) or (b) of subsection (1) has been committed by an attorney, may make or cause the Registrar to make an application to the Committee in respect of the attorney under that subsection.

In this subsection "court" means the Supreme Court, the Court of Appeal, a Resident Magistrate's Court [now Parish Court], the Traffic Court or any other court which may be prescribed.

(3) Any application under subsection (1) or (2) shall be made to and heard by the Committee in accordance with the rules mentioned in section 14.

(4) On the hearing of any such application the Committee may, as it thinks just, make one or more of the following orders as to -

(a) striking off the Roll the name of the attorney to whom the application relates;

(b) suspending the attorney from practice on such conditions as it may determine;

(c) the imposition on the attorney of such fine as the Committee thinks proper;

(d) subjecting the attorney to a reprimand;

(e) the attendance of the attorney at prescribed courses of training in order to meet the requirements for continuing legal professional development;

(f) the payment by any party of costs of such sum as the Committee considers a reasonable contribution towards costs; and

(g) the payment by the attorney of such sum by way of restitution as it may consider reasonable,

so, however, that orders under paragraphs (a) and (b) shall not be made together.

[47] Where the Disciplinary Committee in exercise of its section 12 function directs the suspension of an attorney from practice, it is permitted,

pursuant to section 19, to review that decision and direct the withdrawal of the order of suspension.

[48] I make a number of observations on the supervisory and disciplinary arrangements comprised in the provisions so far reproduced within the context of the LPA as a whole.

[49] Firstly, that the supervision and discipline of attorneys in Jamaica is the remit of the Council.

[50] Second, that the Disciplinary Committee of the Council is statutorily mandated to hear and determine applications alleging misconduct by attorneys in a professional respect. It does not have the responsibility for every concern of the legal profession.

[51] Third, which is not disputed, in addition to persons who may be aggrieved by an act of alleged professional misconduct by an attorney, complaints may also be made to the Disciplinary Committee by any member of the Council.

[52] Fourth, that the disciplinary actions which the Disciplinary Committee are authorised to take if allegations of professional misconduct are proved are specific and limited. With the exception of prescribing courses of training to meet continuing legal professional development requirements, the disciplinary actions are not directed at positive compliance in the absence of punishment which I believe is distinguishable from compliance through deterrence which may result from the availability of and imposition of disciplinary actions subsequent to a finding of breach of professional ethics and conduct rules.

[53] Fifth, that there has been no delegation of power to the Disciplinary Committee to make rules or prescribe conduct which is to be treated as misconduct in a professional respect. As between the Council and the Disciplinary Committee, that is the exclusive remit of the Council. This is put beyond doubt by the provisions of section 12(7) of the LPA which states that

12. …

(7) The Council may –

(a) prescribe standards of professional etiquette and professional conduct for attorneys and may by rules made for this purpose direct that any specified breach of the rules shall for the purposes of this Part [Discipline] constitute misconduct in a professional respect.

(b) prescribe anything which may be or is required to be prescribed for the purposes of this Part.

[54] The foregoing delegated power is three-fold.

(i) The Council is authorised to prescribe standards of professional etiquette and conduct, acceptable behaviour of members of the profession if you will, amongst each other and generally.

(ii) By rules made for the foregoing purpose, the Council may direct that any specified breaches of the rules constitute professional misconduct for the purpose of Part IV of the LPA which is concerned with discipline. It is the Council who determines what breaches do and do not rise to the level of misconduct in a professional respect and are capable of forming the basis of a complaint to the Disciplinary Committee.

(iii) For the purposes of discipline, which is the concern of Part IV of the LPA, the Council is empowered to prescribe anything required to be prescribed.

[55] There is certainly great latitude given to the Council in respect of all three aspects of the power delegated pursuant to section 12(7), with the last of the three powers in particular being expressly wide and may, in my view, be regarded as empowering the Council to prescribe rules which are reasonably incidental to its functions under Part IV.

[56] In my judgment, this reasonably incidental power must include the power to make rules as to how alleged breaches which are reported to the Council are to be treated, including:

(i) rules which enable the Council through its members to make enquiries and form unfettered opinions on whether the Council's prescribed standards have or have not been complied with by an attorney where a complaint is made directly to the Council; and

(ii) rules which permit the Council to give directions which promote or enable positive compliance with the standards it has prescribed without resort to complaints for disciplinary action by the Disciplinary Committee, if alleged breaches may appropriately be treated in that way.

[57] At the time of the passing of the LPA, advertising by attorneys was prohibited at common law and that prohibition was codified in the principal Canons. Times have changed however and the Council has seen fit to permit advertising within certain limits. It is evident in this very dispute that professional standards have evolved to the point where conduct, specifically advertising, which was previously proscribed is no longer regarded as wholly undesirable.

[58] The wide supervisory and rule making powers delegated to the Council enable it to respond to changes which may, by their nature and potential for harm, require the Council to take action to reduce, eliminate or prevent harm to the profession or those its members serve. In these regards, the Council must also be permitted to organize itself and put systems in place, which promote compliance to the extent permitted by the LPA.

[59] In our contemporary society which is characterised by a proliferation of social and other media, and communication platforms with expansive and often immediate access to their content, I believe that advertising justifiably gives rise to concern by a body established to uphold the standards of a noble profession, which has at its very foundation the

integrity and the dignity of each of its members. It is the very first canon of the profession that *"[a]n attorney shall assist in maintaining the dignity and integrity of the legal profession and shall avoid even the appearance of professional impropriety."* In that regard, canon I (b) requires an attorney to *"… at all times maintain the honour and dignity of the profession and abstain from behaviour which may tend to discredit the profession of which he is a member."* Those are the ideals to which any member of the legal profession has agreed to be bound upon admission into it. It is against this milieu that the Council as the standard setting body of the profession must operate.

[60] The preamble to each iteration of the Canons expressly provides that

> *[i]n exercise of the powers conferred upon the General Legal Council by section 12(7) of the Legal Profession Act and of every other power hereunto enabling the following rules are hereby made:*
> *…*

[61] To the extent challenged by the Claimant, the advertising regulations so made provide for the following.

Canon *II(d)(ii):*	*An Attorney may advertise in connection with the attorney's practice provided that such advertising: … shall not be misleading or deceptive or likely to mislead or deceive or is likely to create an unjustified expectation.*
Canon II(e)	*Except as allowed by this Canon, an attorney shall not, directly or indirectly, apply to a person who is not then or who has not been his client for instructions for professional business save for institutions who customarily accept applications for the provision of legal services.*
Canon II(h)	*The General Legal Council may by notice in writing to any attorney order:*

(i) the alteration, withdrawal, removal or discontinuance of an advertisement;

(ii) the alteration or discontinuance of the use of a business card by an attorney;

where the Council is of the opinion that the advertisement or business card contravenes the provisions of the canon.

Canon II(i) *The Council may, having regard to the matters referred to in the above clause, by notice in writing to an attorney order him to cease or limit the lectures, talks, public appearances, transmissions or publications in which he participates, either absolutely or upon conditions.*

Canon II(j) *An attorney shall forthwith comply with any order given by the Council pursuant to clauses (h) and (i) hereof.*

Canon II(k) *(i) An attorney shall be responsible, in so far as it is or should be within his control, to ensure that any publicity relating to his practice or the practice of his firm is done in accordance with these Canons, whether such publicity is done by him, his employee or any other person on his behalf.*

(ii) Where an attorney becomes aware of any impropriety in any publicity relating to his practice or the practice of his firm, he shall be responsible, in so far as it is or should be within his control, to use his best endeavours to rectify or withdraw the publicity, and he shall at all times ensure that the General Legal Council is informed in writing as regards such matter.

(iii) Where it appears to the General Legal

Council that any publicity relating to the practice of an Attorney or his firm is contrary to these Rules, it may, without prejudice to its powers under the Act, after making due inquiry regarding the publicity, order the Attorney or the firm, or both to alter, modify withdraw, remove or discontinue the publicity.

Canon II(l) *An attorney shall not permit his professional standing to be used for the purpose of advertising any particular product, service or commercial organization.*

[62] Canons II (d)(ii), II (e) and II (l) do no more than prescribe standards of professional etiquette and conduct which the Council is clearly empowered by section 12 (7) (a) to make.

[63] Canons II (h) and (i) are in my view within the scope of rules which may be regarded as reasonably incidental to the Council's functions in respect of the supervision and discipline of attorneys. Both empower the Council to make orders which are corrective in nature on receipt of a complaint in respect of alleged advertising breaches. When taken in isolation they make very little sense in this regard, but when placed within the context of the regulations which precede them and which are not challenged in this claim, it is evident that they are aimed at ensuring that prescribed standards of professional etiquette and conduct are complied with so that if at all possible, corrective measures may be taken without recourse to referral of an attorney to the Disciplinary Committee for professional misconduct, from which narrow but very harsh consequences may flow.

[64] Canon II (f) for example requires an attorney to keep records of advertisements for a period of at least twelve months from last use, including of when and where used, and to produce it to the Council for inspection within seven days of a request being so made by Council. Canon II (n) defines an *"advertisement"* to mean

> *[a]ny communication (whether oral or in writing or any other visual form and whether produced by electronic or any other means) which is intended to publicise or otherwise promote an Attorney or Law Firm in relation to their practice or their availability for professional engagement. This includes but is not limited to: any brochure, signage, website, notice, circular, leaflet, poster, placard, photograph, illustration emblem, display, stationery, directory entry, article or statement for general publication.*

[65] Canon (j) directs an attorney to comply with the remedial orders made by the Council pursuant to Canons II (h) and II (i).

[66] Canon II (k) (i) places the responsibility for ensuring that publicity relating to an attorney's practice or that of his firm is compliant with the advertising regulations, to the extent that it is or should be in his control, whether the publicity was done by his employee or some other person on his behalf. Canon II (k) (ii) places the responsibility on an attorney who becomes of improper advertising by his firm to use his best endeavours to rectify or withdraw the publicity, to the extent it is or should be within his control; and to ensure that the Council is kept informed in writing of any such matters. Cannon II (k) (iii) permits the Council to order the Attorney or the firm, or both, to alter, modify, withdraw, remove or discontinue publicity which is contrary to the rules after making due enquiry in respect of the publicity. Collectively, Canon II (k) places responsibility on an attorney - the only professional within the Council's supervisory remit - for publicity relating to his legal practice or that of his firm; and empowers the Council, after enquiry into the publicity, to make remedial orders.

[67] When I have regard to the suite of advertising regulations and the powers given to the Council thereunder, it appears to me that they seek to promote and have compliance with prescribed advertising standards and reduce the incidence of harmful advertising in the first instance, where the Council itself receives an advertising complaint; and obviate, if at all possible, the need for any member of the Council to lay a disciplinary complaint against an attorney before the Disciplinary Committee if a matter can be

addressed otherwise between the Council and the attorney against whom it received a complaint.

[68] In my judgment, the challenged Canons do not exceed the rule making powers given to the Council under Part IV, section 12 (7) of the LPA and are *intra vires* the enabling legislation. Whether or not the measures are able to withstand Charter scrutiny is an altogether different matter, to which I now devote attention.

THE CONSTITUTIONAL CHALLENGE

THE TEST FOR CONSTITUTIONALITY AND GUIDING PRINCIPLES

[69] Pursuant to section 13 (1) (c) of the Charter,

> *all persons are under a responsibility to respect and uphold the rights of others recognized in the Chapter, the [provisions of which] shall have effect for the purpose of affording protection to the rights and freedoms of persons as set out in those provisions, to the extent that those rights and freedoms do not prejudice the rights and freedoms of others.*

[70] In this and other regards, section 13 (2) goes on to provide that,

> *[s]ubject to sections 18 and 49, and to subsections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society*
>
> > *(a) this Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17; and*
> > *(b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights.*

[71] Section 18 is concerned with the status of marriage; section 49 with the alteration of the provisions of the Constitution; section 13 (9) with laws

permitting detention and limitations on the freedom of movement during a period of public emergency or public disaster; and section 13 (12), the saving of existing laws relating to sexual offences, obscene publications or offences regarding the life of the unborn.

[72] Since the passage of the Charter in 2011 a body of case law on the test for constitutionality under it has developed in Jamaica. Although not the first case to consider the approach to be taken to a Charter enquiry, the decision of the Full Court in **Maurice Tomlinson v Television Jamaica Ltd. et al** [2013] JMFC Full 5 may properly be regarded as the jurisprudential start and most recently, and so far as has been cited in these proceedings, the decision of the Court of Appeal in **Maurice Tomlinson v Television Jamaica Ltd. et al** [2020] JMCA Civ 52 may be said to reflect its progress. Common to all the judicial authorities is that the test for constitutionality laid down in **R v Oakes** [1986] 1 S.C.R 103 (hereinafter called "the Oakes test") is applicable in this jurisdiction. Section 1 of the Canadian Charter is in terms similar to section 13 (2) of the Charter.

[73] In the headnote to **Oakes**, the test propounded by Dickson CJ was succinctly summarised at pp. 105-106 thus.

> *Two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justifiable in a free and democratic society. First, the objective to be served by the measures limiting a Charter right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure that trivial objectives or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, the party invoking s.1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the*

objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be proportionality between the effects of the limiting measure and the objective – the more severe the deleterious effects of a measure, the more important the objective must be.

[74] In **R v Edwards Books and Art Ltd** [1986] 2 SCR 713, Dickson CJ modified the test in **Oakes** in respect of the second element of the proportionality test, that the limiting measure should impair the right or freedom *"as little as possible."* Under the modified test, the measure should impair the right or freedom *"as least as is reasonably possible".* McDonald-Bishop JA, with whom the rest of the court concurred in **The Jamaica Bar Association v The Attorney General and the General Legal Council** [2020] JMCA Civ 37, para. [518] endorsed the modified **Oakes** test as a better approach to Charter enquiry. The basis for the preference is stated in this way.

[517] It has been noted by Andrew S Butler (Limiting Rights, page 569), that the Oakes' stipulation at item (ii) above, that in order to be proportionate, a limiting measure must impair the right or freedom "as least as possible" … "came to be regarded as too stringent and too demanding a standard", and so, has been modified. Shortly after R v Oakes, Dickson CJ in R v Edwards Books and Art Ltd, modified that requirement by applying the test of whether the law or the act in question infringes the protected right "as little as is reasonably possible". This is a less stringent test than that in R v Oakes. Indeed, as Andrew S Butler highlighted, there have been Canadian cases, which have replaced the minimal impairment test, which was the focus in R v Oakes, to the concept of "excessive impairment" as the measure (see R v Sharpe [2001] 1 SCR 43 at paragraph 78). This gradual modification in the Oakes test is aimed at causing less restraint on the exercise of Parliament's law making power.

[75] Although we are not here concerned with Parliament's law making power, I believe the modified **Oakes** test which I summarise below is nevertheless

applicable where a rule making power is exercised pursuant to authority delegated by an Act of Parliament, and will be applied here.

(1) Whether the invoked constitutional right has been limited; and
(2) If (1) is answered in the affirmative, whether the measure responsible for a limit is demonstrably justified in a free and democratic society. This test is satisfied where:

a. The objective which a measure or limit is designed to achieve is of sufficient importance (at a minimum, a pressing and substantial concern in a free and democratic society) to warrant overriding the constitutionally protected right or freedom; and
b. The means or limit is reasonable and demonstrably justified, which is answered by a "proportionality test" thus:

i. that the measures designed to meet the objective is rationally connected to the objective (should not be arbitrary, unfair or based on irrational considerations);

ii. that the means used impairs "as little as is reasonably possible" the right or freedom in question; and

iii. that there is proportionality between the effects of the measures limiting the Charter right or freedom and the objective identified as sufficiently important. The more injurious the effects of a measure, the more important the objective must be.

[76] The imprint of the modified **Oakes** test is evident in **Irwin Toy Limited v The Attorney General of Quebec** [1989] 1 S.C.R. 927. The majority

comprising Dickson C.J., Lamer and Wilson JJ found that commercial advertising was in fact protected speech, but that the provisions under the *Consumer Protection Act* which prohibited commercial advertising directed at persons under thirteen years of age, was a demonstrably justified infringement on the right to freedom of expression guaranteed by sections 2(b) and 3 of the of the Canadian and Quebec Charters respectively. The purpose for the prohibition was regarded as pressing, substantial and important, it being aimed at protecting children from advertising. It was rationally connected to and consistent with that objective, minimally impaired the right to freedom of expression, and its effects were not so severe as to outweigh the pressing and substantial objective of the government.

[77] Although there was evidence before the court that other less intrusive options which reflected more modest objectives were available, in the presence of evidence which established the necessity for the restriction to meet the government's objectives, which were themselves reasonably set, the court found the prohibitions to be constitutional. In that regard it was emphatically stated that

> *[the] Court [would] not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups. There must nevertheless be a sound evidentiary basis for the government's conclusions.*

[78] That sentiment followed what may at minimum be regarded as a suggestion that a margin of appreciation or some latitude is allowable to the legislature or rule maker in imposing reasonable objectives and rationally connected limitations on constitutional rights, even though they may not be the least intrusive or least ambitious options. This latitude is permitted where the concern is for the protection of vulnerable groups or mediating between different groups on the one hand, and situations where the government is the sole "antagonist" against an individual on the other hand. The matter was stated thus.

…[I]n matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck. Vulnerable groups will claim the need for protection by the government whereas other groups and individuals will assert that the government should not intrude. In Edwards Books and Art Ltd., supra, Dickson C.J. expressed an important concern about the situation of vulnerable groups (at p. 779):

> *In interpreting and applying the Charter I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.*

When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function. For example, when "regulating industry or business it is open to the legislature to restrict its legislative reforms to sectors in which there appear to be particularly urgent concerns or to constituencies that seem especially needy" (Edwards Books and Art Ltd., supra, at p. 772).

In other cases, however, rather than mediating between different groups, the government is best characterized as the singular antagonist of the individual whose right has been infringed. For example, in justifying an infringement of legal rights enshrined in ss.7 to 14 of the Charter, the state, on behalf of the whole community, typically will assert its responsibility for prosecuting crime whereas the individual will assert the paramountcy of principles of

> *fundamental justice. There might not be any further competing claims among different groups. In such circumstances, and indeed whenever the government's purpose relates to maintaining the authority and impartiality of the judicial system, the courts can assess with some certainty whether the "least drastic means" for achieving the purpose have been chosen, especially given their accumulated experience in dealing with such questions: see Sunday Times v. United Kingdom (1979), 2 E.H.R.R. 245, at p. 276. The same degree of certainty may not be achievable in cases involving the reconciliation of claims of competing individuals or groups or the distribution of scarce government resources…* pp. 993- 994.

[79] As to the applicable burden and standard of proof under the Charter, I believe that questions in those regards can now be considered sufficiently settled. It was addressed in great detail by Sykes CJ in the decision of the Full Court in **Julian J Robinson v The Attorney General of Jamaica** [2019] JMFC Full 04 at paras. [97] to [106] in particular; and by McDonald-Bishop JA a little over a year later in **the Jamaica Bar Association** case. In both it was determined that the presumption of constitutionality of legislation was inapplicable on a Charter enquiry. It is for the party who contends that a limitation on a Charter right is demonstrably justified in a free and democratic society to prove that it is. He must do so at the civil standard, on a balance of probabilities.

[80] Dictum of Dickson CJ in **Oakes** in those regards was cited and applied by both the Full Court and the Court of Appeal, and led McDonald-Bishop JA of the latter to the following determinations.

> *[110] Section 13(2) of the Charter, like section 1 of the Canadian Charter and section 5 of the New Zealand Bill of Rights Act, allocates the burden of proof in Charter cases. I accept the views of Andrew S Butler that the phrase used in the respective sections of the different Charters, "save as is demonstrably justified" suggests that the party seeking to uphold a limit upon a right as being justified will bear the burden of proving it. As Andrew S Butler put it, speaking within the context of the New Zealand Bill of Rights Act: "*

> *"...[T]he purpose of section 5 is to affirm that the [New Zealand Bill of Rights Act] is intended to create a 'culture of justification'."*

The same may be said of section 13(2) of the Charter.

…

[114] … There should be no place for the presumption of constitutionality, coming to the aid of the state in the allocation of the burden of proof in a case such as this, where Charter rights are alleged to be limited by legislative measures. There is a legal onus on the state to justify an infringement, pursuant to section 13(2) of the Charter.

[115] The Constitution expressly provides for its supremacy over Parliament in section 2. In section 13(2)(b), it again, consistent with its supremacy, declares that Parliament shall pass no law and no organ of the state shall take any action to abrogate, abridge or infringe the rights it has guaranteed to every person in Jamaica. Any abrogation, abridgment or infringement, to be upheld as constitutional, must be demonstrably justified in a free and democratic society. It is, therefore, not for the aggrieved individual to show lack of justification but for the state to demonstrate justification, which ought to be measured and tested by reference to the enduring values and essential principles necessary to the survival of a free and democratic society.

…

[121] … The legal burden of proof as well as the evidential burden casts on the state to establish justification would serve to nullify or render nugatory the effect of any presumption that would have been raised in its favour at the outset as to constitutionality of the Regime. It would, therefore, be of no utility to raise a presumption in its favour.

[122] In accordance with the wording of sections 13(1) and (2) of the Charter and the approach advanced in R v Oakes... the starting point [is] that the Charter guarantees the rights and freedoms, which it seeks to protect and that they should not be abrogated, abridged or infringed, unless it can be demonstrated (not merely asserted)

that such abrogation, abridgement or infringement is justified in a free and democratic society. The state, therefore, has the burden to bring justification, upon proof by the appellant of abrogation, abridgement or infringement of a Charter right. This is a positive duty cast on the state to prove constitutionality.

…

[135] … [T] standard of proof that is applicable in Charter cases, even where an Act of Parliament is the subject matter of the complaint, is the civil standard of proof…

[81] In respect of the evidence required to discharge the burden of proof, Sykes CJ quoted Dickson CJ in **Oakes** who held as follows at pages 226-227.

Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the Charter was designed to protect, a very high degree of probability will be, in the words of Denning L.J., "commensurate with the occasion". ***Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the court the consequences of imposing or not imposing the limit****: see L.S.U.C. v. Skapinker, supra, at p. 384; Singh v. Min. of Employment & Immigration, supra, at p. 217.* ***A court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions. I should add, however, that there may be cases where certain elements of the s. 1 analysis are obvious or self-evident.*** *(emphasis added).*

[82] This led Sykes CJ to conclude, which I believe to be correct,

[106] … that in order to establish that a violation can stand, ***other than cases where it is self-evident that the justification is established, evidence will in all likelihood be needed from those who seek to uphold the violation in order to bring the case within the exception.*** *As the learned Chief Justice indicated, the court will need to know the other alternative measures for implementing the objective that were available to the legislators when they made their decision.*

This is importing a high standard of accountability, with which we are not familiar, but this is where the law now is. ***[Emphasis added]***

[83] Although largely concerned with the exercise of parliamentary power and therefore the vertical operation of Charter rights, I find the dicta cited to be applicable on a horizontal application and certainly to the circumstances of the instant case, concerned as it is with the exercise of powers delegated by the Parliament.

[84] For an approach to determining the constitutionality of advertising regulations in respect of a professional body, the Claimant and the Council both rely on the decision of McLachlin J in **The Royal College of Dental Surgeons of Ontario and the Discipline Committee of the Royal College of Dental Surgeons of Ontario v Howard Rocket, D.D.S and Brian Price D.D.S** [1990] 2 S.C.R. 232 (hereinafter called "**Rocket**").

[85] The appellants in **Rocket** were both dentists in Canada and had participated in an advertising campaign. They were charged for breaching parts of regulation 447 made pursuant to section 37 (39) of the Health Disciplines Act which expressly restricted advertising by dentists, and a general professional misconduct provision at section 37 (40) of the said Act. Challenges to the constitutionality of section 37 (39) and an application for a declaration that section 37 (40) was inapplicable were dismissed in the Divisional Court. On an appeal against the dismissal of their constitutional challenge, the Court of Appeal in reversing the decision of court below found that section 37 (39) of the Act infringed the right to freedom of expression which was guaranteed by section 2 (b) of the Canadian Charter, which included the right to engage in commercial advertising and could not be justified under section 1. An appeal against that decision to the Supreme Court was dismissed.

[86] The resolution of the question as to constitutionality was approached in two stages along the line of the decision in **Oakes**. It was found that section 37 (39) prohibited and effectively banned legitimate forms of expression thereby infringing on the right to freedom of expression

guaranteed by section 2 (b) of the Canadian Charter. It limited expression as to content and acceptable modes of advertising being radio, television and the newspapers, apart from the commencement or change of location of a practice. The infringement was not found to be demonstrably justified in a free and democratic society.

[87] The objective of the regulation was regarded as sufficiently important - to maintain a high standard of professionalism and to protect consumers of dental services who were highly vulnerable from irresponsible and misleading advertising. The regulation was found to be rationally connected the objective, but the means used to achieve the objective did not impair the freedom as little as possible and was not proportionate to the objective. The regulation was broadly drafted beginning with an absolute prohibition on all advertising, then provided exceptions to the prohibition. Useful information had been restricted without justification.

[88] While it was concluded that the Charter was not intended to protect economic interest, it was nevertheless determined that the right to freedom of expression was applicable to commercial speech such as advertising on the ground that advertising involved more than economics. Advertising was said to have an intrinsic value as expression, fostered informed economic choices among customers and fulfilled autonomy through the provision of access to information which is necessary or relevant to the exercise of choice by customers.

[89] **Irwin Toy**, in which consumer choice was admitted to have featured more significantly was applied in **Rocket** and the court there concluded at pp. 248-249 thus.

> *Consumers of dental services would be highly vulnerable to unregulated advertising. As non-specialists, they would lack the ability to evaluate competing claims as to the quality of different dentists. Indeed, the practice of dentistry, like other professions, calls for so much exercise of subjective personal judgment that claims about the quality of different dentists may be inherently incapable of verification. Furthermore, the choice of a dentist is, as noted above, a*

relatively important one. The consuming public would thus be far more vulnerable to unregulated advertising from dental professionals than it would be to unregulated advertising from manufacturers or suppliers of many other, more standardized, goods or services. The fact that the provincial legislature here acted to protect a vulnerable group argues in favour of viewing its attempted compromise with some deference…

It is difficult to overstate the importance in our society of the proper regulation of our learned professions. Indeed, it is not disputed that the provinces have a legitimate interest in regulating professional advertising. The maintenance of professionalism and the protection of the public are at the heart of such regulations. As Dubin A.C.J.O. put it:

> *… [unregulated professional advertising] would only encourage the least competent and most unscrupulous dentists to respond in kind to the confusion and detriment of the public and to the diminution of the professionalism of the dental profession. In that respect, I repeat what was stated by Chief Justice Hughes in Semler v. Oregon State Board of Dental Examiners, supra, when he stated:*
>
> > *… the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the "ethics" of the profession is but the consensus of expert opinion as to the necessity of such standards.*

In this passage, Dubin A.C.J.O. identifies two major aims of regulation of professional advertising. The first is maintenance of a high standard of professionalism (as opposed to commercialism) in the profession. The second is to protect the public from irresponsible and misleading advertising. I have earlier observed that in the United States a distinction

has been drawn between restrictions on information about standardized products and restrictions on claims that are inherently not susceptible of verification. If a dentist or other professional claims to be more competent than his or her colleagues, there is no way in which the average consumer can verify that claim. In such circumstances professional regulation of advertising is clearly justified.

I have no difficulty in concluding that it is essential to accord to professional societies the power to regulate the methods by which their members advertise, even though this may infringe the freedom of expression guaranteed to their members by s. 2(b) of the Charter. The only question is whether the regulation here in question meets the second branch of the test under s. 1 - whether the particular limit in question is reasonable and demonstrably justified in a free and democratic society.

[90] It is with the foregoing considerations and principles in mind that I approach the task of determining the constitutionality of the impugned regulations and the processes of the Council which have been challenged by the Claimant.

AREAS OF AGREEMENT AND OF DISPUTE

[91] It was conceded on behalf of the Council that the relevant advertising regulations placed limitations on the Claimant's ability to advertise his practice which would impact, to some extent, some of the Charter rights identified in the pleadings. The rights not impacted were not particularised by the Council. With the exception of the right to life, liberty and security of the person guaranteed by section 13 (3) (a), Counsel Ms. Hall for the Attorney General submitted that the other pleaded Charter rights were engaged in the circumstances of this case.

[92] In *"Additional Submissions*" filed on the 26th October 2021, it was conceded on behalf of the Claimant that the below stated objectives of the advertising regulations and which are set out in the affidavits of the

Chairman of the Council and the Chairman of the Advertising Committee, are in fact sufficiently important. The objectives of the advertising regulations are:

(i) to protect the public from irresponsible and misleading advertising;

(ii) safeguarding the reputation and standing of the legal profession; and

(iii) to maintain a high standard of professionalism.

[93] It was also conceded that the impugned advertising regulations are rationally connected to those sufficiently important objectives. I believe these concessions were inescapable, having regard for example, to the decision in **Rocket** on which both the Claimant and the Council relied.

[94] In consequence of those concessions, where a Charter right is found to be engaged on this claim, the issues are limited to the second and third components of the proportionality test in the modified **Oakes** test and may be framed in the terms below.

(1) Do the means used by the Council impair "as little as is reasonably possible" the right or freedom in question?

(2) Is there proportionality between the effects of the measures limiting the Charter right or freedom, and the sufficiently important objectives identified by the Council?

[95] Both questions are required to be answered in the affirmative if the Council is to discharge the burden placed upon it to prove, on a balance of probabilities, that the limitations imposed by the impugned advertising regulations are demonstrably justified in a free and democratic society.

[96] The Claimant seeks a very wide declaration that canons II (d) (ii), II(e), II(h), II(i), II(j), II(k) and II(l) are unconstitutional as they infringe the rights guaranteed to him by sections 13(3)(a), (c), (d), and (e) of the Charter.

There was attempt to refine the challenges in submissions. Having regard to the nature and scope of the rights, and what I believe forms the substratum of the challenge, I will commence the enquiry with the right enshrined in section 13 (3) (c) of the Charter - the right to freedom of expression.

SECTION 13 (3) (c) CHALLENGE:

The right to freedom of expression.

[97] I do not believe that there is any dispute that commercial speech, advertising in particular, falls for protection under section 13 (3) (c). In **Tomlinson,** Phillips JA in delivering the judgment of the Court of Appeal cited and applied **Irwin Toy** where the majority of the Canadian Supreme Court said this of expression, at pp. 968-970.

> *"Expression" has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content. Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec Charter so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual. …*
>
> *We cannot, then, exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed. Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee…*
>
> *The content of expression can be conveyed through an infinite variety of forms of expression: for example, the written or spoken word, the arts, and even physical gestures or acts. While the*

> *guarantee of free expression protects all content of expression, certainly violence as a form of expression receives no such protection. It is not necessary here to delineate precisely when and on what basis a form of expression chosen to convey a meaning falls outside the sphere of the guarantee. But it is clear, for example, that a murderer or rapist cannot invoke freedom of expression in justification of the form of expression he has chosen...*
>
> *Indeed, freedom of expression ensures that we can convey our thoughts and feelings in non-violent ways without fear of censure.*

[98] The concern here is the advertisement of a legal practice by an attorney. It is not contended that advertisements published were violent and therefore excluded from Charter protection on that basis; or that they did not convey meaning, as advertisements by their very character invariably do. There also cannot be any dispute that the rules made by the Council and reflected in the challenged Canons, or that the Council's orders made pursuant to them and contained in its decision of 26th September 2018 imposed limits on advertising by the Claimant. The right to freedom of expression at section 13 (3) (c) is undoubtedly engaged. As earlier stated, it was conceded that the Council's objectives are sufficiently important and the means adopted by it rationally connected to the objectives.

[99] The Claimant contends however that the means fail the proportionality test and are not demonstrably justified in a free and democratic society as *"[t]here is no published, objective or other guidance that determines what is within acceptable limits or what is outside and therefore misleading."* A part of the evidence in these proceedings is that as at early December 2016, guidelines developed by the Council in 2015, which gave examples of what it considered to be breaches of the Canons were on the Council's website.

[100] That notwithstanding, the Claimant in the *"Additional Submissions"* filed on 26th October 2021 make the submissions below.

a. *There is no guidance such as is provided for in other jurisdictions including the United States and Canada that define the boundaries in (sic) attorneys may legally "speak" or communicate with the public.* [American Bar Association Code [through 1980], New York State Code [through June 1, 2018], Federation of Law Societies of Canada Code [As amended October 19, 2019], Law Society of Manitoba Code [2019] appear in footnote *"as examples that show deference not only to the attorneys (sic) right to speak but also their right to know and respond a fundamental principle that underscores fairness in a free and democratic society."*]

b. *Undisclosed Method of Assessment: The present regulations are arbitrary and unclear as to when the attorney may or may not run afoul of the regulations. The GLC* [Canon II (h) cited in footnote] *has arrogated to itself this unfettered power without more to determine whether the content of the advertising is offensive or not making the regulation also subject to personal tastes, likes or dislikes of the reader without reference to consumer choice the other value of freedom of express (sic).* [Council's letter of 30th January 2018 cited in footnote as an example.]

…

[101] Copies of *the American Bar Association Code [through 1980], New York State Code [through June 1, 2018], Federation of Law Societies of Canada Code [As amended October 19, 2019]* and *Law Society of Manitoba Code [2019*] sought to be relied upon by the Claimant were also filed on the 26th October 2021, the second day scheduled for the hearing of the claim as part of the *"Claimant's Supplemental List of Authorities"*. Ms. Larmond Q.C. on behalf of the Council objected to the Claimant relying on those documents on the ground that they were instruments from other jurisdictions and were being introduced without any evidence being put as to how they are to be interpreted, with the implication that the Court would be required to interpret them. Counsel submitted this was in breach of CPR 31.2. There were also no judicial authorities supplied which interpreted the provisions of the codes the Claimant sought to pray in aid. Ms. Larmond Q.C. conceded that the objection is weakened if the purpose for which the Claimant calls the instruments in aid is to simply show that

they exist but contended that they were being put up as a basis for interpreting the regulations made by the Council.

[102] Mrs. Gibson-Henlin Q.C. regarded the submission as unusual. Counsel contended that it has always been the case, as a matter of law, that the court could have regard to legislation and other instruments other than precedents. Counsel contended that the Claimant proposed to rely on them to demonstrate the existence of other regulations. It was also submitted that CPR 31.2 was inapplicable and that the rule *"would be applicable if for example a contract says that it is to be interpreted or decided based on English Law."*

[103] I do not agree with the limited view taken by Mrs. Gibson-Henlin Q.C. of the rule. CPR 31.2 (1) states that *[t]his rule sets out the procedure which must be followed by a party who intends to adduce evidence on a question of foreign law."* It does not have the limitation proposed to be placed on it. It is applicable in my view, whenever there is a question of foreign law, in whatever context it arises and a party wishes to adduce evidence in respect of the foreign law.

[104] That view notwithstanding, I readily accept that a party may properly rely on decisions of tribunals and authoritative works which concern foreign law, to the extent that they are of relevance to the proceedings. The Claimant here does not merely rely on the codes to demonstrate that they exist, and if he did, questions as to their relevance in resolving the issues on this claim would certainly arise and be determined against him.

[105] The Claimant supplies the codes *"as examples that show deference not only to the attorneys (sic) right to speak but also their right to know and respond a fundamental principle that underscores fairness in a free and democratic society"*, and the boundaries within which attorneys may legally communicate with the public. On my assessment of the proposed use, the codes could only be relevant to demonstrate that the impugned advertising regulations do not meet the test for constitutionality in a free and democratic society. In my judgment they cannot and should not be

permitted to be used for that purpose without precedents of any kind, authoritative works which treat with them, evidence of the particular legal framework under which they were developed, their construction, or of how their constitutionality would be or has been tested in the jurisdictions from which they emanate, to then enable this court to arrive at the conclusion reached by the Claimant as to their character; and even more significantly, to enable the court to arrive at the conclusion that the impugned advertising regulations do not meet the test for constitutionality under the Charter. I find that the codes are irrelevant and are not to be admitted for use in these proceedings. Accordingly, the Council's objection is sustained.

[106] The Chairman of the Advertising Committee avers in her affidavit evidence that it was the Committee that drafted the 2016 amendments to the principal Canons and that as Chairman of the Committee she has personal knowledge of the objectives which the drafters intended to further by those amendments. She was also among the attorneys who consulted with members of the legal profession, conducted seminars to explain the effect of the advertising regulations, and had addressed questions posed by the Jamaica Bar Association (hereinafter called "the JBA") in respect of them.

[107] There is no evidence however on the precise nature and extent of any consultations among attorneys and the JBA in those regards.

[108] While there might be some value in the Council itself publishing widely available guidance on the scope of its standards and the rules developed to give effect to them, I do not believe that their absence is fatal. If there is not that published guidance, the essential question is whether or not the words used in the regulations are clear in accordance with well-established legal interpretative principles. This is evident on the principles set out in the cases discussed below.

[109] In **Luscher v Deputy Minister, Revenue Canada, Customs and Excise**, [1983] B.C.W.L.D. 816, 1985 CanLII 3085 (FCA), it was determined that a limit which is vague, ambiguous, uncertain or subject to discretionary

exercise is unreasonable for that fact alone. Hugessen J in delivering the judgment of the Canadian Federal Court of Appeal stated the matter in this way.

> *[10] In my opinion, one of the first characteristics of a reasonable limit prescribed by law is that it should be expressed in terms sufficiently clear to permit a determination of where and what the limit is.* ***A limit which is vague, ambiguous, uncertain, or subject to discretionary determination is, by that fact alone, an unreasonable limit. If a citizen cannot know with tolerable certainty the extent to which the exercise of a guaranteed freedom may be restrained, he is likely to be deterred from conduct which is, in fact, lawful and not prohibited. Uncertainty and vagueness are constitutional vices when they are used to restrain constitutionally protected rights and freedoms. While there can never be absolute certainty, a limitation of a guaranteed right must be such as to allow a very high degree of predictability of the legal consequences.***
>
> **[Emphasis added]**

[110] Section 1 of the Canadian Charter provides that *"it guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."* It is submitted by the Council that because the words "*a reasonable limit prescribed by law*" do not appear in the Jamaican Charter, it is arguable that the principles relating to constitutional vagueness under the Canadian Charter are inapplicable here. That is an argument with which I cannot agree.

[111] Subject only to sections 18, 49, 13 (9) and (12), the rights under the Charter which are enshrined in the *Constitution* - the supreme law - are guaranteed to each person *"...save only as may be demonstrably justified in a free and democratic society."* It appears to me that the bedrock of the test for constitutionality in **Oakes,** either in its original or modified formulation is the reasonableness of limits imposed on guaranteed rights and freedoms. That test has been accepted in this jurisdiction as being

the applicable test for constitutionality under the Charter, without distinction between the vertical or horizontal application of the rights and freedoms guaranteed.

[112] Such a distinction would in my view be wholly unnecessary in event. In order for a limit to override a constitutional guarantee in a free and democratic society, it cannot be too vague so that it prevents a citizen from knowing the extent to which his rights have be limited. The absence of the words *"a reasonable limit prescribed by law*" in the Charter does not in any way alter that conclusion. It addresses a particular subject matter for which the phraseology is merely more appropriate where guaranteed rights are applied vertically under the Canadian Charter, that is, between individuals and the state. Such language would be inappropriate in the Jamaican Charter which undoubtedly also applies horizontally between natural and juristic persons, having regard to the nature of the right and duty imposed by it as enacted in sections 13 (4) and (5).

[113] The more attractive of the Council's argument in this regard is that the threshold for invalidating a law which is alleged to limit a constitutionally guaranteed right or freedom is relatively high and has not been met in the circumstances of this case. I find that there is merit in this submission.

[114] The Council relies on **Young v Young** [1993] 4 R.C.S. 3, pp. 73-74 where L'Heureux-Dubé J after stating that the Canadian Supreme Court had occasion to consider the concept of vagueness of legislative provisions under the Canadian Charter said this.

> *… While these cases all dealt with vagueness in the criminal context, a number of principles may be derived from this jurisprudence which are useful in the present context.* ***The underlying concern is that a legislative provision be capable of providing a framework or guide within which judicial decisions can be made. The threshold for constitutional violation due to vagueness in legislative provisions is relatively high, and it is not necessary that such provisions carry a precise technical meaning or provide certainty as to the result (R. v. Butler,***

supra; Osborne v. Canada (Treasury Board), supra, and R. v. Nova Scotia Pharmaceutical Society, supra). Rather, the standard requires that the provisions permit the framing of an intelligible legal debate with respect to the objectives contained in the legislation.

[Emphasis added]

[115] In **Osbourne v Canada Treasury Board** [1991] 2 S.C.R. 69, also relied on by the Council, Sopinka J stated that vagueness of legislative provisions is significant in two ways.

> *Vagueness can have constitutional significance in at least two ways in a s. 1 analysis. A law may be so uncertain as to be incapable of being interpreted so as to constitute any restraint on governmental power. The uncertainty may arise either from the generality of the discretion conferred on the donee of the power or from the use of language that is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools. In these circumstances, there is no "limit prescribed by law" and no s. 1 analysis is necessary as the threshold requirement for its application is not met. The second way in which vagueness can play a constitutional role is in the analysis of s. 1. A law which passes the threshold test may, nevertheless, by reason of its imprecision, not qualify as a reasonable limit. Generality and imprecision of language may fail to confine the invasion of a Charter right within reasonable limits. In this sense vagueness is an aspect of over breadth.*
>
> *This Court has shown a reluctance to disentitle a law to s. 1 scrutiny on the basis of vagueness which results in the granting of wide discretionary powers. Much of the activity of government is carried on under the aegis of laws which of necessity leave a broad discretion to government officials. See R. v. Jones, [1986] 2 S.C.R. 284, United States of America v. Cotroni, [1989] 1 S.C.R. 1469, and R. v. Beare, [1988] 2 S.C.R. 387. Since it may very well be reasonable in the circumstances to confer a wide discretion, it is preferable in the vast majority of cases to deal with vagueness in*

the context of a s.1analysis rather than disqualifying the law in limine. In this regard, I adopt the language of McLachlin J. in Canada (Human Rights Commission) v. Taylor, [1990] 3 S.C.R. 892, at p. 956:

> *That is not to say that the alleged vagueness of the standard set by the provision is irrelevant to the s. 1analysis. For reasons discussed below, I am of the opinion that the difficulty in ascribing a constant and universal meaning to the terms used is a factor to be taken into account in assessing whether the law is "demonstrably justified in a free and democratic society". But I would be reluctant to circumvent the entire balancing analysis of the s. 1test by finding that the words used were so vague as not to constitute a "limit prescribed by law", unless the provision could truly be described as failing to offer an intelligible standard…*

[116] The Claimant having conceded that the Council's objectives were sufficiently important and the advertising regulations rationally connected to them, the constitutional significance of vagueness in this case must be in the second sense envisioned by Sopinka J, that is, by reason of imprecision, they do not qualify as a reasonable limit to guaranteed rights and freedoms and are therefore unconstitutional. I now turn to the impugned canons.

Canon II (d) (ii): *"… an Attorney may advertise in connection with the attorney's practice provided that such advertising: shall not be misleading or deceptive or likely to mislead or deceive or is likely to create an unjustified expectation."*

[117] It was submitted by the Council that the words used are capable of judicial interpretation and that *"an attorney armed with a dictionary can be certain as to what the canon prohibits and can take steps to avoid breaching it."* I agree and would make a like observation in respect of all the canons challenged by the Claimant.

[118] Although the meaning of the words "mislead" and its derivative "misleading", "deceive" or its derivative "deceptive", "likely", "create", "unjustified" and "expectation" used in the provision have not been set out in the canons, they are in my view ordinary English words, the meanings of which are clear in the context of each provision and the Canons as a whole.

[119] The Oxford Paperback Dictionary & Thesaurus (3rd edn, 2009) for example, defines the following words, to the extent necessary thus.

> ***[M]islead [-] verb (misleads, misleading, misled)*** *give someone a wrong impression or information.*
>
> ***[D]eceive [-] verb (deceives, deceiving, deceived) 1*** *deliberately make someone believe something that is not true.* ***2*** *(of a thing) give a mistaken impression.*
>
> ***[D]eceptive [-] adjective*** *giving a false impression.*
>
> ***[I]mpression [-] noun 1*** *an idea, feeling, or opinion.* ***2*** *the effect that something has on someone…*
>
> ***[L]ikely [-] adjective (likelier, likeliest) 1*** *probable* ***2*** *promising.*
>
> ***[P]robable [-] adjective*** *likely to happen or be the case.*
>
> ***[C]reate [-] verb (creates, creating, created) 1*** *bring into existence.* ***2*** *cause something to happen…*
>
> ***[U]njustified [-] adjective*** *not justified; unfair.*
>
> ***[J]ustify [-] verb (justices, justifying, justified) 1*** *prove something to be right or reasonable.* ***2*** *be a good reason for…*
>
> ***[E]xpectation [-] noun 1*** *belief that something will happen or be the case.* ***2*** *a thing that is expected to happen.*

[120] As seen from the ordinary meaning of the foregoing words, the limitation on an attorney's expression in respect of advertising his practice, which is imposed by canon II (d) (ii) is generally that the advertising should not give the audience or consumer if you will, the wrong information, a wrong or false impression; or the advertising should not be one which is likely or will probably cause the audience or customer to have an incorrect or unreasonable belief that something will happen or be the case. Canon VIII (d) prescribes that canon II (b) breaches constitute misconduct in a

professional respect, and that the attorney in breach is subject to any of the orders contained in section 12(4) of the LPA. The standard is clear and when read together with the disciplinary regulation, as it must be, there is also a very high degree of predictability of the consequences for an attorney who is in breach of canon II (b) (ii). The regulation is not vague.

[121] Every consumer of legal services has a right to information which enables him to make informed choices is these regards. Any expression in advertising which is of a character of the advertising prohibited by Canon II (d) (iii) would undermine this significant consumer interest and offend the dignity and integrity of the legal profession which each attorney must assist in maintaining.

[122] In my view the measure also satisfies the test of proportionality in that it infringes as little as is reasonably possible on an attorney's Charter right to freedom of expression and is proportionate to the objectives of the Council in implementing the measure, not least of which is the protection of the public from irresponsible and misleading advertising by attorneys. Canon II (d) (ii) is therefore a self-evident and obviously demonstrably justified limit on the right to freedom of expression in a free and democratic society.

Canon II (e): *Except as allowed by this Canon, an attorney shall not, directly or indirectly, apply to a person who is not then or who has not been his client for instructions for professional business save for institutions who customarily accept applications for the provision of legal services.*

Canon II (l): *An attorney shall not permit his professional standing to be used for the purpose of advertising any particular product, service or commercial organization.*

[123] These regulations, in respect of which the Claimant makes similar arguments, may for that reason be considered together.

[124] Again, the words used in these regulations are ordinary English words, the meanings of which can easily be had by reference to a dictionary in the language should it be required. Pursuant to canon VIII (d) a breach of canon II (e) constitutes misconduct in a professional respect subjecting an attorney to any of the orders contained in section 12 (4) of the LPA.

[125] Pursuant to section 12 (7) (a) of the LPA which empowers the Council to make rules prescribing standards of professional etiquette and professional conduct for attorneys, the Council is to direct that specified breaches of the rules made constitute misconduct in a professional respect for the purposes of Part IV of the Act. While the Council has prescribed a standard at canon II (l), it has not directed that its breach constitutes misconduct in a professional respect.

[126] The meaning of the words in these canons are clear and there is also a very high degree of predictability of the legal consequences for an attorney who is in breach of either. As observed by Hugessen J in **Luscher** (supra), *"[u]uncertainty and vagueness are constitutional vices when they are used to restrain constitutionally protected rights and freedoms. While there can never be absolute certainty, a limitation of a guaranteed right must be such as to allow a very high degree of predictability of the legal consequences."* A breach of canon II (e) having been specified as constituting misconduct in a professional respect, it may properly be the subject of a complaint to the Disciplinary Committee upon which any of the orders at section 12 (4) of the LPA may be made. A breach of canon II (l) not having been specified to constitute misconduct in a professional respect however, it cannot be the subject of such a complaint or enable an attorney to be subject to any of the orders at section 12 (4) of the LPA. The regulations are not vague.

[127] The Claimant nevertheless contends in his *"Additional Submissions"* that canons II (e) and (l) are unnecessary having regard to the general provisions which place restrictions on advertising and prays in aid the decision in **Assie v The Institute of Chartered Accountants of Saskatchewan** 2001 SKQB 396.

[128] In **Assie** the Queen's Bench Division of the Judicial Centre of Saskatoon granted declarations sought by the applicant, a partner in a chartered accounting firm, that bylaws 301.2 and 214 of the Institute of Chartered Accountants were invalid on the basis that they contravened the right to freedom of expression guaranteed by s. 2(b) of the Canadian Charter; and an order prohibiting the Discipline Committee of the Institute from proceeding to hear a complaint against the applicant to the said bylaws.

[129] The applicant's firm developed a "business advisory model" to determine and set benchmarks for performance of dental practices in the Saskatoon area. It required them to assemble data from a number of dental practices, the sufficiency of which would enable the firm to develop benchmarks to analyse dental practices, identify opportunities for growth and improvements in profitability for dentists who participated in the study. In that regard the firm sent letters to dentists in the area describing the proposal and to determine their interest in participating in the project. One such letter was sent to a dentist who was already represented by a firm of chartered accountants. A complaint was made to the Institute that the letter violated certain of its regulations restricting advertising and solicitation of clients. The relevant bylaws, as appears at paragraphs 4 and 35 of the judgment read as follows.

> *301.1*
> *Members shall not adopt any method of obtaining or attracting clients which tends to bring disrepute on the profession.*
>
> *301.2*
> *A member shall not directly or through a party acting on behalf of and with the knowledge of the member solicit any professional engagement which has been entrusted to another member engaged in the practice of public accounting or who carried on a business or practice which constitutes a related function.*
>
> *214 Fee Quotations*
> *A member shall not quote a fee for any professional service unless requested to do so by a client or a prospective client and no quote*

shall be made until adequate information has been obtained about the assignment.

General Advertising

217.1 A member may advertise, but shall not do so, directly or indirectly, in any manner:

(a) which the member knows, or should know, is false or misleading, or

(b) which contravenes professional good taste or fails to uphold normal professional courtesy, or

(c) which makes unfavourable reflections on the competence or integrity of the profession or any member thereof, or

(d) which includes a statement the contents of which the member cannot substantiate.

[130] The restraints at 217.1 were considered reasonable restrictions on the right to advertise in light of the objectives of the Institute in maintaining high standards of professionalism and preventing advertising which is misleading or confusing. Smith J at para. [36] found that byelaws 301.2 and 214 *"… clearly go beyond these sensible restraints and set out absolute prohibitions against unsolicited fee quotation and solicitation of business, directly or indirectly, from another chartered accountant."*

[131] The reason for the court's decision in respect of the challenged bylaw is fivefold.

(i) They did not appear to be designed to protect consumers, which objective was achieved by bylaw 217.1;

(ii) they operated to restrict the flow of information to potential clients, which they might find useful;

(iii) that the limitations cannot be justified solely on the basis that they prevent competition among chartered accountants for clients;

(iv) that the suggestion that any competition for clientele among chartered accountants is *per se* unseemly and unprofessional was inconsistent with decisions in *Re Grier and Alberta Optometric Association et al.* 42 D.L.R. (4th) 327 (Alta. C.A.) and *Bratt v. British Columbia Veterinary Medical Assn*. 2 C.P.R. (4th) 417 (B.C.S.C.) which approved, in the public interest, the publication of price quotes for professional services to the extent that they do not otherwise violate legitimate rules designed to restrain misleading professional advertising; and

(v) that competition becomes unseemly and unprofessional when it misleads, contravenes good taste, makes unfavourable reflections on the competence and integrity of other members or includes subjective claims of superiority which cannot be substantiated, which was already covered by bylaw 217.1.

[132] Upon an examination of the Canons in their entirety, with a view to identify areas of superfluity, as submitted by the Council I find that **Assie** is distinguishable from the instant case. On my examination of the Canons, so far as may be relevant to canons II (e) and II (l), a number of the them may be said to be implicated in one way or other. They are as follows.

> Canon II (b)
> *An attorney shall not in the carrying on of his practice or otherwise permit any act or thing which is likely or is intended to attract business unfairly or can reasonably be regarded as touting.*
>
> Canon II (bb)
> *Touting is defined as seeking/soliciting instructions from potential clients by the use of persistent, pushy or annoying tactics whether directly or indirectly.*
>
> Canon II (c)

An Attorney shall not endeavour by direct or indirect means to attract the clients of his fellow Attorneys and where one Attorney refers a client to another Attorney, the client remains the client of the referring Attorney and the Attorney to whom the client is referred shall act with due deference to the relationship between the client and the referring Attorney.

Canon II(d)

An Attorney may advertise in connection with the attorney's practice provided that such advertising:

- *(i) shall not be false in any material particular;*
- *(ii) shall not be misleading or deceptive or likely to mislead or deceive or likely to create an unjustified expectation;*
- *(iii) shall not be vulgar, sensational or of such frequency or otherwise such as would or would be likely to adversely affect the reputation or standing of any attorney or the legal profession;*
- *(iv) shall not claim or imply superiority for the attorney over any or all other attorneys;*
- *(v) shall not make any reference to the fact that the attorney has held judicial appointment;*
- *(vi) shall not name a member of staff in the advertisement unless that member of staff is an attorney qualified to practice and, where the attorney named in the advertisement is not a partner, the status of the attorney must be expressly stated and any of the following terms used alone or in combination will be deemed a sufficient indication of the status of such person, namely, associate, assistant, consultant;*
- *(vii) shall not contain any claim or words to the effect or implying that the attorney is a specialist, expert, leader or an established or experienced practitioner in any field of practice or generally although it may contain a statement of the fields of practice in which the attorney will or will not accept instructions except that an attorney who has obtained a certificate of accreditation in an area of law pursuant to and in accordance with an accreditation scheme*

approved by the General Legal Council, may advertise the fact of that accreditation, and may be identified as a "specialist", "accredited specialist" or "accredited attorney" in the area of law to which the certificate of accreditation relates.

[133] In my view, the scope of canons II (e) and (l) are entirely different from other provisions in the Canons.

[134] While canon II (c) is aimed at preventing one attorney from attracting an existing client of a fellow attorney, canon II (e) has a different aim. It is the evidence of the Chairman of the Advertising Committee that the prohibition *"helped protect prospective clients from being unduly influenced, intimidated or encouraged to litigate by attorneys who may be fuelled by the pursuit of wealth"* but nevertheless arose out of consideration *"that there was room for relaxing the canon in light of the practice of many corporate clients inviting attorneys to be placed on their panel of attorneys. It therefore carved out an exception for those circumstances."*

[135] To "apply", which is contemplated by canon II (e), is to make a formal application or request which appears to me to be distinct from advertising generally, and the content prohibitions at canon II (d). The prohibitions at canon II (b) and (bb) in respect of touting relate to the use of persistent, pushy or annoying tactics whether directly or indirectly to seek or solicit instructions for potential clients. This method prohibition is also distinct in my opinion, from making an application to an institutional customer who customarily accepts such applications.

[136] It is my own view that cannon II (e) is really an exception to the historical prohibition against solicitation by attorneys, allowing it in respect of institutional clients who may already have one or more attorneys on a panel for that purpose, and who customarily accept applications for the provision of legal services. It is not superfluous and unnecessary as contended by the Claimant.

[137] I arrive at the same conclusion in respect of canon II (l) which is concerned not with the advertising of the legal practice of an attorney or his firm but the use of one's standing as an attorney to advertise particular products, services or commercial organizations. There is no other regulation which is concerned with this prohibition.

[138] The measures at canons II (e) and II (l) are not unnecessary.

[139] The relevant enquiry is whether the measures limit as little as is reasonably possible the right to freedom of expression and are proportionate to the objectives of the Council.

[140] I believe canon II (e), in light of the right to advertise subject to the limitations at Canon II (d), infringes as little as reasonably possible on the right to freedom of expression guaranteed by the Charter and is proportionate to the objectives of the Council. Together they allow an attorney to advertise his practice generally so that potential customers of legal services are provided relevant information to make informed choices with regard to instructing an attorney, while allowing attorneys to make direct applications to institutional customers who have customarily chosen to accept such applications. In these circumstances canon II (e) is proportionate to the objectives of the Council in safeguarding the reputation and standing of the legal profession which may have a trade component as reflected in an attorney's ability to charge fees for legal services, but remains overwhelmingly a public service.

[141] I also find that the measure at canon II (l) limits as little as is reasonably possible the constitutionally guaranteed right to freedom of expression and is proportionate to the objectives of the Council. The advertising of products, services or commercial organizations is not in any way connected to an attorney's legal practice and cannot be regulated by the Council with a view to achieving any of the admitted laudable objectives if an individual uses his standing as an attorney at law to advertise those products, services or commercial organizations. The canon does not prevent an individual *per se* from advertising non-legal services but simply

restricts his standing as an attorney, an officer of the Supreme Court, being used to advertise services which are not connected with an attorney's practice area - the law.

[142] In the foregoing premises, I believe it to be self-evident and obvious that canons II (e) and II (l) are demonstrably justified limitations to the right to freedom of expression in a free and democratic society.

Canon II(h): *The General Legal Council may by notice in writing to any attorney order:*

(i) the alteration, withdrawal, removal or discontinuance of an advertisement;

(ii) the alteration or discontinuance of the use of a business card by an attorney;

where the Council is of the opinion that the advertisement or business card contravenes the provisions of the canon.

Canon II (i): *The Council may, having regard to the matters referred to in the above clause, by notice in writing to an attorney order him to cease or limit the lectures, talks, public appearances, transmissions or publications in which he participates, either absolutely or upon conditions.*

Canon II(j): *An attorney shall forthwith comply with any order given by the Council pursuant to clauses (h) and (i) hereof.*

Canon II(k): *(i) An attorney shall be responsible, in so far as it is or should be within his control, to ensure that any publicity relating to his practice or the practice of his firm is done in accordance with these Canons, whether such publicity is done by him, his employee or any other person on his behalf.*

(ii) Where an attorney becomes aware of any impropriety in any publicity relating to his practice or the practice of his firm, he shall be responsible, in so far as it is or should be within his control, to use his best endeavours to rectify or withdraw the publicity, and he shall at all times ensure that the General Legal Council is informed in writing as regards such matter.

(iii) Where it appears to the General Legal Council that any publicity relating to the practice of an Attorney or his firm is contrary to these Rules, it may, without prejudice to its powers under the Act, after making due inquiry regarding the publicity, order the Attorney or the firm, or both to alter, modify withdraw, remove or discontinue the publicity.

[143] The words and terms used in the foregoing canons are ordinary English words and terms which are capable of being interpreted judicially. Breaches of any of them are effectively misconduct in a professional respect, for which an attorney is subject to any of the disciplinary orders at section 12 (4) of the LPA. Accordingly, the canons are not vague.

[144] Canons II (h), II (i), II (j) are related to each other and have some similarities with canon II (k) (iii), which conveniently enables them to be dealt with together. Before doing so however, I address the provisions at canon II (k) (i) and (ii) two which are in my view, entirely capable of individual Charter scrutiny.

Canons II (k) (i) and II (k) (ii)

[145] Canon II (k) (i) places the responsibility on an attorney to ensure that publicity relating to his practice or that of his firm is in accordance with the provisions of the Canons, whether the publicity was done by his employee or some other person on his behalf. An attorney's responsibility is not at large however, but is to the extent that the publicity is or should be in his control. Canon II (k) (ii) places the responsibility on an attorney who becomes aware of impropriety in any publicity relating to his practice or the practice of his firm, to use his best endeavours to rectify or withdraw the publicity, to the extent that the publicity is or should be within his control; and also to ensure that the Council is kept informed in writing of any such matters. It is the evidence of the Chairman of the Advertising Committee that Canon II (k) would protect the Council's objectives by encouraging attorneys to take steps which would ensure that publicity of

their legal practices were done in compliance with the Canons, even if the publicity was done by a third party.

[146] The assignment of responsibility to an attorney for publicity in respect of a legal practice in the above circumstances does not appear to me to be constitutive of a *prima facie* breach of the right to freedom of expression, on account that they do not proscribe expression in form or content. To the extent that they are aimed at enforcing or promoting observance of what may be described as content regulations however, I find that they trespass as little as is reasonably possible on the attorney's right to freedom of expression and that there is proportionality between them and the objectives of the Council. I believe that to be self-evident and obvious.

[147] Advertising is generally a means of bringing to the attention of the public products, services, opinions and the like with a view to having them respond to that which is being advertised in a certain way. What it is not is a legal service, which is the concern of members of the legal profession. The Council was established pursuant to section 3 of the LPA and has as its concern the legal profession and in particular, and so far as is relevant, the function of upholding standards of professional conduct.

[148] The Council is without the power to prescribe standards of conduct for any other group or person who may be concerned in the advertising of a legal practice and it is therefore reasonable that provision is made as to the circumstances in which an attorney is to be regarded as responsible for ensuring that publicity relating to his practice or that of his firm do not contravene the prescribed standards of his profession; to use his best endeavours to rectify or withdraw offending publicity when he becomes aware of it, to the extent that any of those things are or should be in his control; and to advise the regulator of the profession of such matters. The provisions do not go too far in meeting the Council's admitted important objectives.

[149] In consequence, it is my judgment that canons II (k) (i) and II (k) (ii) are necessary and demonstrably justified limitations on the attorney's right to freedom of expression in a free and democratic society.

Canons II (h), II (i), II (j) and Canon II (k) (iii)

[150] Under canon II (h), the power reserved to the Council is not at large but is limited to advertisements or business cards that, in the opinion of the Council, contravene the provisions of the Canons. In its exercise the Council may make an order for the alteration, withdrawal, removal or discontinuation of an advertisement, or the alteration or discontinuation of the use of a business card by an attorney. The breach of this canon is prescribed as constituting misconduct in a professional respect.

[151] Canon II (i) empowers the Council, based on the matters at canon II (h) to further order an attorney to cease or limit the lectures, talks, public appearances, transmissions of publications in which he participates, either absolutely or upon condition. Breach of this canon is not specified as misconduct in a professional respect but a breach of canon II (j) has been so designated. Canon II (j) prescribes that an attorney shall forthwith comply with any order given by the Council pursuant to canons II (h) and II (i). Consequently, an attorney's failure to comply with an order of Council made pursuant to canon II (i) effectively enables the attorney alleged to be in breach to be subject to any of the disciplinary orders at section 12 (4) of the LPA.

[152] Cannon II (k) (iii) permits the Council to order an attorney or his firm, or both, to alter, modify, withdraw, remove or discontinue publicity which is contrary to the rules, after making due enquiry in respect of the publicity. Breach of Canon II (k) is also specified as constituting misconduct in a professional respect.

[153] The Chairman of the Advertising Committee acknowledges in evidence that the effect of canons II (h), II (i) and II (k) (iii) is similar, in that they permit the Council to order modification or removal of advertisements believed to be in contravention of the Canons. She goes on to aver that

stakeholders write to the Council from time to time to complain about advertisements which they believe are in breach the Canons and are detrimental to the public or the reputation of the profession. Canons II (h), II (i) and II (k) (iii) she says, allow the Council to intervene in those circumstances. It is the evidence of the Chairman of the Council that when the Council intervenes it is merely trying to achieve compliance by an attorney and proceedings in those regards are not disciplinary but compliance proceedings. He also avers that if an attorney refuses to regularise his advertising in breach of the orders made by Council pursuant to that process, any Council member may escalate the matter by making a formal complaint to the Disciplinary Committee in accordance with section 12 of the LPA. While the approach of the Council may be regarded as noble, I am unable to find that canons II (h), II (i) and II (k) (iii) are demonstrably justified limits on an attorney's right to freedom of expression in a free and democratic society.

[154] On the Council's own evidence, the powers given to it by canons II (h), II (i) and II (k) (iii) do not appear to enable it to meet the specific objective of ensuring compliance with the advertising regulations. In the words of the Chairman of the Advertising Committee which appear at paragraph 19 of her affidavit, after her averment that canons II (h), II (i) and II (k) (iii) allow the Council to intervene when it receives complaints of alleged breaches of the advertising regulations:

> 19. [t]*he GLC does not have the power to sanction an attorney for breaching the canons. Its power is regulatory and not disciplinary. Canon II (j) requires compliance with any order to remove an advertisement but the GLC cannot sanction an attorney who refuses to comply.*

[155] If the orders made pursuant to canons II (h), II (i) and II (k) (iii) cannot, except by moral persuasion, ensure compliance with the established advertising standards, I am unable to discern the necessity for the inclusion of these particular canons. Contrary to the submission of the Council that **Assie** is distinguishable and should not apply, I find that the overarching principle emanating therefrom, that where the measures

limiting a guaranteed right go beyond existing sensible regulatory restraints, they are in effect unnecessary.

[156] In the face of the averments by the Chairman of the Council and the Chairman of the Advertising Committee of the inability of the orders of the Council to secure compliance by an attorney with the advertising regulations; the existence of canons which prescribe advertising and publicity standards; ascribe responsibility to an attorney for advertising and publicity relating to his practice or his firm; assign responsibility to an attorney to use his best endeavours to rectify or withdraw improper publicity of which he is aware to the extent it is or should be in his control; regulations which require an attorney to keep the Council informed of such matters; and which specifically prescribe that breach of most of the advertising canons constitute misconduct in a professional respect, I cannot find that the provisions at canons II (h), II (i) and II (k) (iii) limit as little as is reasonably possible the attorney's right to freedom of expression or that they are proportionate to the stated objective. They go too far.

[157] In all the foregoing premises, the Claimant's contention that the impugned advertising canons and proceedings of the Council succeeds in part. I find that canons II (h), II (i), II (j) and II (k) (iii) are unconstitutional, void and of no legal effect. They have not been proved on a balance of probabilities to be demonstrably justified limits on an attorney's right to freedom of expression which is a guarantee of a free and democratic society. In the result, any orders made by the Council in purported exercise of the powers given to it by these unconstitutional canons are themselves void and of no legal effect. I find however, that the measures contained in canons II (d) (ii), II (e), II (l), II (k) (i) and II (k) (ii) are demonstrably justified limitations on the attorney's constitutional right to freedom of expression in a free and democratic society and are therefore constitutional.

SECTION 13 (3) (d) CHALLENGE

The right to seek, receive, distribute or disseminate information, opinions and ideas through any media.

[158] The Claimant contends that the right guaranteed to him by section 13 (3) (d) of the Charter, in particular, to distribute or disseminate information through any media has been breached.

[159] Phillips JA in delivering the judgement of the Court of Appeal in **Tomlinson**, accepted the argument of the appellant's counsel that "media" in section 13 (3) (d) included the respondent private television broadcaster. The literal definition of the word as appears in the Concise Oxford Dictionary (11th edn revised) was ascribed. "Media" is defined there as the *"main means of mass communication (especially television, radio and newspapers) regarded collectively."*

[160] That approach to the construction of the other words appearing in the provision recommends itself. According to the Oxford Paperback Dictionary & Thesaurus (3rd edn, 2009), the meaning of the verbs *"distribute"* and *"disseminate"* are to *"hand or share out to a number of people"* and *"spread information widely"* respectively. I see no basis for departing from these meanings of the words.

[161] It is the Claimant's contention, which I am inclined to accept, that 'media' at section 13 (3) (b) of the Charter should be taken to include social media.

[162] It was aptly opined by P. Williams J (as she then was) in **Tomlinson** that the right guaranteed by section 13 (3) (d) of the Charter may properly be viewed as a complementing and supplementing the right to freedom of expression which is protected by section 13 (3) (c).

[163] The Claimant submits that the Council's decision to restrict him from advertising on social media was a breach of the right guaranteed by the Charter. I observe that the order is not as broad as the Claimant suggests however. For the record, he was prohibited from engaging in any further advertisements of the type or character referred to in certain paragraphs of the Council's order which concerned an electronic billboard located at Half-Way Tree, Ticker Tape advertisement, Facebook, Instagram and other social media platform, without the prior approval of the Council.

[164] The mischaracterisation notwithstanding, the order is said to have been made pursuant to canons II (h), II (i) and II (j) which I have already found are unconstitutional on the ground that they are not demonstrably justified limitations on the right to freedom of expression in a free and democratic society. In consequence of that finding, and for like reasons, the order of the Council limiting the Claimant from advertising his or his firm's legal practice on social media without the prior approval of the Council, constitutes a breach the complementary right under section 13 (3) (d) to distribute or disseminate information through any media.

[165] It is also contended that canons II (d) (ii), II (e) and (l) imposed restrictions on the right to distribute or disseminate information through any media and are not demonstrably justified limitations in a free and democratic society *"for the reasons submitted in relation to the breach of sections 13 (3) (a) and (c)*." I have already concluded that there was no merit to the Claimant's submissions in those regards, for the reasons already set out in the preceding analysis in relation to the right to freedom of expression. For reasons to be stated later, I find that the claim of an alleged breach of section 13 (3) (a) is also without merit.

SECTION 13 (3) (e) CHALLENGE

The right to freedom of peaceful assembly and association.

[166] So far as I have been able to glean from the submissions, the Claimant's argument in this regard is that canon II (l) places an absolute ban on the Claimant's right to advertise or associate with commercial products.

[167] I have earlier found, in respect of the same submission raised in the context of the Claimant's right to freedom of expression, that canon II (l) does not prevent an individual *per se* from advertising non-legal services but simply restricts his standing as an attorney, an officer of the Supreme Court, being used for purposes unconnected to legal practice.

[168] No authority was cited by the Claimant or any other participant in the proceedings for that matter, as to the scope of the right to freedom of

association in the context of the Charter and the test for constitutionality under it.

[169] In **Banton and others v Alcoa Minerals of Jamaica Incorporated and Others** [1971] 17 W.I.R. 275, a case cited by the Attorney General, freedom of association which was then protected by section 13 (b) of the Constitution was discussed in relation to a workers' right to belong to a trade union of his choice. Graham-Perkins J cited with approval at p. 286 the dictum of Lord Donovan in the Privy Council decision in **Collymore v the Attorney General of Trinidad and Tobago** (1969) 2 All ER 1207, 1211 where the following statement by Sir Hugh Wooding CJ in the court below was quoted with approval.

> *"… [F]reedom of association means no more than freedom to enter into consensual arrangements to promote the common interest objects of the association group. The objects may be any of many. They may be religious or social, political or philosophical, economic or professional, educational or cultural, sporting or charitable. But the freedom to associate confers neither right nor licence for a course of conduct or for the commission of acts which in the view of Parliament are inimical to the peace, order and good government of the country."*

[170] As to the right now guaranteed under the Charter, I find assistance in Canadian jurisprudence. The right to association is guaranteed by section 2 (d) of the Canadian Charter, on which the Supreme Court of Canada has had occasion to rule. In a majority judgment delivered by Bastarache J in **Dunmore v Ontario (Attorney General)** 2001 SCC 94 (CanLII), [2001] 3 SCR 1016, paras. [14] - [18], the origin and progress of jurisprudential thought on the scope of the right was chronicled. Bastarache J stated:

> *18 [i]n sum, a purposive approach to s. 2(d) demands that we "distinguish between the associational aspect of the activity and the activity itself", a process mandated by this Court in the Alberta Reference (see Egg Marketing, supra, per Iacobucci and Bastarache JJ., at para. 111). Such an approach begins with the*

> *existing framework established in that case, which enables a claimant to show that a group activity is permitted for individuals in order to establish that its regulation targets the association per se (see Alberta Reference, supra, per Dickson C.J., at p. 367).* ***Where this burden cannot be met, however, it may still be open to a claimant to show, by direct evidence or inference, that the legislature has targeted associational conduct because of its concerted or associational nature. [Emphasis added]***

[171] A summary of the existing framework referenced appears in the dictum of Sopinka J in **Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)***, 1990 CanLII 72 (SCC), [1990] 2 S.C.R. 367 ("PIPSC"), at pp. 401-2* who stated as follows.

> *Upon considering the various judgments in the Alberta Reference, I have come to the view that four separate propositions concerning the coverage of the s. 2(d) guarantee of freedom of association emerge from the case:* ***first, that s. 2(d) protects the freedom to establish, belong to and maintain an association; second, that s. 2(d) does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association; third, that s. 2(d) protects the exercise in association of the constitutional rights and freedoms of individuals; and fourth, that s. 2(d) protects the exercise in association of the lawful rights of individuals****. [Emphasis again added]*

[172] As to the purpose of freedom of association, Bastarache J stated:

> *15 In addition to the four-part formulation in PIPSC, supra, an enduring source of insight into the content of s. 2(d) is the purpose of the provision. This purpose was first articulated in the labour trilogy and has accordingly been used to define both the "positive" freedom to associate as well as the "negative" freedom not to (see Alberta Reference, supra; Lavigne v. Ontario Public Service Employees Union, 1991 CanLII 68 (SCC), [1991] 2 S.C.R. 211, at p. 318; R. v. Advance Cutting & Coring Ltd., [2001] 3 S.C.R.*

209, 2001 SCC 70). In defining this purpose, McIntyre J. stressed, in Alberta Reference, supra, at p. 395, the unique power of associations to accomplish the goals of individuals:

> *While freedom of association like most other fundamental rights has no single purpose or value, at its core rests a rather simple proposition: the attainment of individual goals, through the exercise of individual rights, is generally impossible without the aid and cooperation of others. "Man, as Aristotle observed, is a 'social animal, formed by nature for living with others', associating with his fellows both to satisfy his desire for social intercourse and to realize common purposes." (L. J. MacFarlane, The Theory and Practice of Human Rights (1985), p. 82.)*

This conception of freedom of association, which was supported by Dickson C.J. in his dissenting judgment (at pp. 334 and 365-66), has been repeatedly endorsed by this Court since the Alberta Reference (see PIPSC, supra, per Sopinka J., at pp. 401-2, per Cory J. (dissenting), at p. 379; R. v. Skinner, 1990 CanLII 107 (SCC), [1990] 1 S.C.R. 1235, per Dickson C.J., at p. 1243; Lavigne, supra, per La Forest J., at p. 317, per Wilson J., at p. 251; per McLachlin J. (as she then was), at p. 343). In Lavigne, Wilson J. (writing for three of seven judges on this point) conducted an extensive review of this Court's s. 2(d) jurisprudence, concluding that "this Court has been unanimous in finding on more than one occasion and in a variety of contexts that the purpose which s. 2(d) is meant to advance is the collective action of individuals in pursuit of their common goals" (p. 253). Wilson J. added that the Court has remained steadfast in this position despite numerous disagreements about the application of s. 2(d) to particular practices.

16 As these dicta illustrate, the purpose of s. 2(d) commands a single inquiry: has the state precluded activity <u>because</u> of its associational nature, thereby discouraging the collective pursuit of common goals?...

[173] The dicta in the cases are persuasive and I find them suitable for application to the right guaranteed by section 13 (3) (e) of the Charter, whether on a horizontal or vertical application. They make it apparent that individual rights such as the rights to freedom of expression and to distribute and disseminate information are important means to enjoyment of freedom of association. It is therefore unsurprising that the latter right has been held in Canada to protect *"… the exercise in association of the constitutional rights and freedoms of individuals; and…the exercise in association of the lawful rights of individuals."*

[174] While it is my view that canon II (l) does engage the right to freedom of association in preventing an attorney from using his standing in the profession for the purpose of advertising particular products, services or commercial organizations, which measure could be said to be tied to the thinking that "lawyering" is not at its core a trade but has as its primary concern the provision of a public service, the measure passes the test for constitutionality.

[175] As stated previously, the advertising of products, services or commercial organizations is not in any way connected to an attorney's legal practice and would be outside the supervisory remit of the standard setting and supervisory body for the legal profession. If an individual is permitted to use his standing as an attorney to advertise as now proscribed by canon II(l), the Council would be stymied in achieving its admitted laudable objectives of safeguarding the reputation and standing of the legal profession, and in maintaining a high standard of professionalism. The measure is rationally connected to the Council's objectives.

[176] The measure also interferes with the right to freedom of association as little as is reasonably possible and is proportional to the objectives of the Council. It does not prohibit association in pursuit of commercial objectives altogether but merely proscribes use of standing as a member of the legal profession for the purpose of advertising services unconnected to legal practice. In my judgment, it is obvious and self-evident that the

measure is a justified derogation from the right to freedom of association guaranteed by section 13 (3) (e) of the Charter.

SECTION 13 (3) (a) CHALLENGE

The right to life, liberty and security of the person and the right not to be deprived thereof except in the execution of the sentence of a court in respect of a criminal offence of which the person has been convicted.

[177] The Claimant's submissions in respect of the Charter rights at section 13 (3) (a) invoke allegations of breach of the rights to liberty and security of person in that:

(i) the letters sent to him from the Advertising Committee served no purpose other than to harass and police his expression in the context that:

a. the Advertising Committee established under the 1998 Amendments was no longer in existence, following the revocation of provisions which established it pursuant to the 2016 Amendments; and

b. the requirement under the 1998 Amendments for an attorney to seek and obtain prior approval of advertisements before publication was revoked by the 2016 Amendments;

(ii) the conduct of the Council, commencing with its letter dated 27th December 2012 and ending with the decision rendered on 26th September 2018, placed an unreasonable restriction on his right to freedom of expression; and

(iii) canon II (l) places an absolute ban on his right to advertise or associate with commercial products, which affects his right to earn his livelihood in circumstances where he is not engaged in an unlawful activity.

[178] Ms. Hall for the Attorney General submitted that the rights to liberty and security of person are not engaged in the circumstances of this case. While I am also of that view, I have come to it on an entirely different path from that traversed by Ms. Hall, whose conclusion is based on an entreaty to the Court to narrowly interpret the rights guaranteed by section 13 (3) (a) as being limited to the physical liberty of the person. That is not the approach to be taken to the interpretation of Charter rights.

[179] Ms. Hall prayed in aid the decision of the Court of Appeal in the **Jamaica Bar Association case** (supra) in contending that the Court of Appeal *"… recognised that Strasbourg jurisprudence confines the right to liberty contained in Article 5 of the European Convention on Human Rights (which is similar to section 13(3)(a) of the Charter) within narrow limits and confined it to physical liberty, but does not expressly say whether section 13(3)(a) should be confined within those narrow limits."* I do not believe the attribution to the Court of Appeal is correct. In the first instance, the narrow limit recognised by Strasbourg jurisprudence and to which the Court of Appeal made reference is in respect of the "deprivation of liberty", which is but one aspect of the rights guaranteed by the section. McDonald-Bishop JA stated:

> *[325] In Secretary of State for the Home Department v JJ and others [2007] UKHL 45, it was established that the word "liberty" has a range of meanings. In a narrow sense, it may mean physical freedom to move, so that deprivation of liberty would be physical incarceration or restraint. In a wider sense, it may mean the freedom to behave as one chooses. The words deprivation of liberty, it said, should be interpreted in the narrow sense of physical incarceration or restraint. This is the sense adopted in the Strasbourg jurisprudence and applied by the Full Court.*

[180] Further, Charter rights are not to be narrowly interpreted and this was put beyond doubt by McDonald-Bishop JA in stating as follows.

> *[328] … [A]s the Full Court opined, there must, nevertheless, be a broad and purposive approach to the interpretation of the Charter.*

> *This is necessary to give full effect to the liberty rights as guaranteed. This approach would be in keeping with the intention of its framers. In Minister of Home Affairs and another v Fisher, Lord Wilberforce pointed to the need for a, "generous interpretation" that is suitable to give to individuals the full measure of the fundamental rights and freedoms guaranteed to them by the Constitution.*

[181] It was accordingly concluded that the right to liberty guaranteed by section 13 (3) (a) comprised two distinct albeit intertwined rights - the right not to be deprived of liberty and the simple and fundamental right to be free from impositions on one's personal liberty. Ahead of so concluding, McDonald-Bishop JA said this.

> *[310] A thorough reading of the Charter reveals that section 13(3)(a) not only protects the right not to be deprived of liberty but also the fundamental rights to life, liberty and security of the person. It is well-established that along with the right to life, the right to liberty is one of the most valued of all human rights. In Maneka Gandhi v Union of India 1978 AIR 597, the Supreme Court of India, in discussing the expression, "personal liberty, within the ambit of Article 21 of the Constitution of India, explained that personal liberty is of the "widest amplitude" and covers "a variety of rights which go to constitute the personal liberty of man". Hence, the right to liberty should be twinned with the right not to be deprived of it.*

[182] While not framed as a submission to the court, having regard to the authorities relied on by the Claimant in invoking the right to liberty and security of the person, it is clear that he is contending that they are not to be restricted to physical restraint of the person.

[183] The Claimant relies on the dictum of Kopstein, Prov. Ct. J in **R v Cunningham** 31 C.C.C. (3d) 223, a decision of the Provincial Court (Criminal Division), in which **Reference re s. 94(2) of the Motor Vehicle Act (1985)** was applied. Both decisions are concerned with the right guaranteed by section 7 of the Canadian Charter which provides that *"[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of*

fundamental justice." It was held that the right to life, liberty and security of the person are three related rights which are part of one context, each standing on their own; and that the court must give meaning to each element which make up the right.

[184] Section 13 (3) (a) of the Jamaica Charter provides for *"the right to life, liberty and security of the person and the right not to be deprived thereof except in the execution of the sentence of a court in respect of a criminal offence of which the person has been convicted."*

[185] Although the terms of the exceptions to the rights under both formulations are clearly differently phrased, they each, in my view, guarantee at a fundamental level the very same rights. The rights to life, liberty, security of the person and the concomitant right not to be deprived of them except in accordance with law. I find support for this conclusion in the dictum of McDonald Bishop JA in **the Jamaica Bar Association case** where the following was stated in respect of the construction of section 13 (3) (a) of the Charter by the Full Court.

> *[329] … the Full Court ... in adopting the narrow sense of the word liberty as meaning incarceration or physical restraint, ought to have construed section 13(3)(a) by an examination of the actual words used in that section, while having regard to the provisions of the Charter, read as a whole. Had the Full Court employed that broad and purposive approach, it would have recognised the two distinct liberty rights secured by section 13(3)(a) as well as the intimate connection between section 13(3)(a) and sections 13(3)(p) and 14… the Full Court would have recognised that the Charter in treating with liberty rights is not as fundamentally different, in terms and effect, from section 7 of the Canadian Charter, as it had opined. [The learned Justice of Appeal goes on to state that] [t]his similarity arises from the fact that the specific qualifier in section 14 of the Charter [which provides that a person should not be deprived of his liberty] "except on reasonable grounds and in accordance with fair procedures established by law", is not so far removed, if, at all it is, from the qualifier in section 7 of the Canadian Charter, "except in*

accordance with the principles of fundamental justice". Principles of fundamental justice must include reasonableness as well as substantive and procedural fairness, which is recognised by the Charter.

[330] Our constitutional framework offers no less protection to the liberty rights of persons in Jamaica than the Canadian Charter. Restriction on liberty in Jamaica must be on reasonable grounds and in accordance with fair procedures, established by law, just as it must be in accordance with principles of fundamental justice in Canada.

[186] In consequence of the foregoing, and in approaching the construction of section 13 (3) (a) in a purposive manner, the approach of the Canadian courts in regarding the right to life, liberty and security of the person as three related rights which stand on their own although forming part of one context; and in ascribing the responsibility to the court to give meaning to each element which constitutes the enshrined right, recommends itself.

[187] As to the nature of the rights, I again find assistance in **Cunningham** and **Carter v Canada (Attorney General)** [2015] 1 R.C.S. 331 which were relied upon by the Claimant. In both cases the rights to life, liberty and security of the person at section 7 of the Canadian Charter were regarded as abstract rights which though they may not have any relation to legal processes, may nevertheless undermine the rights guaranteed; and that they are associated with other protected rights which would give effect to them.

[188] **Cunningham** was concerned with the prohibition in the Criminal Code aimed at eliminating street prostitution. Under one provision it was a criminal offence for persons in a public place or place open to public viewing from stopping or attempting to stop or communicate with any person for the purpose of engaging in prostitution or obtaining the sexual services of a prostitute. In the other, the keeping of a common bawdy house; being an inmate or being found without lawful excuse in a common bawdy house; and knowingly permitting a place or any part thereof to be

let or used for the purposes of a common bawdy house. The impugned provisions had the effect of supressing entirely the occupation or business of prostitution, neither of which were illegal in Canada. It was determined that the right to life, liberty and security of the person included the right to conduct a lawful business, which the legislation could not supress only by virtue of it having been enacted for an important public interest. There was evidence of viable alternatives which could be as effective in eliminating the problem of street prostitution while impairing less the liberty of prostitutes and their customers. Accordingly, the court found that the limit was not such a reasonable one and was not demonstrably justified in a free and democratic society.

[189] In **Carter** it was found that parts of the Criminal Code, insofar as they prohibited competent adults suffering serious and irremediable medical conditions which caused intolerable and enduring suffering from engaging physician-assisted dying, infringed the rights to liberty and security of the person.

[190] Of the right to liberty and security of the person, Kopstein Prov. Ct. J in **Cunningham** said this at pages 229-230.

> *… "[L]iberty" within the meaning of s. 7 of the Charter may be properly considered by this court as beyond the idea of physical restraint and detention.*
>
> *In advancing that view that s.7 protects the individual from potential deprivations of liberty, beyond physical restraint and detention, I venture that it protects the liberty of that other dimension, those liberties mentioned in the American cases cited which may be broadly described as including the right to freedom of choice in respect of life-style, occupation and within the latter the right to make one's living in any manner not contrary to law.*
>
> *Similarly, the s.7 right to "security of the person", may protect rights in a different realm than the rights protected by other sections of the Charter. Again, in my view, the right to "security of the person" is*

an abstract right which may relate, in part at least, to actions by the State that have no relation to legal processes, but which may, none the less, undermine the security of the person. To take a blatant example, the exercise of the freedom of opinion or expression which is disturbing to the government or one of its agencies would be worth little, if upon the expression of an opinion the person expressing himself or herself suddenly found that he or she were the subject of great attention from the police, such as spot checks at every corner, constant observation, persistent questioning, or other forms of harassment. Other more subtle forms of harassment might be imagined. While in Canada, those possibilities seem remote, that kind of harassment would undermine the security of the person and it is in that context, I think, that the right to "security of the person" enacted finds its meaning.

[191] In **Julian Robinson**, a case concerned with the constitutionality of the National Identification and Registration Act, which the Court ordered unconstitutional, null, void and of no legal effect, Mr. Robinson contended, among other things, that privacy rights existed under section 13 (3) (a) of the Charter. The Attorney General contended, like Ms. Hall now does, that the right to liberty was to be restricted to personal liberty. Sykes CJ concluded that the right to life, liberty and security of the person guaranteed by section 13 (3) (a) of the Charter went beyond physical restraint of the person and includes protection against any forced intrusion on the part of the state. This follows reference to Canadian authorities which dealt with the point. Among the authorities cited in arriving at that conclusion was **Blencoe v British Columbia (Human Rights Commission)** 190 DLR (4th) 513, 2000 SCC 44 (CanLII), [2000] 2 SCR 307 which was also applied in **Carter**, an authority cited by the Claimant.

[192] The court in **Carter** said this in respect of the right to liberty and security of the person.

[64] Underlying both of these rights is a concern for the protection of individual autonomy and dignity. Liberty protects "the right to make fundamental personal choices free from state interference: Blencoe v British Columbia (Human Rights Commission), 2000

> *SCC 44, [2000] 2 S.C.R. 307, at para. 54.* ***Security of the person encompasses "a notion of personal autonomy involving… control over one's bodily integrity free from state interference" (Rodriguez, at pp. 587-88, per Sopinka J., referring to R. v. Morgentaler, [1988] 1 S.C.R. 30) and it is engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering (New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 S.C.R. 46, at para. 58; Blencoe, at paras. 55-57; Chaoulli, at para. 43, per Descamps J.; para. 119, per McLachlin C.J. and Major J,; and paras. 191 and 200, per Binnie and LeBel JJ.)***

[193] **Blencoe** [2000] 2 SCR 307 concerned a state-caused delay in the human rights proceedings against a former minister of Government who was removed from Cabinet and dismissed from his party's caucus following the filing of a sexual harassment complaint. Two other complaints followed and there was intense media scrutiny which caused him to suffer severe depression. Hearings into the allegations against him were scheduled before the British Columbia Human Rights Tribunal over 30 months after the initial complaints were filed against him with the Human Rights Commission which was charged with investigating the allegations. The minority having declared that the matter should be resolved on the basis of administrative law principles, rendering an opinion on the application of s. 7 of the Canadian Charter unnecessary, the majority determined that the statutory Commission, though independent of government, derived its powers therefrom and that the government programme was susceptible to Charter scrutiny. It was nevertheless found that the Canadian Charter rights of liberty and security of the person had not been engaged in the circumstances of the case. Per McLachlin C.J. and L'Heureux-Dubé, Gonthier, Major and Bastarache JJ at pp. 309-310:

> *[s]ection 7 of the Charter can extend beyond the sphere of criminal law, at least where there is state action which directly engages the justice system and its administration…*

In order for s. 7 to be triggered, one must first establish that the interest in respect of which the respondent asserted his claim falls within the ambit of s. 7. The liberty interest protected by s. 7 is no longer restricted to mere freedom from physical restraint. "Liberty" is engaged where state compulsions or prohibitions affect important and fundamental life choices. The s. 7 liberty interest protects an individual's personal autonomy. In our free and democratic society, individuals are entitled to make decisions of fundamental importance free from state interference. Such personal autonomy, however, is not synonymous with unconstrained freedom…

The right to security of the person guaranteed by s. 7 protects the psychological integrity of an individual. However, in order for this right to be triggered, the psychological harm must result from the actions of the state and it must be serious…

First, the s. 7 rights of "liberty and security of the person" do not include a generalized right to dignity, or more specifically a right to be free from the stigma associated with a human rights complaint. While respect for the inherent dignity of persons is clearly an essential value in our free and democratic society which must guide the courts in interpreting the Charter this does not mean that dignity is elevated to a free-standing constitutional right protected by s. 7. The notion of "dignity" is better understood as an underlying value. Like dignity, reputation is not a free-standing right. Neither is freedom from stigma. Second, the state has not interfered with the ability of the respondent and his family to make essential life choices. In order for security of the person to be triggered in this case, the impugned state action must have had a serious and profound effect on the respondent's psychological integrity. It is only in exceptional cases where the state interferes in profoundly intimate and personal choices of an individual that state-caused delay in human rights proceedings could trigger the s. 7 security of the person interest. Here, the alleged right to be free from stigma associated with a human rights complaint does not fall within this narrow sphere. The state has not interfered with the

respondent's right to make decisions that affect his fundamental being.

[194] Although not the subject of argument before the court, I observe that Canadian jurisprudence has to a large extent regarded the purpose of the rights guaranteed by section 7 of the Charter as guarding against interference or deprivations which arise on the interaction by the individual with the "justice system and its administration". This was the subject of dictum by McLachlin CJ who was in the majority in **Gosselin v Quebec (Attorney General)** [2002] 4 S.C.R. 429, 2002 SCC 84.

[195] In that case the appellant - a welfare recipient in a class action suit on behalf of welfare recipients under 30 years old - contended that the regime under the social security scheme developed by the government of Quebec in 1984 violated section 7 of the Canadian Charter in subjecting members of the class of litigants to differential social security assistance. The scheme set the base amount of welfare payable to persons under the age of 30 years old at roughly one third of that payable to those 30 years old and over. Persons under 30 years old could increase their welfare payments to either the same or within $100 of the base amount payable to those 30 years old and over however, if they participated in one of three education or work experience programs.

[196] McLachlin CJ stated:

> *76 As emphasized by my colleague Bastarache J, the dominant strand of jurisprudence on s. 7 sees its purpose as guarding against certain kinds of deprivation of life, liberty and security of the person, namely, those "that occur as a result of an individual's interaction with the justice system and its administration": New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 S.C.R. 46, at para. 65. "[T]he justice system and its administration" refers to "the state's conduct in the course of enforcing and securing compliance with the law" (G. (J.), at para. 65). This view limits the potential scope of "life, liberty and security of the person" by asking whom or what s. 7 protects against. Under this narrow interpretation, s. 7 does not protect against all measures that might*

in some way impinge on life, liberty or security, but only against those that can be attributed to state action implicating the administration of justice: see Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123 (the "Prostitution Reference"), at pp. 1173-74, per Lamer J. (as he then was), writing for himself; B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315, at paras. 21-23, per Lamer C.J., again writing for himself alone; and G. (J.), supra, for the majority. This approach was affirmed in Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307, 2000 SCC 44, per Bastarache J. for the majority.

78 This Court has indicated in its s. 7 decisions that the administration of justice does not refer exclusively to processes operating in the criminal law, as Lamer C.J. observed in G. (J.), supra. Rather, our decisions recognize that the administration of justice can be implicated in a variety of circumstances: see Blencoe, supra (human rights process); B. (R.), supra (parental rights in relation to state-imposed medical treatment); G. (J.), supra (parental rights in the custody process); Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.), [1997] 3 S.C.R. 925 (liberty to refuse state-imposed addiction treatment). Bastarache J. argues that s. 7 applies only in an adjudicative context. With respect, I believe that this conclusion may be premature. An adjudicative context might be sufficient, but we have not yet determined that one is necessary in order for s. 7 to be implicated.

79 In my view, it is both unnecessary and undesirable to attempt to state an exhaustive definition of the administration of justice at this stage, delimiting all circumstances in which the administration of justice might conceivably be implicated. The meaning of the administration of justice, and more broadly the meaning of s. 7, should be allowed to develop incrementally, as heretofore unforeseen issues arise for consideration. The issue here is not whether the administration of justice is implicated - plainly it is not - but whether the Court ought to apply s. 7 despite this fact.

> *80 Can s. 7 apply to protect rights or interests wholly unconnected to the administration of justice? The question remains unanswered. In R. v. Morgentaler, [1988] 1 S.C.R. 30, at p. 56, Dickson C.J., for himself and Lamer J. entertained (without deciding on) the possibility that the right to security of the person extends "to protect either interests central to personal autonomy, such as a right to privacy". Similarly, in Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, at p. 1003, Dickson C.J., for the majority, left open the question of whether s. 7 could operate to protect "economic rights fundamental to human . . . survival". Some cases, while on their facts involving the administration of justice, have described the rights protected by s. 7 without explicitly linking them to the administration of justice: B.(R.), supra; G. (D.F.), supra.*
>
> *81 Even if s. 7 could be read to encompass economic rights, a further hurdle emerges. Section 7 speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of these. Such a deprivation does not exist in the case at bar.*

[197] While I am not bound by any of the dicta in the Canadian cases, I find the principles espoused in them to be highly persuasive and arrive at the conclusion that the right to liberty of the person and the right not to be deprived of it as enshrined in section 13 (3) (a) of the Charter includes physical liberty but also extends to the right to exercise personal autonomy in respect of choices which are *"fundamentally and inherently personal*" and which go to *"the core of what it means to enjoy individual dignity and independence",* to borrow the phrase attributed to La Forest J in **Godbout**. I am also of the view that the right to security of the person is capable of being applied to an individual's psychological integrity; and that any harm

or threatened harm to the rights must be causally connected to the limitation, be serious and profound to fall within the ambit of the protected rights.

[198] That conclusion is unaffected by the fact that the stand alone but contextually connected rights guaranteed by section 13 (3) (a) of the Charter are guaranteed to every person *"except in the execution of the sentence of a court in respect of a criminal offence of which the person has been convicted*".

[199] While it might be tempting to instinctively associate and limit the rights to life, liberty and security of the person and the corresponding right not to be deprived of them with physical restraint, particularly when the exception to their enjoyment is premised on the execution of a sentence of the court in respect of conviction for a criminal offence, to do so ignores the reality that sentences on a criminal conviction are not limited to interference with the physical person.

[200] Under the **Criminal Justice Reform Act** for example, the court is permitted to deal with a person who has attained age eighteen and has been convicted of a criminal offence which is not excluded under the Act, in any manner prescribed by law instead of imposing a sentence of imprisonment. In that regard there are provisions for a wide range of non-custodial sentences which include but are not limited to community service, curfew, forfeiture and restitution orders, which by their nature may deprive a convict, at the time of their performance or execution, of the freedom to do those things which may be of value to the individual, the pursuit of which will often determine the quality of the human life, an important aspect of the human existence.

[201] Further, to limit the rights guaranteed by section 13 (3) (a) to the physical and thereby exclude other aspects of being falls woefully short of the recognition by the framers of the Charter at section 13 (1) (b) that each person is entitled to preserve for themselves as well as future generations the fundamental rights and freedoms to which they are entitled *"… by*

virtue of their inherent dignity as persons and as citizens of a free and democratic society."

[202] It was observed by McDonald-Bishop JA, consistent with Canadian jurisprudence, that the restrictions on liberty in Jamaica must be on reasonable grounds and in accordance with fair procedures established by law, as it must be in accordance with principles of fundamental justice in Canada. I agree and would conclude likewise in respect of the other stand-alone rights to life and security of the person and the right not to be deprived thereof, which are part of the same context.

[203] In enacting that each person is entitled to the rights and is not to be deprived of them *"except in the execution of the sentence of a court in respect of a criminal offence of which the person has been convicted*", I am also of the view that at a minimum, the guarantees at section 13 (3) (a) include matters connected to an individual's interaction with the justice system and its administration.

[204] Whatever may be the precise scope of the boundaries of the justice system and its administration, it is also my judgment that the activities of the Council in the circumstances of this case make them amenable to Charter scrutiny. While I would not go so far to regard the Council as an organ of the state as the Claimant contends, there is certainly a public element to the Council. It is established by statute and exercises rule making and disciplinary powers over attorneys who are officers of the Supreme Court and who are engaged in the provision of what is truly a public service in their professional capacity, notwithstanding that they are permitted to charge fees. The question is whether the rights have been engaged in the circumstances of this case.

[205] It appears to me that implicit in the Claimant's contention that canon II (l) places an absolute ban on his right to advertise or associate with commercial products thereby affecting his right to earn his livelihood in circumstances where he is not engaged in an unlawful activity, is an argument that the rights to liberty and security of the person should include

the right to use his professional standing as an attorney for the purpose of advertising particular products, services or commercial organizations which are unconnected to legal practice, which is currently prohibited by canon II (l). If I am correct in my appreciation of the contention, it is my view that it is without merit.

[206] The authorities demonstrate that the right to liberty concerns interference with important, fundamental and inherently personal life choices. The choice of an individual to earn or not earn a livelihood may well be regarded as being of such a character.

[207] If the individual exercises his choice by electing to earn a livelihood, he may also choose to obtain an education which earns him some professional qualification and may choose to apply to be admitted as a member of the profession where that is a requirement. Those are inherently fundamental life choices.

[208] Where the profession is regulated, controlled, or maintained if you will, so that it operates properly, and the individual applies for admission into it, it must be taken to be with his acceptance - which is itself an exercise of an inherently personal choice to earn his livelihood as a member of the particular profession - that in his professional capacity, the personal autonomy which he may have as individual may be circumscribed by the rules and regulations of the profession.

[209] His admission to the profession is not an inherently personal choice however, because rules and regulations for admission may well lead to the conclusion that he is not suitable to be admitted as a member. If he is fortunate enough to be admitted, and so long as he continues to be a member, the inherent personal autonomy which he continues to have as an individual is properly circumscribed by the rules and regulations of the profession which are put in place to regulate it, to the extent that they are lawful. This is the position of the Claimant, an admitted and continuing member of the legal profession. I have already determined that the Canon II (l), in addition to being *intra vires* the powers of the Council under the

LPA is also a demonstrably justified limitation on an attorney's right to freedom of expression and associated rights in a free and democratic society and is therefore constitutional and valid.

[210] Although the court held in **Cunningham** (supra) that the like rights in the Canadian Charter included the right to conduct a lawful business, that case is distinguishable from the instant. The prostitutes were not a part of a regulated profession and could not be said to have consented - in exercising the important, fundamental and inherently personal choice to earn a livelihood by engaging in the lawful business of prostitution - to having their individual autonomy in providing those very services circumscribed by rules or regulations imposed by the state.

[211] In respect of the Claimant's complaint that the letters sent to him from the Advertising Committee established by the Council served no purpose other than to harass and police his expression, it is my view that the Council is permitted to establish operational committees such as the 2016 Advertising Committee to assist it with its various functions. Those functions may properly include the periodic review of advertising by attorneys and the offering of such expertise as its members may have in assisting attorneys to comply with the rules, notwithstanding the absence of provisions in the Canons permitting it to do so. Where the matter is not resolved through communication with the attorney, the Advertising Committee makes a report to the Council. The authority of any member of the said committee to form an opinion that advertising by an attorney is in breach of the canons and to then make a report or complaint to the Council is not dependent on any power given by the Council. Any person feeling aggrieved by the conduct of an attorney is permitted to do so on account that the Council is the statutorily enabled supervisor and regulator of the legal profession in Jamaica.

[212] As it relates to orders made by the Council, although they and canon II (l) placed restrictions on the Claimant's right to freedom of expression they do not prevent the Claimant from earning a livelihood as an attorney nor do they prevent him in his personal capacity from choosing to earn a

livelihood through commercial advertising or commercial association, he is simply prohibited from using his standing as an attorney in doing so.

[213] Accordingly, while the right to freedom of expression and associated rights have in fact been engaged, breaches of which could enable the rights to liberty and security of the person enshrined in section 13 (3) (a) of the Charter to also be engaged in an appropriate case, there is no evidence of conduct on the part of the Council, whether by itself or through its 2016 Advertising Committee which rises to the level of serious and profound harm which the authorities, correctly in my view, contemplate as being within the ambit of the protected rights. I therefore find, as submitted on behalf of the Attorney General, that there is no engagement of the rights to liberty and security of the person guaranteed by section 13 (3) (a) of the Charter in the circumstances of this case, albeit for entirely different reasons.

SECTION 16 (2) CHALLENGE

In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law.

[214] I begin with the Claimant's submissions in relation to the breach of the rights guaranteed to him by section 16 (2) of the Charter so that their scope may be properly determined. This then enables me to make an assessment as to whether any of the guarantees at section 16 (2) have been engaged in the first instance, and if they have been, to determine whether limitations thereon are demonstrably justified in a free and democratic society.

[215] In his *"Additional Submissions"* the Claimant contends as follows.

> *…*
>
> *c. The consequences of a breach [of the Canons] will result in a finding of professional misconduct and is so serious that the*

haloed principle of natural justice which is also enshrined in section 16(2) Charter should not be lightly subverted…

d. ***The means used to determine the attorney's right of access to the independent institution and adjudication of the Disciplinary Committee****. The GLC as the regulatory entity, "affected party" should not be the arbiter of whether the advertisement runs afoul of the regulations as this offends the principles of the separation of the judge from the affected party and from each "judge" in the adjudication process. There must be true independence – and there is a body set up for this by law.* [Paragraph 38 of the Affidavit of the Chairman of the Council where the creation and general remit of the Council and the Disciplinary Committee under the LPA are averred to and cited in footnote.]

e. *In this context, Canons II(d)(ii), II(h), II(j)* [Paragraphs 3, 6 and 7 of the Affidavit of the Chairman of the Council in support of complaint to the Disciplinary Committee cited in footnote] - *then form the basis of a complaint to the proper authority after the GLC has already pronounced that the attorney is in breach. There is no justice in this as it breaches a fundamental tenet of judicial independence* [Judge William Birtles, "The Independence of the Judiciary" in Francis Neate et al (eds), The Rule of Law, Perspectives from Around the Globe, reprinted 2009 and 2013 LexisNexis) cited in footnote] *so that justice will not be seen to be done. It was intended that the Disciplinary Committee be institutionally shielded and separate from the institution of the Council as the administrative arm of the regulator. A decision of Council must perforce, even if only by appearance, [reference is made in footnote that the decision of the Council is attached to the Affidavit filed by its Chairman in support of the complaint to the Disciplinary Committee], have some influence on the Disciplinary Committee thereby subverting the right to an independence (sic) tribunal and also a fair hearing.*

[216] In his initial submissions filed 22nd October 2021, he makes several contentions which I summarise below.

(i) The hearing before the Council was unfair as the Chairman who presided over it was tainted by apparent bias. According to the Claimant, the Chairman was predisposed to being biased because he had signed a letter of 30th January 2018 where he described the Claimant's tickertape advertisement during the Grammy's as "particularly egregious".

(ii) That the hearing before the Council was unfair as it failed to disclose that the Insurance Association of Jamaica (IAJ) had initiated the complaint in consequence of which the Claimant was unable to put evidence forward in support of his case.

(iii) The Chairman of the Council did not follow the procedure set out in the Disciplinary Rules thereby denying him a fair hearing and right of access to the Disciplinary Committee which is by law established to hear and consider breaches of the canons, including the advertising rules.

(iv) The Council conducted a full hearing into the matter the subject of the Chairman's complaint to the Disciplinary Committee, and a retrial before the Disciplinary Committee is likely to be unconstitutional and unfair as it is highly likely that the Committee will come to the same conclusion of the Council.

[217] The premise of the submissions summarised at (ii) and (iv) above are not supported by the evidence in the proceedings.

[218] Firstly, the complaint from the IAJ to the Council is dated 7th March 2019, approximately fourteen months from the Advertising Committee's letter of 27th December 2017 indicating that a certain advertisement had come to its attention, and some five months after the decision of the Council on

26th September 2018. On the evidence and on a simple mathematical exercise, the IAJ could not have initiated the complaints the subject of the hearings before the Council, which culminated in its decision of 26th September 2018. Further, the complaint from the IAJ concerned "a recent television advertisement" whereas the hearings before the Council were concerned with advertising in various media including billboard, social media and ticker tape advertising.

[219] Second, there is also no evidence that a formal complaint to the Council by an external stakeholder was the trigger for the Notice of Hearing of 30th April 2018. The notice references the letter from the Chairman of the Council dated 6th March 2018 where advertising records were sought, and alluded to the failure to produce the information requested by the Council within seven days of request as required by Canon II (f). The Claimant and his firm were also advised that a complaint had been received from Calabar High School in respect of the unauthorised use of its trademark. In respect of the latter, the Council was advised that a congratulatory message had been published and that the publication was not done for a commercial purpose. While the Council had asked that a written apology be sent to the school, the Council had not ascertained if it had been done and it made no orders in respect of that particular complaint.

[220] Third, the advertisement which is the subject of the complaint to the Disciplinary Committee is that which was published to the Instagram account @bignalllaw on or about 4th December 2018, over two months after the decision of the Council on 26th September 2018 which remained on the said Instagram account at the date of the complaint made by the Chairman of the Council to the Disciplinary Committee dated 25th July 2019. Again, a simple mathematical exercise demonstrates the impossibility of the Claimant's contention that the Council had conducted a full hearing into the matter the subject of the complaint to the Disciplinary Committee.

[221] Those matters aside, as I understand the Claimant's submissions, the hearing before the Council is being challenge on three broad grounds: (i)

*ultra vires, (ii) violat*ion of the principle of separation of powers and (iii) bias.

[222] I will address each in turn after remarking briefly on the approach suggested by the authorities in determining whether the rights guaranteed by section 16 (2) of the Charter are engaged.

[223] The Claimant relies on the decision of the Full Court in **Ernest Smith & Co. (A firm) et al v Attorney General of Jamaica** [2020] JMFC Full 7, and the following statement by E. Brown J at para. [3]:

> *Section 16 (2) of the Charter is a near cousin of the previous section 20 (1) of the old Bill of Rights section. That is to say, as was said of section 20(1) in Bell v The Director of Public Prosecutions [1985] 1 AC 937 (Bell v DPP),* ***section 16 (2) is a composite of three discrete rights: entitlement to a fair hearing; fair hearing within a reasonable time; and by an independent and impartial court or authority established by law****. I quote section 16 (2): "In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law". So understood, I agree with the submission of learned counsel for the claimant Thompson, that section 16 (2) is a compendious statement of the fundamental right to due process. Indeed, the Charter declares this to be so in section 13 (3) (r). The subsection specifically references the right to due process as provided in section 16.* **[Emphasis added]**

[224] The case was concerned with the reasonable time guarantee for a fair hearing and there was no discussion on the other rights guaranteed by section 16 (2), being the right to a fair hearing and a fair hearing by an independent and impartial court or authority established by law. I nevertheless find some guidance in the dictum of Brooks JA (as he then was) in **Shawn Campbell and others v R** [2020] JMCA App 41 in those regards. It was among the appellants' complaints in that case that the delay of the court in delivering its judgment had breached their right to a

fair hearing as guaranteed by section 16 (1) of the Charter which provides that ***"****[w]henever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."*

[225] During the course of the judgment there was occasion to remark on the approach to determining whether there has been a fair hearing as guaranteed by the Charter. Although the authority was not cited in argument, I believe the principles which I propose to reference and rely are uncontroversial. Brooks JA cited with approval at paras. [13] and [14], dicta of de la Bastide PCCJ and Pollard JCCJ in **R v Mitchell Lewis** [2007] CCJ 3 (AJ), (2007) 70 WIR 75 as to how the determination is to proceed. The learned President, with whom five of the other Justices agreed in **Mitchell Lewis** said this at para. [43]:

> *"[13] … [w]e do not… accept what appears to have been the view of Lord Keith that the question whether a case has received 'a fair hearing' within the meaning of the relevant constitutional provision, can never be a question of interpretation of that provision.* ***More often than not what will be involved in the answering of this question, is the application of some well-established rule as to what does or does not constitute a fair hearing, to the facts of the particular case.*** *In the instant case, that rule was that the hearing must be before an unbiased jury. There may be cases, however, in which the fairness of the hearing is challenged by the inclusion of some novel element or feature in the concept of what constitutes a fair hearing…"* ***[Emphasis added]***

[226] Pollard JCCJ in the same case put it this way at para. [89].

> *14… "In my opinion, a judicial determination whether, on the basis of the facts established in any given case, the constitutional right of an accused to a fair trial guaranteed by Section 18(1) has been breached, unavoidably engages an interpretation of the Constitution. Nevertheless,* ***in any particular case it is for the courts to determine if, on the facts found, a judicial***

interpretation of a fair trial in accordance with the Constitution has already been made by a court of competent jurisdiction and all that remains to be done is to apply the relevant principles to the instant case." ***[Emphasis added]***

[227] The approach which appears in the highlighted portions of these dicta recommends itself having regard to what I believe is a similar provision to section 16 (2) of the Charter in the form of article 6 (1) of the **European Convention on Human Rights** (hereinafter called the "ECHR"), on which there has been judicial determination as to the scope of the aspects of the right engaged on the Claimant's challenge – the right a fair hearing and the right to a fair hearing by an independent and impartial court or authority established by law. I now return to the Claimant's challenges.

THE PLEADED ULTRA VIRES CHALLENGE

[228] This challenge is twofold. It is contended that:

(i) the Council arrogated unto itself the disciplinary powers given to the Disciplinary Committee by the LPA; and

(ii) the Disciplinary Committee is the authority established by law to hear, determine and discipline in respect of allegations of professional misconduct so that the hearing before the Council was not before a tribunal established by law and therefore unfair, contrary to section 16 (2) of the Charter.

ARROGATION OF DISCIPLINARY POWERS UNDER THE LPA

[229] The Claimant contends that the proceedings before the Council were disciplinary proceedings which resulted in disciplinary sanctions being imposed and is therefore *ultra vires* the powers of the Council under the

LPA. In my view the proceedings before the Council were not disciplinary proceedings. Further, the orders made by Council are not disciplinary actions as contemplated by the LPA to make them *prima facie ultra vires* the statute.

[230] It was contended by Counsel for the Council, that the orders made by it on conclusion of its proceedings were not sanctions. In its ordinary signification a sanction in addition to being a penalty for disobeying a rule or a law also denotes official approval or permission of an action. On enquiry by the Court as to the label to be attached to Council's orders, Mr. Hylton Q.C. stated that they were "cease and desist orders".

[231] While I agree with Mr. Hylton Q.C. that those orders directing the discontinuation of specified advertisements by the Claimant and his firm may in fact be so described, it does not in my opinion prevent them from also being objectively regarded as a form of sanction which denotes the Council's disapproval of the relevant advertisements on the basis that they were in breach of advertising regulations. In consequence, the relevant question in my view is not whether the orders were sanctions but whether the Council, by the challenged canons and orders made pursuant to them, arrogated to itself the powers of the Disciplinary Committee to discipline an attorney for misconduct in a professional respect. It is my judgment that the answer to that question is no, having particular regard to the scope of the disciplinary actions which may be taken by the Disciplinary Committee where professional misconduct allegations are proved. As observed earlier in this judgment, though extremely impactful, the disciplinary actions are very narrow in their scope.

[232] The most draconian action which the Disciplinary Committee may take is the striking off the Roll the name of the attorney. There is also the power to suspend an attorney from practice on such conditions as the Disciplinary Committee may determine; impose a fine; reprimand; order attendance at prescribed courses of training to meet requirements for continuing legal professional development; order the payment of costs; and the payment of restitution.

[233] While the Disciplinary Committee is admittedly given some latitude where it makes the decision to suspend an attorney from practice, such suspension being permitted to be made on conditions as it may determine, the imposition of conditions is predicated on discipline in the form of suspension. There was no power of suspension given to the Council by the challenged canons nor was such a power exercised by it in the making of its orders. In the result the orders of the Council are not in the nature of any of the disciplinary actions which the Disciplinary Committee may impose for misconduct in a professional respect.

[234] Canon II (f) which requires an attorney to keep records of advertisements and to supply them to the Council within seven days of request for the same has not been challenged. The genesis of the engagement between the Council and the Claimant in respect of matters the subject of this claim is the letter from the former dated 30th January 2018. The Claimant and his firm were advised that it had come to the Council's attention that the firm had engaged in concerning advertising for which a request for records was made pursuant to Canon II (f), including of when and where used, the frequency and the name of the attorney responsible for the advertising.

[235] While the Claimant attempted to comply with the request, all the information requested was not provided in time in one instance and in others, some records were not provided. In responding to the Council's request the Claimant had also expressed that he was "baffled" that the Council had the concerns it raised in its letter and requested that the legal basis upon which the Council's views were based be provided to him. The Council responded to acknowledge receipt of records supplied and advised of the records which were missing and repeated the request for the same. The correspondence alleging trademark infringement by Calabar High School was received by Council in the interim.

[236] On enquiry from the bench of Mrs. Gibson-Henlin Q.C. as to whether every complaint or expression of concern in respect of an attorney which is received directly by the Council should be referred to the Disciplinary Committee, Counsel answered in the affirmative. I do not agree.

[237] While it is certainly open to a member of the Council to refer an attorney to the Disciplinary Committee for alleged breaches which may amount to professional misconduct, whether in respect of advertising or otherwise, prudence dictates that on Council's receipt of complaints of misconduct it should itself make some inquiry into them. The inquiry may include but certainly is not limited to viewing the content of advertising if available; requesting information of records of the advertising with a view to apprising itself not only of their contents where the Council is itself unable to obtain the advertisement, but also as to the context within which the advertisement was published which in some instances could cause an advertisement to be regarded as being in breach of one or other of the prescribed advertising regulations. This can appropriately be done at the level of Council where an opportunity is allowed to each member to enquire into the allegations in some way and form an opinion as to the veracity or otherwise of the allegations, before taking the extraordinary step of initiating disciplinary proceedings against an attorney before the Disciplinary Committee. Such a course seems to recommend itself highly, lest it be said that any member of the Council fettered the discretion given to him or her to arrive at a view on the alleged breaches and in initiating disciplinary proceedings. Having developed the standards for the profession, the Council through its members must be regarded as competent to form an opinion as to breach and offer guidance to an attorney in those regards at its meetings.

[238] On my review of the minutes of the meetings of the Council, there was faithful observance of the provisions for the conduct of its meetings as prescribed in the Schedule to the LPA. The only matter which had not been specifically prescribed by the Schedule was the attendance and manner of participation by the Claimant and his firm. In light of the power given to the Council to regulate its own proceedings however, it is my view that it was permitted to invite the Claimant and his firm to make written submissions and attend and be heard, consistent with requirements of natural justice. The Claimant was in fact represented by Counsel Ms. Archer at the hearings and was permitted to address the Council in

person. I could find no fault with that process up to this point. An enquiry and the offer of guidance was not the purpose and extent of the meetings however, so the enquiry cannot properly end here.

RIGHT TO A FAIR HEARING BY AUTHORITY ESTABLISHED BY LAW

[239] Fair hearing rights are not uncommon in instruments which guarantee fundamental rights and freedoms. As stated earlier, the right appears for example in article 6 (1) the ECHR which states:

> *[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*

[240] I have already reproduced elsewhere in this judgment the provisions comprised in sections 16 (1) and (2) of the Charter. Section 16 (3) prescribes that "*[a]ll proceedings of every court and proceedings relating to the determination of the existence or the extent of a person's civil rights or obligations before any court or other authority, including the announcement of the decision of the court or authority, shall be held in public,"* subject to the power given at section 16 (4) to exclude from the proceedings persons other than the parties and their legal representative in specified circumstances.

[241] Although not worded in the same manner, it is my view that cumulatively the provisions at sections 16 (1), (2) and (3) of the Charter are similar to the provision which appears in article 6 (1) of the ECHR. In light of their similarity, it is my view that decisions which treat with the scope of the rights guaranteed by article 6 (1) of the convention are capable of providing assistance in the determination of the issues here.

[242] While the word "tribunal" which has been found to have a particular meaning in Strasbourg jurisprudence does not appear in section 16 (2) of the Charter, I find that the meaning given to the term "established by law"

which follows that recognised forum is capable of offering guidance as to the meaning of the said term which follows “court or authority”, the constitutionally recognised fora at section 16 (2) of the Charter.

[243] No authority was cited in these proceedings as to the construction of the term “established by law” but I have found the decision in **Coppard v Customs and Excise Commissioners** [2003] EWCA Civ 511 to be particularly useful in this regard. Sedley LJ in delivering the judgment of the court said this of the meaning of the term.

> *[34] There is no decision of either the European Court of Human Rights or the European Commission of Human Rights which deals comprehensively with the content of the expression 'established by law'. But in Zand v Austria (1978) 15 DR 70 at 80 (para 69) the Commission of Human Rights, in debating the status of the Austrian labour courts, which had been set up only under elective ministerial powers, said that the object and purpose of the provision was -*
>
> > *'that the judicial organization in a democratic society must not depend on the discretion of the Executive, but that it should be regulated by law emanating from Parliament.'*
>
> *The Court of Human Rights has made it clear (see Sunday Times v UK (1979) 2 EHRR 245) that law declared by the courts ranks for these purposes with that made by Parliament. We do not consider, however, that this passage in Zand's case (which s 2 of the 1998 Act requires us to take into account) answers the question. First of all, it is addressed to the issue then before the Commission of Human Rights, which concerned the use of ministerial powers to create courts - hence the focus on the executive. Secondly, it seems to us that independence from the executive is what the word 'independent' in art 6(1) is principally concerned with. Thirdly, and perhaps most importantly, it is plain that much more than this is involved in the concept of a tribunal established by law. Among other things, the purpose (especially when one remembers the period of European history of which the convention was intended to mark a definitive end) is to ensure that justice is administered by, and only by, the prescribed exercise of the judicial power of the*

state, not by ad hoc 'people's courts' and the like. Such a principle must be fundamental to any concept of the rule of law. Implicit in it is that the composition and authority of a court must not be arbitrary.

[244] The foregoing approach enabled the court to find that a well-qualified circuit judge who was authorised to deal with the business of the Technology and Construction Court was a de facto judge whose authority was established by common law and accordingly "a tribunal established by law" for the purposes of article 6 (1). This conclusion was arrived at notwithstanding that the statutory power of the Lord Chancellor to authorise circuit judges to sit as justices of the High Court had not been exercised in respect of the judge through oversight. The de facto doctrine validated the office rather than the acts of the judge and matched the substantive content of the phrase "established by law".

[245] The matter was stated this way in **Zand** by the European Commission of Human Rights:

68. On this issue, the Commission observes that the term "a tribunal established by law" in Art. 6 (1) envisages the whole organizational set-up of the courts, including not only the matters coming within the jurisdiction of a certain category of courts, but also the establishment of the individual courts and the determination of their local jurisdiction. The creation of the Salzburg Labour Court and the attribution of its local district is therefore a matter which must be governed by law.

69. It is the object and purpose of the clause in Art. 6 (1) requiring that the courts shall be "established by law" that the judicial organization in a democratic society must not depend on the discretion of the Executive, but that it should be regulated by law emanating from Parliament. However, this does not mean that delegated legislation is as such unacceptable in matters concerning the judicial organization. Art. 6 (1) does not require the legislature to require each and every detail in this field by formal Act of Parliament, if the legislature establishes at least the organizational framework for the judicial organization.

[246] We are concerned here not with a court but an authority established by law, which has among its functions the prescription of standards for the legal profession, to make rules in that regard, and specify which breaches of those rules constitute misconduct in a professional respect. That is the Council. The LPA also establishes as part of the Council a Disciplinary Committee whose remit is to hear, determine and discipline in respect of allegations of professional misconduct by attorneys.

[247] In these premises the Claimant's contention is understood to be that the proceedings before the Council, where there were allegations that advertising of his legal practice was not compliant with the regulations was not a fair hearing before an authority established by law for that purpose and constituted a breach of the right guaranteed to him by section 16 (2) of the Charter. I find that there is merit in such a submission.

[248] In addition to advising the Claimant and his firm that they had failed to produce all advertising records to the Council within seven days of their request and that it had been copied on Calabar High School's letter of complaint, the Notice of Hearing dated 30th April 2018 expressly stated that they were being invited to Council's meeting of 30th May 2018 where it was proposed to determine whether to make an order pursuant to canon II (h), that the advertisements be withdrawn or discontinued.

[249] Pursuant to that stated purpose, the Council in its decision dated 26th September 2018 proceeded to make orders directing that advertisements for which full records were requested but not provided to the Council be discontinued and ordered the Claimant and his firm to seek and obtain its prior approval for future advertising before publication. Those orders could only have been made by Council pursuant to Canons II (h), (i) and (j), and it is expressly stated to be so in respect of the order requiring the Claimant to seek and obtain prior approval.

[250] I note that the power reserved to the Council to order the alteration, withdrawal, removal or discontinuance of an advertisement or the use of a business card under Canon II (h), arises *"… where the Council is of the*

opinion that the advertisement or business card contravenes the provisions of the canon." On my review of the order of the Council directing the Claimant and his firm to seek and receive prior approval for future proposed advertisements, it does not appear to be within the powers given to the Council at canon II (h), which contemplates an existing advertising which *"contravenes the provisions of the canon"*. That order would therefore be *ultra vires* canon II (h) itself.

[251] That however is not the greatest difficulty for the Council. While I do not find that the orders made were in the nature of disciplinary actions which the Disciplinary Committee may take against an attorney that it finds guilty of misconduct in a professional respect, they nevertheless give rise to constitutional concern.

[252] There is a well-established system in existence for determining allegations of misconduct in a professional respect, which most of the advertising canons are expressly stated to constitute. Where that expressed designation is absent in respect of any prescribed standard, thereby preventing an attorney from being subject to any of the disciplinary actions under section 12 (4) of the LPA, any departure from that established process to which an attorney or other aggrieved person has a right of appeal to the Court of Appeal cannot be ignored. It is in these circumstances that I find that the proceedings before the Council crumble under the weight of section 16 (2) scrutiny.

[253] Disciplinary proceedings under the LPA is the remit of the Disciplinary Committee of the Council, established in accordance with section 11 of the LPA. The Legal Profession (Disciplinary Proceedings) Rules (hereinafter called the "Disciplinary Rules") contained in the Fourth Schedule of the Act prescribes the procedure for hearings before the Committee, pursuant to section 14 (2) of the Act.

[254] To commence proceedings, an application in Form 1 and an affidavit in Form 2 in the Schedule to the Disciplinary Rules are sent to the secretary of the Disciplinary Committee. The application is to require the attorney

to attend to answer to allegations which are contained in the affidavit. The Committee is responsible for serving a copy of the application, the affidavit in support thereof and all other relevant documents and information. Within forty-two days of such service an attorney shall respond to the application in the form of an affidavit. Rule 22 prescribes however, that *"[n]otwithstanding anything to the contrary the Committee may extend or abridge the time for doing anything under [the Disciplinary] Rules."*

[255] Upon the expiration of the period for a response, the Committee is required to consider the application and any response, if there be any, and exercise one of two options. Firstly, if in the opinion of the Committee a *prima facie* case is shown, the committee shall fix a date for hearing, notice of which shall be served by the Secretary on the applicant and the attorney. Parties to the application are required to furnish lists of documents for the hearing, which the party served may inspect within fourteen days of receipt for a request for inspection. Documents on which the parties intend to rely are to be furnished to the secretary and where the other party intends to make a preliminary objection, notice of objection which should include a brief statement as to the nature and ground of the objection is to be given to the Secretary and the other party within seven days of the date fixed by the Committee for hearing the application.

[256] Generally, evidence before the Committee may be by way of affidavit and or oral evidence. Upon the hearing the Committee may permit affidavit evidence to be amended or added to where it appears to it that the allegations require amendment or addition, which may be by way of a further affidavit where the addition or amendment is not within the scope of the original affidavit. The Committee is empowered to grant an adjournment of the hearing if the addition or amendment is such as to take the attorney by surprise, on such terms as to costs or otherwise which may appear to the Committee to be just.

[257] Orders and directions given by the Disciplinary Committee made and filed with the Registrar of the Supreme Court in accordance with section 15 of the LPA shall be acted upon by the said Registrar; and are enforceable in

the same manner and to like effect as a judgment, order or directions of the Supreme Court at the instance and on the application of the Secretary of the Council.

[258] An attorney or aggrieved person to whom the application relates, including the Registrar of the Supreme Court and any member of the Council may appeal any order made by the Disciplinary Committee. Unless otherwise directed, the lodging of an appeal does not operate as stay of execution of the order of the Disciplinary Committee.

[259] The hurdle for the Council, which has not been surmounted, is that in disciplinary proceedings under section 12 of the LPA, it is open to the Disciplinary Committee which operates independently of the Council to find that allegations of breach, including on a complaint made by any member of the Council have not been made out. However remote some may regard this possibility, so long as it exists there is a real risk that the power given to the Council under canons II (h), II (i) and II (k) (iii) to limit in whole or part advertising or other publicity may be used to exclude expression which the Disciplinary Committee may find is inoffensive to the advertising canon alleged to have been breached.

[260] The Council in concluding the hearing into the complaints made against the Claimant and his firm did in fact make such orders for discontinuation and withdrawal, and went even further to require them to receive prior approval before publishing any further advertisements. Among the disciplinary actions which may be taken by the Disciplinary Committee following a trial before it within the context of the due process guarantees under the LPA, is an order of suspension to which it may impose conditions. Where it is found that an attorney has engaged in advertising in breach of the canons which constitute misconduct in a professional respect, one such conditionality may no doubt be the modification, withdrawal or discontinuation of the offending advertising and so prevent continuation of any publication of harmful content.

[261] While there was in fact observance of principles of natural justice as evidenced by the opportunities given to the Claimant to be heard by the Council, the conclusion to the hearing which had as its very objective the making of a decision as to whether an order should be made that the Claimant and his firm withdraw or discontinue their advertisements places a stain on the proceedings before the Council. This has left it open to me to find that the proceedings in respect of the Claimant which culminated with the decision of 26th September 2018 was *prima facie* in breach of the right to a fair hearing before an authority established by law to enquire into allegations against an attorney for professional misconduct and discipline where the allegation is proved. The right guaranteed by section 16 (2) is accordingly engaged.

[262] For the most part, breach of the impugned advertising canons constitute misconduct in a professional respect. Under the LPA enquiry into complaints of that nature is the remit of the Disciplinary Committee. Where the Council chooses to depart from that process it is my view that it must demonstrate by evidence that the departure is demonstrably justified in a free and democratic society. I believe a like obligation exists to justify the failure to specify that the breach of a professional standard contained in a rule constitutes misconduct in professional respect, thereby preventing the invocation of the disciplinary process established by the LPA for that purpose, which exists not merely for the benefit of attorneys or the Council but for the benefit of persons who are aggrieved by the conduct of an attorney. Evidence supplied in justification must be cogent, particularly where a rule limits a Charter right and depends on moral persuasion for its effectiveness. The rules which empowered the Council to make the orders on conclusion of its hearing could not be enforced by it and may be so regarded.

[263] The Council has failed to put any evidence before the court which could cause me to be satisfied on a balance of probabilities that the measures and process which permitted it to make the orders it did are demonstrably justified derogations in a free and democratic society from the right to a

fair hearing before the Disciplinary Committee which is the authority established by the LPA for enquiring into allegations of misconduct in a professional respect by an attorney, and for its failure to prescribe that a breach of any of the standards contained in the regulations constitute misconduct in a professional respect.

[264] Accordingly, I find that the hearing before the Council which culminated in the orders made pursuant to Canons II (h), II (i) and II (k) (iii) breached the Claimant's right to a fair hearing by an authority established by law and is void and of no legal effect. I arrive at the same conclusion for the same reasons in respect of the involvement of the 2016 Advertising Committee when it purported to *"demand"* that the Claimant and his firm discontinue use of the specified advertisement or any other advertisement which is in breach of specified or other Canons.

SUBSTANTIVE ULTRA VIRES

[265] Although no authorities were cited by Mrs. Gibson-Henlin Q.C. in submissions which deal specifically with *ultra vires*, I have nevertheless found useful the following statement made by Carswell J in respect of challenges to the validity of delegated legislation generally in *Re Police Association for Norther Ireland's Application* [1990] NI 258, 278.

> *The traditional statement of the rule defining the limits of judicial challenge to the validity of delegated legislation is contained in the proposition that it may be attacked on the ground that it is ultra vires, that it goes beyond the powers conferred by the enabling statute on the rule-making agency. The two forms of control are sometimes referred to as the doctrines of procedural and substantive ultra vires or as defects of procedure and substance…*

[266] Also useful was the dictum of Singh LJ in **R Mohammad Al-Enein v Secretary of State for the Home Department** [2019] EWCA Civ 2024, where there was remark on the doctrine of substantive *ultra vires* where subsidiary legalisation is the concern. The following principle expressed

by Waite LJ in **R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants** [1997] 1 WLR 275, 293 and which is described as undisputed, was applied.

> *Subsidiary legislation must not only be within the* vires *of the enabling statute but must also be so drawn as not to conflict with statutory rights already enacted by other primary legislation.*

[267] This led Singh LJ to opine as follows:

> *In my view, the same principle would apply to subsidiary legislation which is in conflict with statutory rights conferred by the same primary legislation under which the subsidiary legislation is made. A fundamental point of principle is that subsidiary legislation will be* ultra vires *if it seeks to cut down or negate rights which have been created by primary legislation. The same would also apply to a governmental policy, which does not have the force of legislation…*

[268] Having determined that the right to a fair hearing by the authority established by law as guaranteed by section 16 (2) of the Charter has been breached by the Council, I am constrained to find that the proceedings before the Council and the directive of its 2016 Advertising Committee are *ultra vires* the LPA in the substantive sense. They unjustifiably conflict with and cut down the due process provisions under the Act which are afforded an attorney who is alleged to have engaged in conduct which has been prescribed as constituting misconduct in a professional respect.

VIOLATION OF PRINCIPLE OF SEPARATION OF POWERS

[269] The argument here is that the Council as regulator and affected party should not be the arbiter of whether or not the Canons have been breached. In that regard Mrs. Gibson-Henlin Q.C. contended that the Council is the regulatory and rule making arm and the Disciplinary

Committee the adjudicatory arm under the LPA. Counsel likened the former to the Legislature and the latter to the Judiciary under the Constitution and submitted that the proceedings before the Council breached the doctrine of separation of powers and compromised the impartiality and independence of the Disciplinary Committee. The analogy is in my respectful view misplaced and the submission unmeritorious.

[270] The LPA prescribes the context within which the Council and the Disciplinary Committee are to operate and the constitutionality of the LPA has not been challenged by the Claimant.

[271] As stated previously, the Council's functions include the discipline of attorneys, which is exercised through its Disciplinary Committee appointed pursuant to section 11 of the LPA. They are not separate yet co-equal in the sense that the Judiciary is from the other two branches of government. This is obvious when one has regard to the appointment and composition of the Disciplinary Committee.

[272] Its members, which shall be not less that fifteen are appointed by Council and numbering among may be members of the Council, pursuant to section 11(1) (a) of the LPA. The Disciplinary Committee may sit in two or more divisions with each division appointing its own chairman. A division acts only while three of its members are present. With a minimum of 15 members and a quorum of only three for a division to act, principles of independence and impartiality are capable of being observed. That was in fact the determination of the majority of the Court of Appeal in **McCalla v Disciplinary Committee of the General Legal Council** (1994) 49 WIR 213 in the judgment delivered by Wright JA with whom Wolfe JA (as he then was) concurred. That aspect of the judgment remained undisturbed by the Judicial Committee of the Privy Council in **McCalla v Disciplinary Committee of the General Legal Council** (1998) 53 WIR 272.

[273] In any event, notwithstanding that members of the Council may be appointed to the Disciplinary Committee under the LPA, it is unchallenged evidence of the Chairman of the Council that the Council and the

Disciplinary Committee have separate membership and function independently of each other. Any member of Council is permitted to have an opinion on the conduct of an attorney and where he or she feels aggrieved by any alleged act of professional misconduct, he or she may make an application to the Disciplinary Committee for the attorney to answer to those allegations.

[274] The Disciplinary Committee in accordance with its processes is free to hear and determine the complaint and take such disciplinary action it deems fit having regard to the nature of the misconduct in a professional respect.

[275] I can find nothing inherently wrong with a member of the Council, the Chairman in this instance, making a complaint to the Disciplinary Committee. The legislation does in fact contemplate that a member of the Council can have a view as to breach of the canons which is a basis for any member to feel aggrieved. The statement of Hamilton J in **Re A Solicitor ex parte The Law Society** [1912] 1 KB 302, 314 is as true today as it was in 1912 in that

> *…[i]t is obvious that the conduct of [an attorney] in his profession must be judged by the rules of his profession and by the standard which its members set up not only for their brethren, but for themselves…*

[276] In these premises, it is my judgment that the right to a fair hearing by an independent and impartial tribunal as guaranteed by section 16 (2) has not been engaged on the basis that there is a violation of the principle of separation of powers.

BIAS

[277] The Claimant's complaint as to bias is twofold. Firstly, he contends that the Chairman of the meetings of the Council where the advertisements were discussed was predisposed to bias on account that the said Chairman had written the letter of 30th January 2018 and expressed that

the scale and intensity of adverting on TVJ was concerning, and that the advertisement on the said channel during the Grammy Awards on the 28th January 2018 was said to be "particularly egregious". He states the nature of the alleged bias in this way at para. [60] of his written submissions.

> *The hearing to determine that the Claimant had breached the regulations was therefore not fair as it was tainted by apparent bias on the part of Allan Wood.*

[278] The Council relies on the decision in **Abraham Joseph Dabdoub and Raymond Anthony Clough v the Disciplinary Committee of the General Legal Council (ex parte Dirk Harrison, Contractor General of Jamaica** [2018] JMSC Civ. 97 in resisting the Claimant's submission, and in contending that the issue of bias was not raised with the Council at its meetings with the Claimant to enable any adverse finding against the Council in that regard. In that case Brown Beckford J struck out as an abuse of process the claimants' claim wherein a number of declaratory relief were sought, including that complaints were fixed for hearing before a division of the Disciplinary Committee whose members were part of the Disciplinary Committee which determined that a *prima facie* case had been established in breach of the claimants' constitutional rights. It was held that an application for recusal should be made to the tribunal against whom bias is alleged and that the jurisdiction of the court had been prematurely invoked. Leave having been refused by Brown Beckford J to appeal the decision to strike out, an application to the Court of Appeal for leave to appeal was made in **Ervin Moo Young** but denied.

[279] It is the undisputed evidence of the Chairman of the Council that the issue of bias had not been raised at the meetings of the Council chaired by him which would have presented an opportunity for consideration of recusal. The issue not having been raised with the arbiter against whom bias is now alleged at the hearing which is being challenged, the Claimant cannot now claim that the proceedings before the Council were unfair as a result.

[280] As it concerns the second complaint of bias, that *"[a] decision of Council must perforce, even if only by appearance, have some influence on the Disciplinary Committee thereby subverting the right to an independence (sic) tribunal and also a fair hearing",* the Claimant points to the fact that the decision of the Council of 28th September 2018 is attached to the affidavit of the Chairman of the Council filed in support of the disciplinary compliant. I find the argument to be without merit.

[281] While the affidavit filed exhibits the decision of the Council, it is entirely competent to the Disciplinary Committee convened to hear a complaint, to determine what weight if any it will attach to any opinion expressed by the Council in the decision. In any event, any properly drafted affidavit filed in support of a disciplinary complaint will have averments in its body which set out the allegations of the affiant and the factual circumstances under which they are made, and such evidence of the alleged breach as is available. The exhibition of the decision of the Council no more predisposes the Disciplinary Committee to conclude that allegations have been proved than allegations in a complaint and the facts set out in an affidavit in support of a complaint in ordinary course.

[282] Further, on a review of the minutes of the meetings of the Council and its decision, there was no finding that the content of any of the subject advertising had breached the canons. The findings of the Council were in respect of the failure to provide the complete record of the advertisements requested by it pursuant to an unchallenged regulation. These failures were the premise for the orders made by the Council for the removal and discontinuation of specified advertising and in requiring the Claimant and his firm to obtain its prior approval before publishing any further advertisements. The complaint to the Disciplinary Committee does not contain charges that the Claimant failed to provide requested advertising records in breach of the advertising regulations.

[283] The allegations of apparent bias on the part of the Chairman of the Council does not avail the Claimant in his quest to have the hearing before the Council be declared unfair. Neither does the premature allegation of the

likely appearance of bias on the part of any division of the Disciplinary Committee which may be convened to hear and determine the complaint. The right to a fair hearing which is guaranteed by section 16(2) of the Charter is not found to have been engaged on the basis of bias in these circumstances.

REQUEST FOR INJUNCTION AND STAY OF DISCIPLINARY PROCEEDINGS

[284] The complaint of the 25th July 2019 is the only complaint to the Disciplinary Committee which is directly implicated in these proceedings. It is not in fact being pursued by the Council following its undertaking to the court to stay the proceedings until the instant claim is determined.

[285] It is essentially the Claimant's contention that on a finding of unconstitutionality he should obtain a stay of the disciplinary complaint of the 25th July 2019 and be granted *"[a]n injunction restraining the 1st Defendant, whether by itself, its servants and or/agents or otherwise howsoever from commencing or continuing any disciplinary proceedings of any kind whatsoever against [him]."* I find that he is not entitled to the injunctive relief sought or a stay of existing or future disciplinary proceedings before the Disciplinary Committee as sought.

[286] There were no submissions made in respect of the claim for injunctive relief but I nevertheless regard the Claimant as praying for a final stay of any existing disciplinary proceedings and any such proceedings in the future. It is in that context that I view his reliance on the following dictum of Sykes J (as he then was) in **Mervin Cameron v Attorney General for Jamaica** [2018] JMFC Full 1 who said this in respect of section 14 (3) of the Charter at para. [130]:

> [130] … *section 14 (3) must be taken very seriously and not read down in such a manner and to such an extent that it is deprived of its intended impact. Under this new Charter, the people of Jamaica through their elected representatives, and after twenty-one years of debate have decided that trials should not be delayed unreasonably. They have thought this right so important that they have placed it in*

a separate section of the Charter. In other words, the reasonable time dimension was deliberately separated from the place where it is usually found, that is, in the company of the usual fair hearing/trial formulation. The new placement of the reasonable time hearing must mean something. In my view, the reasonable time dimension was intended to be elevated and given equal standing with the fair hearing itself. It must be given weight. The expanded influence of the reasonable time dimension as reflected in section 14 (3) must influence how section 16 (1) is interpreted. It is my view that section 14 (3) stands on equal footing with section 16 (1) of the Charter.

[287] The Claimant goes on to submit that the observation in the last paragraph of the dictum applies equally to section 16 (2).

[288] D. Fraser J (as he then was) with whom K. Anderson J agreed to constitute the majority in **Mervin Cameron** observed at para. [215], and I believe correctly so, that section 14 (3) focuses on the reasonable time guarantee which is distinct from what he describes as the "omnibus collection of rights" guaranteed by article 6 (1) of the ECHR which provides that *"[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*

[289] For myself, I am not entirely convinced of the view taken by Sykes J (as he then was) that section 14 (3) stands on equal footing with section 16 (1) of the Charter having regard to the circumstances under which each becomes operable. It is my view that the right to a trial within a reasonable time which is guaranteed by section 14 (3) is geared at preserving the right of the freedom of the person where there has been interference with liberty vis a vis arrest or detention as expressly stated in the provision. This is distinct from the right to due process which embodies the right to a fair hearing guaranteed by section 16 of the Charter. Pursuant to section 16 (1) a right is preserved to ***"… any person [who] is charged with a criminal offence … unless the charge is withdrawn****, [to] be afforded a*

fair hearing within a reasonable time by an independent and impartial court established by law." **[Emphasis added]**

[290] In my view, the peril of the man who has been deprived of his liberty before the state has had a chance to prove a criminal charge against him places the reasonable time guarantee at section 14 (3) of the Charter on a different footing than the right to a fair hearing within a reasonable time guaranteed by section 16 (1) for a person not deprived of his liberty. Although all the reasonable time guarantees may be said to be equally important, the urgency of a hearing within a reasonable time for a man who has been charged but who has neither been arrested nor detained are likely to give rise to different considerations. It is for that reason that I believe the legislature was careful to specifically and distinctly preserve the right guaranteed at section 14 (3) of the Charter.

[291] Similarly, it is my view that the right to a fair hearing within a reasonable time in a criminal cause which is the concern of section 16 (1) and the right to a fair hearing within the context of the determination of a person's civil rights and obligations which is guaranteed at section 16 (2) are not on equal footing, having regard to their subject matter and the context within which the rights may be engaged.

[292] In that and other regards, the facts in **Mervin Cameron** are clearly distinguishable from the instant case. For reasons which I will state later, the right to a fair hearing within a reasonable time has not been engaged in the circumstances of this case. **Mervin Cameron** concerned the liberty of an accused in a criminal cause who remained in custody for some four years after being charged and in respect of whom a preliminary enquiry had been stalled. It was unanimously held that the right guaranteed by section 14 (3) of the Charter which prescribes that *"[a]ny person who is arrested or detained shall be entitled to be tried within a reasonable time"* was breached in respect of Mr. Cameron. Sykes J (as he then was) was the dissenting voice in finding that a stay of proceedings was the appropriate remedy for the breach.

[293] Notwithstanding the disagreement on the remedy, Sykes J (as he then was) like the rest of the court recognized that remedies other than a stay are available for breach of constitutional rights and that the appropriateness of any remedy will depend upon the circumstances. He said this at paras. [138] and [142].

> *[138] ... The appropriate remedy will depend on the nature of the violation and the context in which the violation took place…*
>
> *[142] There is no logical or rational reason for me to accept that in Jamaica the only remedy for a violation of the reasonable time standard is a stay. Other remedies are available. The remedy must be fashioned to meet the circumstances of the case…*

[294] D. Fraser J (as he then was) had also raised as a concern at para. [216] in **Mervin Cameron** but did not explore how the dynamics created by the embrace of both civil and criminal proceedings in article 6 (1) of the ECHR - which I have found is similar to the provisions at section 16 of the Charter- affected how the bundle of rights were to be exercised between parties in civil matters on the one hand and the citizen and the state in criminal proceedings on the other.

[295] That notwithstanding, **Attorney General's Reference (No 2 of 2001)** [2004] 2 AC 72 was among the cases referred to and applied in **Mervin Cameron**, with a focus on the dicta relating to the right of an accused in a criminal cause to a trial within a reasonable time, having regard to the subject matter of the case. There are however very useful dicta both of the majority and minority in **Attorney General's Reference (No 2 of 2001)** as to the inappropriateness of the automatic termination of proceedings which are within the civil arena as distinct from the criminal realm, where there is breach of constitutional rights. Lord Bingham (majority) said it this way:

> *11 … article 6 applies not only to the determination of criminal charges, which understandably give rise to most of the decided cases, but also to the determination of civil rights and obligations. In a criminal case*

the issue usually arises between a prosecutor, who may be taken to represent the public interest, on one side and an individual defendant on the other. In a civil case there may well be individuals, each with rights calling for protection, on both sides. It will only be acts of a public authority incompatible with a Convention right which will give rise to unlawfulness under section 6(1) of the Act. But the Convention cannot, in the civil field, be so interpreted and applied as to protect the Convention right of one party while violating the Convention right of another.

12 … [I]t is clearly established that article 6(1), in its application to the determination of civil rights and obligations and of criminal charges, creates rights which although related are separate and distinct: see Porter v Magill [2002] 2 AC 357, 489, 496, paras 87, 108; Dyer v Watson[2004] 1 AC 379, 407, 420, 422-423, paras 73, 125, 138; Mills v HM Advocate [2004] 1 AC 441, 448-449, paras 12-13; HM Advocate v R [2004] 1 AC 462, 470, para 8. Thus there is a right to a fair and public hearing; a right to a hearing within a reasonable time; a right to a hearing by an independent and impartial tribunal established by law; and (less often referred to) a right to the public pronouncement of judgment. It does not follow that the consequences of a breach, or a threatened or prospective breach, of each of these rights is necessarily the same.

…

14 If the domestic court appreciates, before an impending trial, that the tribunal by which the case is due to be heard lacks independence or impartiality, it will of course take steps to ensure that the trial tribunal does not lack those essential qualities. If it learns after the event that the trial tribunal lacked either of those qualities, any resulting conviction will be quashed: Millar v Dickson [2002] 1 WLR 1615; Porter v Magill [2002] 2 AC 357; Mills v HM Advocate [2004] 1 AC 441, 448, para 12.

…

16 In its application to civil proceedings, the rationale of the reasonable time requirement is not in doubt. The state should not subject claimants to prolonged delay in pursuing their claims, whatever the outcome, nor defendants to prolonged uncertainty and anxiety in

learning whether their opponents' claims will be established or not. The ill consequences of delay in civil litigation, immortalised in Bleak House, need no elaboration.

…

20 It is a powerful argument that, if a public authority causes or permits such delay to occur that a criminal charge cannot be heard against a defendant within a reasonable time, so breaching his Convention right guaranteed by article 6(1), any further prosecution or trial of the charge must be unlawful within the meaning of section 6(1) of the Human Rights Act 1998. Not surprisingly, that argument has been accepted by highly respected courts around the world. But there are four reasons which, cumulatively, compel its rejection. First, the right of a criminal defendant is to a hearing. The article requires that hearing to have certain characteristics. If the hearing is shown not to have been fair, a conviction can be quashed and a retrial ordered if a fair trial can still be held. If the hearing is shown to have been by a tribunal lacking independence or impartiality or legal authority, a conviction can be quashed and a retrial ordered if a fair trial can still be held. If judgment was not given publicly, judgment can be given publicly. But time, once spent, cannot be recovered. If a breach of the reasonable time requirement is shown to have occurred, it cannot be cured. It would however be anomalous if breach of the reasonable time requirement had an effect more far-reaching than breach of the defendant's other article 6(1) rights when (as must be assumed) the breach does not taint the basic fairness of the hearing at all, and even more anomalous that the right to a hearing should be vindicated by ordering that there be no trial at all.

21 Secondly, as the Court of Appeal recognised, at p 1875, para 19, a rule of automatic termination of proceedings on breach of the reasonable time requirement cannot sensibly be applied in civil proceedings. An unmeritorious defendant might no doubt be very happy to seize on such a breach to escape his liability, but termination of the proceedings would defeat the claimant's right to a hearing altogether and seeking to make good his loss in compensation from the state could well prove a very unsatisfactory alternative.

22 Thirdly, a rule of automatic termination on proof of a breach of the reasonable time requirement has been shown to have the effect in practice of emasculating the right which the guarantee is designed to protect. It must be recognised, as the Privy Council pointed out in Dyer v Watson [2004] 1 AC 379, 402, para 52, that the Convention is directed not to departures from the ideal but to infringements of basic human rights, and the threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed…

[296] Lord Hope (dissenting) put it this way in terms of the unsuitability of automatic termination in civil proceedings:

87 As Lord Bingham has pointed out, in paragraph 21 of his judgment, a rule of automatic termination of proceedings in the event of a breach of the reasonable time requirement cannot sensibly be applied in civil proceedings. He gives this as another reason for rejecting the proposition that any further prosecution or trial of a criminal charge must be unlawful within the meaning of section 6(1) of the Human Rights Act 1998: see paragraph 20.

88 Of course, the prospect of an automatic termination for breach of the reasonable time requirement cannot sensibly be applied in civil proceedings. Newman Shopfitters Ltd v M J Gleeson Group plc 2003 SLT (Sh Ct) 83, provides an example of a case where a termination of the proceedings was thought to be appropriate. That was a case where the pursuer had delayed unreasonably in the conduct of proceedings for the giving of effect to an arbitration clause. But it has never been part of the argument in favour of the approach which I would adopt to the analysis of this Convention right that this must happen. In HM Advocate v R [2004] 1 AC 462, 485, para 57, I said that it was important to start with domestic law when one is considering the question of remedy. I suggested that the proper approach would be first to identify the remedy which would ordinarily be thought to be appropriate in domestic law for a breach of the kind that has taken place, and then to consider whether the remedy which has thus been selected would achieve just satisfaction for the breach as indicated by the jurisprudence of the European Court.

> *89 If that approach is adopted, the problem that has been suggested disappears. It would hardly ever be thought appropriate for civil proceedings to be terminated under our domestic system because of an unreasonable delay on the part of a public authority in the determination of the parties' civil rights and obligations. In practice an attempt by one party to have the proceedings terminated on this ground would almost always be rejected. The appropriate time to seek a remedy for the delay would be at the end, when the proceedings were all over: see, for example, Porter v Magill [2002] 2 AC 357.*
>
> *90 But there is no reason why the issue of delay should not be raised prior to the determination of the issue between the parties in a civil case. If that were to be done, the appropriate remedy under section 8(1) would be to take steps to accelerate its determination. Sound practice suggests that this point should be taken as soon as it was apparent that the determination was being delayed unreasonably. But if a remedy by way of acceleration is to be given under section 8(1) it would be necessary first to find that the proposed act of the public authority in continuing to delay the proceedings was "unlawful" within the meaning of section 6(1) of the Act. It is not obvious how a finding to that effect could be made on the approach favoured by the majority.*

[297] I accept the common rationale for the inappropriateness of an automatic stay of proceedings concerned with the civil rights and obligations of parties and believe it to be equally applicable to an enquiry into the appropriate remedy for breaches of the fair hearing guarantees enshrined in section 16 (2) of the Charter. Where, having regard to the circumstances of a case a fair hearing is still possible, a stay of proceedings is not an appropriate remedy and I certainly do not find it to be appropriate here.

[298] The Council's complaint to the Disciplinary Committee contains three (3) allegations and has as its substratum the advertisement published by the Claimant on Instagram on or about the 4th December 2018. This publication was not the subject of the hearing before the Council which

culminated in its decision of 26th September 2018 following a hearing over several meetings.

[299] The complaint to the Disciplinary Committee alleges that:

> …
>
> *(6) The Respondent [the Claimant here] did not seek or obtain prior approval from the Council for the publication of the said video advertisement mentioned above and in breach of the Council' Order dated 26 September 2018. This failure to comply with the Council's Order Constitutes a breach of the Legal Profession (Canons of Professional Ethics) Rules Canon II (h).*
>
> *(7) Further, in breach of the Legal Profession (Canons of Professional Ethics) Rules Cannon II (d)(ii) the said advertisement creates or is likely to create an unjustified expectation that if a client sustains seemingly minor damage to a motor vehicle, the Respondent will be so successful that the client will be able to obtain a new and upgraded vehicle.*
>
> *(8) The video advertisement also promotes a specific product being Audi motor vehicles in featuring the Audi showroom, its location and an actor leaving in an Audi Q7. In so doing, the Respondent has used his professional standing to advertise a product in breach of the Legal Profession (Canons of Professional Ethics) Rules Canon II (L) (sic).*

[300] The Chairman of the Council in his affidavit in support of the complaint avers that up to the 25th July 2019, the date of the complaint, the advertisement remained published on the "Respondent's" publicly accessible Instagram page @bignalllaw.

[301] The only charge which is associated with the hearing before the Council and its decision of 26th September 2018 is that which alleges a breach of canon II (h) which I have earlier found to be unconstitutional and that any orders made in purported exercise of that power are null and void and of no effect. I have also found that a breach of canon II (l) is not specified as constituting misconduct in a professional respect as required by section 12 (7), which would then enable an attorney such as the Claimant to be

subject to disciplinary orders at section 12 (4) of the LPA in accordance with canon VIII (d). Any trial on those charges would be unfair and their stay entirely appropriate and their separation from the complaint before the Disciplinary Committee warranted.

[302] In the result, the only charge on the complaint of 25th July 2019 which could properly proceed before the Disciplinary Committee is that the advertisement published on the Instagram account @bignalllaw on or about 4th December 2018 offends canon II(d)(ii), the breach of which is specified as constituting misconduct in a professional respect pursuant to canon VIII (d).

[303] That publication and the remaining charge in respect of it was not and could not have been the subject of the Council's hearing which culminated in the decision and orders of 26th September 2018 several months prior.

[304] The subject matter of the charge also does not give rise to the challenges which often beset matters which are largely dependent upon the availability or recollection of witnesses for their prosecution or defence. In any event, each attorney is required by canon II (f) to keep records of all advertising for a period of twelve months of last publication, which if observed places the Claimant in a position to defend a complaint against him in respect of his advertising.

[305] Additionally, and contrary to the Claimant's contention, the hearing of any of the charges on the complaint of 25th July 2019 would not constitute a re-hearing of the advertising complaints to which the decision and orders of the Council on the 26th September 2018 relate so as to engage the reasonable time guarantee provided by section 16 (2) of the Charter. Further, the complaint to the Disciplinary Committee having been made on the 25th July 2019 and fixed for hearing on the 28th March 2020 does not, without more cause the reasonable time guarantee to be engaged. The hearing could not proceed on the occasion however because of the global pandemic. That delay has nevertheless been eclipsed by the stay of proceedings pending the determination of this claim.

[306] As observed by Lord Bingham in **Attorney General's Reference (No 2 of 2001)** the threshold of proving breach of a reasonable time requirement is a high one which is not easily crossed. The Claimant has not crossed it. I am therefore unable to find that there has been any delay in the hearing of the disciplinary complaint which would enable the fair hearing within a reasonable time guarantee which is enshrined in section 16 (2) to be engaged in respect of the complaint which has been laid before the Disciplinary Committee and which is specifically implicated in this case.

[307] It is accordingly my judgment that there are no circumstances in this case which warrant a stay of the disciplinary complaint of the 25th July 2019 in its entirely or the stay of other unspecified disciplinary complaints which currently exist or which may be competently laid against the Claimant before the Disciplinary Committee. Any court would be loathed to make such an order except on compelling evidence that an attorney could not receive a fair hearing before an independent and impartial Disciplinary Committee constituted pursuant to the LPA for the purpose. The integrity, dignity and honour of the legal profession is only maintained so long as each member observes these fundamental tenets of the profession, and where it is alleged that any among its number have failed to abide the lawful prescribed standards of the profession, breach of which constitute misconduct in a professional respect under the Canons, he must be made to answer the allegations before the Disciplinary Committee established to hear, determine and take disciplinary action against him as appropriate.

COSTS

[308] Although claimed as a relief, there were no submissions as to costs. That notwithstanding, the general rule is that an award of costs of proceedings is within the discretion of the court and that the discretion is to be judicially exercised. Pursuant to rule 56.15 (4) of the CPR, the court on an application for administrative orders may make such orders as to costs as appears to it to be just. I have determined that the advertising standards prescribed by the Council and which were challenged by the Claimant are lawful, but that the Council erred in respect of the mechanism for their

enforcement. In the result, both parties have had a measure of success in the claim. While an apportionment of costs would have been generally possible, I believe that it is just in the circumstances of this case to make no order as to costs. I come to this conclusion having particular regard to the sufficiently important and laudable objectives of the Council in passing the advertising regulations, which includes not only the protection of the public from irresponsible and misleading advertising, but also safeguarding the reputation and standing of the legal profession and maintaining a high standard of professionalism in the very profession of which the Claimant is a member, with an interest in its proper regulation.

DISPOSITION

[309] In the premises of the foregoing I would resolve the claim as follows.

(a) The Attorney General is removed as a defendant to these proceedings and is designated an "Interested Party".

(b) The Claimant's claim for a declaration that Canons II (d)(ii), II(e), II(k)(i), II(k)(ii) and II(l) of the *Legal Profession (Canons of Professional) Ethics Rules* breach the rights guaranteed to him by sections 13(3) (a), (c), (d), and (e) of the *Charter of Fundamental Rights and Freedoms* is refused.

(c) The Claimant's claim for an injunction restraining the General Legal Council whether by itself, its servants and or agents or otherwise howsoever from commencing or continuing any disciplinary proceedings of any kind whatsoever against him is refused.

(d) The charge at paragraph 7 of the Affidavit of the Chairman of the General Legal Council sworn on the 25th July 2019, which accompanies his Form of Application Against an Attorney-at-Law dated 25th July 2019 and which alleges a breach of Cannon II (d)(ii) in respect of advertising published after the decision of

the Council on 26th September 2018 may accordingly proceed before the Disciplinary Committee.

(e) It is hereby declared that Canons II (h), II (i), II (j) and II (k) (iii) of the *Legal Profession (Canons of Professional) Ethics Rules* are not demonstrably justified limitations on the right to freedom of expression guaranteed by section 13 (3) (c) of the *Charter of Fundamental Rights and Freedoms* and are therefore unconstitutional, null, void and of no legal effect.

(f) It is hereby declared that Canons II (h), II (i), II (j) and II (k) (iii) of the *Legal Profession (Canons of Professional) Ethics Rules* are not demonstrably justified limitations on the right to distribute or disseminate information through any media guaranteed by section 13 (3) (d) of the *Charter of Fundamental Rights and Freedoms* and are therefore unconstitutional, null, void and of no legal effect.

(g) The directive of the Advertising Committee of the Council contained in its letter dated 21st February 2019 whereby it demanded that the Claimant discontinue advertising which it considered to be in breach of the *Legal Profession (Canons of Professional) Ethics Rules*, breached the Claimant's right to a fair hearing by an authority established by law which is guaranteed by section 16 (2) of the *Charter of Fundamental Rights and Freedoms* and is unconstitutional, null, void and of no legal effect.

(h) The directive of the Advertising Committee of the Council contained in its letter dated 21st February 2019 whereby it demanded that the Claimant discontinue advertising which it considered to be in breach of the *Legal Profession (Canons of Professional) Ethics Rules* is *ultra vires* the *Legal Profession Act*.

(i) The hearing before the Council which culminated with its decision and orders of 26th September 2018 breached the Claimant's right to a fair hearing by an authority established by law which is guaranteed by section 16 (2) of the *Charter of Fundamental Rights and Freedoms* and is unconstitutional, null, void and of no legal effect.

(j) The hearing before the Council which culminated with its decision and orders of 26th September 2018 is accordingly *ultra vires* the *Legal Profession Act*.

(k) The charges at paragraphs 6 and 8 of the Affidavit of the Chairman of the General Legal Council sworn on the 25th July 2019 which accompanies his Form of Application Against an Attorney-at-Law dated 25th July 2019 and which allege breaches of canons II (h) and II (l) of the *Legal Profession (Canons of Professional Ethics) Rules* are stayed.

(l) No order as to costs.

L. PUSEY, J

CONCLUSION

[310] In coming to its unanimous conclusion, the court wishes to make a few comments.

[311] Firstly, we would like to thank all counsel involved for the helpful and relatively succinct submissions made which assisted the court greatly.

[312] Secondly, we reiterate that this court is of the view that in general the objectives and rationale of the Advertising Regulations are meritorious and relevant. However, our concern lies with some areas of the Regulations, in particular the aspects which empower the General Legal Council to permanently order the discontinuation or modification of activity which it believes to be in breach of the Regulations without a process which creates an avenue to challenge the order.

[313] The court observed that the General Legal Council attempted to deal with the Claimant fairly in enforcing those powers but could not overlook the offending aspects of the Advertising Regulations despite the attempts to provide some procedural fairness.

ORDER

[314] Accordingly, the court orders as follows

(a) The Attorney General is designated an "Interested Party" in these proceedings.

(b) The Claimant's claim for a declaration that Canons II (d)(ii), II(e), II(k)(i), II(k)(ii) and II(l) of the *Legal Profession (Canons of Professional) Ethics Rules* breach the rights guaranteed to him by sections 13 (3) (a), (c), (d), and (e) of the *Charter of Fundamental Rights and Freedoms* is refused.

(c) The Claimant's claim for an injunction restraining the General Legal Council whether by itself, its servants and or agents or otherwise howsoever from commencing or continuing any disciplinary proceedings of any kind whatsoever against him is refused.

(d) The charge at paragraph 7 of the Affidavit of the Chairman of the General Legal Council sworn on the 25th July 2019, which accompanies his Form of Application Against an Attorney-at-Law dated 25th July 2019 and which alleges a breach of Cannon II (d)(ii) in respect of advertising published after the decision of the Council on 26th September 2018 may accordingly proceed before the Disciplinary Committee.

(e) It is hereby declared that Canons II (h), II (i), II (j) and II (k) (iii) of the *Legal Profession (Canons of Professional) Ethics Rules* are not demonstrably justified limitations on the right to freedom of expression guaranteed by section 13 (3) (c) of the *Charter of*

Fundamental Rights and Freedoms and are therefore unconstitutional, null, void and of no legal effect.

(f) It is hereby declared that Canons II (h), II (i), II (j) and II (k) (iii) of the *Legal Profession (Canons of Professional) Ethics Rules* are not demonstrably justified limitations on the right to distribute or disseminate information through any media guaranteed by section 13 (3) (d) of the *Charter of Fundamental Rights and Freedoms* and are therefore unconstitutional, null, void and of no legal effect.

(g) The directive of the Advertising Committee of the Council contained in its letter dated 21st February 2019 whereby it demanded that the Claimant discontinue advertising which it considered to be in breach of the *Legal Profession (Canons of Professional) Ethics Rules*, breached the Claimant's right to a fair hearing by an authority established by law which is guaranteed by section 16 (2) of the *Charter of Fundamental Rights and Freedoms* and is unconstitutional, null, void and of no legal effect.

(h) The directive of the Advertising Committee of the Council contained in its letter dated 21st February 2019 whereby it demanded that the Claimant discontinue advertising which it considered to be in breach of the *Legal Profession (Canons of Professional) Ethics Rules* is *ultra vires* the *Legal Profession Act*.

(i) The hearing before the Council which culminated with its decision and orders of 26th September 2018 breached the Claimant's right to a fair hearing by an authority established by law which is guaranteed by section 16 (2) of the *Charter of Fundamental Rights and Freedoms* and is unconstitutional, null, void and of no legal effect.

(j) The hearing before the Council which culminated with its decision and orders of 26th September 2018 is accordingly *ultra vires* the *Legal Profession Act*.

(k) The charges at paragraphs 6 and 8 of the Affidavit of the Chairman of the General Legal Council sworn on the 25th July 2019 which accompanies his Form of Application Against an Attorney-at-Law dated 25th July 2019 and which allege breaches of canons II (h) and II (l) of the *Legal Profession (Canons of Professional Ethics) Rules* are stayed.

(l) No order as to costs.

…….
Leighton Pusey
Puisne Judge

……..
Lisa Palmer Hamilton
Puisne Judge

…….
Carole Barnaby
Puisne Judge