IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Heller v. Law Society of British Columbia,* 2026 BCSC 431

Date: 20260313
Docket: S259455
Registry: Victoria

Between:

James Heller

Plaintiff

And

Law Society of British Columbia

Defendant

Before: The Honourable Justice Chan

Reasons for Judgment

Counsel for the Plaintiff:	P.E. Jaffe
Counsel for the Defendant:	P.R. Senkpiel, K.C. K. Strong
Place and Dates of Hearing:	Victoria, B.C. October 21–24, 2025 January 26–29, 2026
Place and Date of Judgment:	Victoria, B.C. March 13, 2026

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Introduction

[1] The plaintiff James Heller is a practising lawyer in Victoria. He alleges the Law Society of British Columbia (the "Law Society") defamed him by the issuance of a press release on September 10, 2024. Mr. Heller filed a notice of civil claim on February 4, 2025, alleging defamation, negligence and intentional infliction of mental and/or emotional distress. The Law Society filed a response to civil claim (the "Response") on March 10, 2025.

[2] Mr. Heller brings this application to strike the Response pursuant to Rule 9-5(1)(a) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*SCCR*], arguing it raises no reasonable defence. In the alternative, Mr. Heller argues the Response should be struck pursuant to Rule 9-5(1)(b) (c) and (d), as it is unnecessary, scandalous, frivolous or vexatious; it would prejudice, embarrass or delay a fair trial; and it is an abuse of process. Mr. Heller in the further alternative argues the Response should be struck pursuant to Rule 22-7(2)(d) as the Law Society has not complied with the *SCCR* with respect to the drafting of pleadings and the discovery of documents.

Background of the Litigation

[3] The genesis of the dispute between the parties began with Mr. Heller sending an email to the Law Society on July 26, 2024, raising what Mr. Heller viewed as inaccuracies in the Indigenous Intercultural Course ("IIC") materials on the subject of unmarked graves at the former Kamloops residential school site. Lawyers in British Columbia are required to complete the IIC. Mr. Heller sent follow-up emails on August 1 and 9, 2024.

[4] On August 19, 2024, Mr. Heller along with another lawyer Mark Berry submitted a resolution to be considered at the Law Society's upcoming annual general meeting to be held on September 24, 2024 (the "Resolution"). The Resolution proposed that the Law Society correct its false statements in the Indigenous Training by replacing: "discovery of an unmarked burial site containing the bodies of 215 children on the former Kamloops Indian Residential School grounds" with "discovery of a potentially unmarked burial site on the former Kamloops Indian Residential School grounds". The

Resolution also proposed the phrase in the IIC that "the discovery confirms what survivors have been saying all along" be deleted. The Resolution was published on the Law Society's website on August 23, 2024, along with a statement from the Law Society setting out that "Clarification regarding "potential burial sites" will be addressed in the next edit".

[5] On September 9, 2024, the B.C. First Nations Justice Council ("BCFNJC") posted a statement on its own website, strongly opposing the Resolution, calling it in the title of the statement a "Racist Resolution". On September 10, 2024, the Law Society issued a press release (the "Press Release") on the Resolution, which included a link to the statement of the BCFNJC. The Press Release stated in its last paragraph: "The resolution submitted by Mr. Heller and Mr. Berry only highlights the need for the IIC and confirms much work remains to be done to increase knowledge and understanding, continue our efforts of advancing meaningful reconciliation with Indigenous people, and eliminate racism in our profession". Mr. Heller alleges the Press Release was defamatory by imputing he was a racist.

[6] The Resolution did not pass. Mr. Heller, starting in October 2024 through counsel, requested the Press Release be removed from the Law Society website, and an apology be issued. Mr. Heller started this action in February 2025.

[7] The Law Society did remove the Press Release in August 2025. The course materials were amended in August 2025.

The Notice of Civil Claim

[8] Mr. Heller in Part 1, the statement of facts of the Notice of Civil Claim (the "NOCC"), sets out that a passage in the IIC course materials is inaccurate as "there has been no confirmation of actual unmarked burial sites on the former Kamloops Indian Residential School grounds". Mr. Heller pleads the decision of *R. v. Dick*, 2024 BCCA 272, for the proposition that the appropriate terminology was "potential" burial sites, and that the Law Society knew prior to September 2024 such terminology regarding the findings made on the former Kamloops residential school site was "responsible, factually accurate and not indicative of intolerance, denial or bias". The

plaintiff sets out the contents of the Press Release and alleges it provided a wider scope of publication of the BCFNJC statement "for what the defendant knew to be a false and defamatory attack on the plaintiff". Mr. Heller pleads "the Press Release contained further accusations of unethical practice, denialism, racism, insensitivity to experiences of indigenous peoples and resistance to meaningful reconciliation" and that he "suffered shock, embarrassment, anxiety, fear and a sense of betrayal that his own professional governing body responsible for ethical standards in the legal community would collaborate with an activist group in advancing such a dishonest and damaging attack".

[9] Under Part 3, legal basis, Mr. Heller sets out the Law Society's conduct was defamatory and also constitutes negligence and intentional infliction of mental and/or emotional distress.

The Response to Civil Claim

[10] The Law Society pleads the IIC course materials were accurate when read in context against the historical background. The Law Society denies the Press Release was defamatory. If the Press Release was defamatory, the Law Society pleads qualified privilege, fair comment and responsible communication. Further, the Law Society pleads Mr. Heller has suffered no damages or has failed to mitigate his damages.

[11] The Law Society in its Response sets out the background of the IIC course materials. This background included the Truth and Reconciliation Commission's "Missing Children and Unmarked Burials Project" (the "2015 TRC Report"), the statements of the Tk'emlúps te Secwépemc Nation ("TSN"), findings of Dr. Sarah Beaulieu with respect to ground-penetrating radar, an article by Dr. Scott Hamilton, a joint statement from the Canadian Archaeological Association on residential school denialism, and the findings in *Dick*.

[12] The Law Society then sets out the emails from Mr. Heller starting on July 26, 2024. The Law Society pleads the emails from Mr. Heller were inaccurate and misleading. The Law Society sets out the discussion on its website portal regarding

the Resolution, including comments made by Mr. Heller which the Law Society pleads were inaccurate and misguided.

[13] With respect to the Press Release, the Law Society denies that it was defamatory. The Law Society pleads that the content of the Press Release "addresses many issues raised by the Resolution and by the discussions that took place on the Law Society portal".

Pleadings in Defamation Cases

[14] To establish a claim for defamation, the plaintiff must prove: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff: *Grant v. Torstar Corp*., 2009 SCC 61 at para. 28; *Nu Fibre Inc. v. Ishkanian*, 2013 BCSC 1255 [*Nu Fibre*] at para. 43. If the plaintiff succeeds in establishing defamation, falsity, malice and damage are presumed, and the onus shifts to the defendants to establish a defence: *Grant* at para. 28; *Nu Fibre* at para. 44.

[15] Defences to defamation include fair comment, justification, responsible communication and qualified privilege: *Lu v. Shen*, 2020 BCSC 490 at para. 185; *Smith v. Cross*, 2007 BCSC 1757 [*Smith BCSC*] at paras. 45–46, aff'd 2009 BCCA 529 [*Smith BCCA*] at paras. 26–27; *Grant* at para. 126.

[16] The defence of fair comment requires the defendant to prove (a) the comment was on a matter of public interest; (b) the comment was based on fact; (c) the comment, although it can include inferences of fact, must be recognisable as comment; and (d) the comment must be objectively capable of being held honestly by a person on the proved facts: *Lu* at para. 186, citing *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 [*WIC*] at para. 28. Malice can defeat a defence of fair comment: *WIC* at paras. 28, 63.

[17] Justification is an absolute defence to defamation. It applies to statements of fact. It will succeed if the defendant proves, on a balance of probabilities, the substantial truth of what is alleged to be defamatory: *Lu* at para. 188.

[18] The defence of responsible communication requires the defendant to prove the publication is on a matter of public interest, and that the publication was responsible, in that the defendant was diligent in trying to verify the allegations, having regard to all the relevant circumstances: *Grant* at para. 98. Factors to consider in determining diligence include (a) the seriousness of the allegation; (b) the public importance of the matter; (c) the urgency of the matter; (d) the status and reliability of the source; (e) whether the plaintiff's side of the story was sought and accurately reported; (f) whether the inclusion of the defamatory statement was justifiable; (g) whether the defamatory statement's public interest lay in the fact that it was made rather than its truth; and (h) any other relevant circumstances": *Grant* at para. 126.

[19] With respect to the defence of qualified privilege, the defendant must prove the statement was made on an occasion of qualified privilege, where the defendant had an interest in or legal, social, or moral duty to make the statement, and the persons to whom it was made have a corresponding interest or duty to receive it: *Pressler v. Lethbridge and Westcom TV Group Ltd.*, 2000 BCCA 639 at para. 62; *Smith BCSC* at para. 45. Qualified privilege attaches to the occasion that the communication was made, and not to the communication itself: *Smith BCSC* at para. 46. Qualified privilege can be defeated by a finding of malice: *Smith BCCA* at para. 30.

[20] A response in a defamation action must state expressly the defences being raised. Affirmative defences must be specifically pleaded, and a general denial is insufficient. The defendant cannot make general pleas of defences but must provide particulars in order that the plaintiff knows what defences are raised and what particulars the defences are based on: *Hemming v. Newton*, 2006 BCSC 1748 at para. 6; *Gosal v. Gill*, 2018 BCSC 2132 at para. 6, rev'd on other grounds 2019 BCCA 147.

[21] When determining the allegedly defamatory meaning of impugned words, statements on a related subject which refer to one another should generally be read together. For example, as set out in *Weaver v. Corcoran*, 2017 BCCA 160 at para. 78, "where provisions of one document are cited in another, depending on the circumstances and issues for determination, it may be appropriate to read the two together to ascertain the meaning of impugned words."

[22] The surrounding circumstances and contemporaneity of the other material with the primary source should be considered to see if they are so intimately connected as to affect the way in which the impugned words would be understood. If so, they should be read together for meaning: *Weaver* at paras. 79, 83.

Rule 9-5(1)(a)

Rule 9-5 – Striking Pleadings

Scandalous, frivolous or vexatious matters

(1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

(a) it discloses no reasonable claim or defence, as the case may be,

(b) it is unnecessary, scandalous, frivolous or vexatious,

(c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or

(d) it is otherwise an abuse of process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

Admissibility of evidence

(2) No evidence is admissible on an application under subrule (1) (a).

[23] The well-established test on an application to strike under Rule 9-5(1)(a) is whether, assuming the truth of the pleaded facts, it is plain and obvious that it discloses no reasonable cause of action or defence: *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 15, citing *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980, 1990 CanLII 90. Evidence is not admissible on such an application: Rule 9-5(2).

[24] A claim or defence will only be struck if it cannot be amended to cure the defect: *Strohmaier v. British Columbia (Attorney General)*, 2015 BCSC 1189 at para. 17; *Shoolestani v. Ichikawa*, 2017 BCSC 1589 at paras. 53–55. Further, the fact that a claim is novel does not mean it should be struck. A novel but arguable claim ought to be permitted to proceed to trial: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 21. Pleadings will only be struck if there is a "radical defect": *Hemming v. Newton*, 2006 BCSC 1748 at para. 9. This means that an applicant faces a high bar to succeed in their application to strike under Rule 9-5.

[25] Rule 3-3(2)(a) states that a defendant in responding to a civil claim must for any fact that is denied, concisely set out the defendant's version of that fact and set out in a concise statement any additional material facts that the defendant believes relate to the matters raised by the notice of civil claim. The defendant, if opposed to any of the relief sought in the notice of civil claim, must set out a concise summary of the legal basis for that opposition: Rule 3-3(2)(c).

[26] As I understand it, Mr. Heller argues the Response does not set out any reasonable defence because it fails to plead any material facts to establish the pleaded defences of qualified privilege, fair comment and responsible communication. Mr. Heller argues each of the pleaded defences is doomed to fail as the Law Society did not plead due diligence by the Law Society before publishing the Press Release; the Law Society did not plead any facts to support publication to the world versus limiting the publication to members only; and as the Law Society knew the IIC materials were factually inaccurate, Mr. Heller argues there can be no defences available to it.

[27] In my view, the Law Society's pleaded defences are not so plainly and obviously deficient that its Response should be struck. The Law Society's position is the Press Release is not defamatory. Alternatively, if the Press Release is found to be defamatory, the Law Society pleads fair comment, qualified privilege and responsible communication.

[28] The Law Society has pleaded facts to support a defence of fair comment. The background of the Resolution, including the historical background on the subject of missing children and unmarked burials at the site of the Kamloops residential school, the statements made by various stakeholders such as the TSN, the Canadian Archeological Association, the findings of Dr. Beaulieu, and the discussion on the Law Society portal on the Resolution, are capable of proving the subject matter of the Press Release was a matter of public interest and the statements made by the Law Society were comments that could objectively be held on the proved facts.

[29] With respect to the defence of qualified privilege, the defendant must prove the statement was made on an occasion of qualified privilege, where the defendant had an interest in or legal, social, or moral duty to make the statement, and the persons to whom it was made have a corresponding interest or duty to receive it: *Smith BCSC* at paras. 45–46. The pleaded facts of the defendant are capable of supporting this defence, as the Law Society is the provincial regulator of the legal profession and the recipients of the Press Release included members of the bar in the province.

[30] With respect to the defence of responsible communication, the defendant must prove the publication was on a matter of public interest and that the publication was responsible, in that the defendant was diligent in trying to verify the allegations, having regard to all the relevant circumstances. The pleaded facts of the defendant are capable of supporting this defence, as the pleaded facts purport to show the subject matter of the Press Release was a matter of public interest and the plaintiff was provided with contrary opinions to his own on the portal discussion.

[31] With respect to Mr. Heller's specific arguments, in my view, the Law Society did set out the steps taken before publishing the Press Release that can show diligence. It is unclear if the scope of publication impacts the availability of the pleaded defences. As for Mr. Heller's claim the Law Society knew the IIC materials were factually inaccurate, in my view, that is an assertion that remains to be proven by the plaintiff at trial. None of these arguments show the Response contains such radical defects that it should be struck as containing no reasonable defence.

Rule 9-5(1)(b) to (d)

[32] The principles that underlie an application to strike pursuant to Rule 9-5(1)(b), (c) and (d) were summarized in *Sahyoun v. Ho*, 2015 BCSC 392:

> [58] The test for striking a pleading under R. 9-5(1)(b), on the basis that it is unnecessary, scandalous, frivolous or vexatious, was recently summarized in *Willow v. Chong*, 2013 BCSC 1083, where Fisher J. said:
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> > [20] Under Rule 9-5(1)(b), a pleading is unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action, if it does not advance any claim known in law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the court's time and public resources: *Citizens for Foreign Aid Reform Inc. v Canadian Jewish Congress*, [1999] BCJ No. 2160 (SC); *Skender v Farley*, 2007 BCCA 629. If a pleading is so confusing that it is difficult to understand what is pleaded, it may also be unnecessary, frivolous or vexatious.
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> [59] An "embarrassing" pleading, as contemplated by R. 9-5(1)(c), is one that is so irrelevant that to allow it to stand would involve useless expense and would also prejudice the trial of the action by involving the parties in a dispute apart from the issues; *Keddie v. Dumas Hotels Ltd.* (1985), 62 B.C.L.R. 145 at 147 (C.A.).
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> [60] The abuse of process standard under R. 9-5(1)(d) derives from a flexible doctrine. It allows the court to prevent a claim from proceeding where to do so would violate principles of judicial economy, consistency, finality and the integrity of the administration of justice; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at paras. 35-37.
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> [61] Though subsections (a)-(d) of R. 9-5(1) address different concerns and different wrongs, there is also some overlap between these subsections. Thus, for example, a pleading that discloses no cause of action, contrary to R. 9-5(1)(a), can also be unnecessary, frivolous or vexatious within the meaning of R. 9-5(1)(b); see e.g. *Virk v. Brar*, 2012 BCSC 1004 at paras. 69-70.
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> [62] A pleading can be embarrassing if it does not state the real issue in an intelligible form. It can also be embarrassing if it is prolix, includes irrelevant facts, argument or evidence. It can be prejudicial if it is designed to or has the effect of confusing the defendant, making it difficult, if not impossible, to answer; *Virk* at para. 75.
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> [63] These same concerns can constitute an abuse of the court if a litigant has been expressly told that there are aspects of its pleadings that are deficient or defective, and if that litigant persists, in its amended claim, to advance the same claims or issues in the same way.

[33] Mr. Heller made a variety of submissions to argue the Response should be struck pursuant to Rule 9-5(1)(b) (c) and (d). In my view, his arguments can be grouped into the following three areas:

Allegation of Gratuitous Smears in Response

[34] Mr. Heller argues at various paragraphs throughout the Response that he is insulted and attacked. For example, Mr. Heller is referred to as offensive (paras. 81, 83(c), 101). He also argues the Response attacks his competence as a lawyer by claiming he fails to understand different standards of proof (paras. 9(d), 77, 83(b), 90(e)), has a "seeming inability to grapple with the actual evidence" (para. 104) and his views are "misinformed and misguided" (para. 110).

[35] Mr. Heller argues these gratuitous insults in the Response are not material facts. He argues the inclusion of these attacks in the Response is unnecessary, scandalous, frivolous or vexatious, and the pleadings ought to be struck.

Allegation the Response is Ideologically Driven

[36] As I understand it, Mr. Heller argues the Response is written in an angry tone, from the Law Society's view that it sits on moral high ground on the issue of missing children and unmarked burial sites. His view is the Response conveys the Law Society is prioritizing supporting Indigenous groups over factual accuracy and shows the Law Society's ideological perspective on the issue.

[37] He argues the Response is filed for a collateral purpose to advance social justice issues, and as such, to allow it to stand is an abuse of process. He also argues much of the Response contains irrelevant information, is prolix and confusing, and ought to be struck pursuant to Rule 9-5(1)(b) (c) and (d).

Allegation that *R. v. Dick* has decided the use of "potential"

[38] Mr. Heller argues the Court of Appeal in *Dick* has decided the use of the word "potential" in relation to the subject of unmarked burial sites is appropriate. As such, he argues the Response is an abuse of process, as the issue of the appropriateness

of his Resolution has been confirmed by the court. To allow the Response to stand would be contrary to the principles of judicial economy and finality.

Recent Developments

[39] After the hearing concluded, Mr. Heller brought to the Court's attention a news release by the TSN dated February 17, 2026, which referenced the continuing investigation at the former Kamloops residential school site for "potential burials".

Analysis

[40] In my view, considering the evidence adduced in this application, there is no basis to strike the Response pursuant to any of the grounds in Rule 9-5(1)(b), (c) and (d).

[41] It cannot be said the Response is unnecessary and vexatious. Much of what Mr. Heller complains as being irrelevant—the historical information from the Truth and Reconciliation Commission's 2015 TRC Report, the statements of TSN, the findings of Dr. Beaulieu with respect to ground-penetrating radar, an article by Dr. Hamilton, and a joint statement from the Canadian Archaeological Association on residential school denialism, among other sources—is pled to give context to the Resolution and the Press Release. That is, the Resolution and the Press Release must be interpreted against the background of the known information on the subject of missing children and unmarked burial sites, with specific reference to the Kamloops residential school site. The Law Society's position is the Press Release was not defamatory. The surrounding circumstances of the Press Release are relevant to assess whether the words of the Press Release may tend to lower the reputation of Mr. Heller in the eyes of a reasonable person. In the alternative, to establish the defences of fair comment, qualified privileged and responsible communication, the entire context is relevant, including the portal discussion which sets out the public interest of the subject and the differing viewpoints of the plaintiff and others.

[42] I also do not find the Response will prejudice, embarrass or delay a fair trial. The Response is not prolix or confusing. The portions of the source information are

set out in detail, to assist the plaintiff in knowing the specifics of the sources relied on by the Law Society as relevant context. To establish the defences, one of the elements the Law Society will be required to prove is that the subject matter is of public interest. The sources cited in the Response, including the portal discussion, are relevant considerations.

[43] With respect to Mr. Heller's position that the Response should be struck as an abuse of process as *Dick* has already determined his use of the word "potential" in the Resolution is appropriate, I agree with the Law Society that it is arguable *Dick* does not so hold. *Dick* was a sentence appeal on the ground of apprehension of bias of the sentencing judge. It was not a case which made any factual determinations of the existence of unmarked burial sites. As for the February 2026 press release by the TSN which used the phrase "potential burials", it is unclear how that is relevant to Mr. Heller's application to strike the Law Society's Response, particularly as the Response was filed in March 2025.

[44] Mr. Heller also argues the Response is an abuse of process as it was filed for a collateral purpose. As I understand it, he argues the Response was filed to express an ideological stance, to advance and prioritize Indigenous issues. I do not find the evidence supports any such inference. Due to the filing of the NOCC, the Law Society had a right to defend itself by filing a Response. I do not find that by filing the Response the Law Society was choosing to file a meritless defence to advance an ideological perspective.

[45] I do not find the content of the Response to be angry or morally indignant towards the plaintiff. The Law Society in its Response can set out where it disagrees with the plaintiff's views or where it believes the plaintiff's views are incorrect. However, I do find the use of "offensive" to describe the plaintiff to be inappropriate. The use of "offensive" in these circumstances is needlessly inflammatory and goes beyond disagreement with another's viewpoint. I would direct the Law Society to amend the passages to delete "offensive" and rewrite with a more appropriate word.

Presence of Malice

[46] Mr. Heller argues the defences pleaded by the Law Society to defamation can be defeated if the Court finds malice. He argues there is evidence of malice.

[47] In my view, the Court cannot make any determination about whether there was malice on a pleadings motion. This will have to be determined at trial.

[48] Mr. Heller also makes much of the Law Society's refusal to apologize. If he is arguing that refusal to apologize is admissible evidence of malice, that argument will have to be made at trial.

Response to Notice to Admit/Discovery of Documents

[49] Mr. Heller argues the Response ought to be struck pursuant to Rule 22-7(5)(d) for non-compliance with the *SCCR*: *Plaza 500 Hotels Ltd. v. SRC Engineering Consultants Ltd.*, 2024 BCCA 288 at paras. 41–45.

[50] Mr. Heller issued a notice to admit to the Law Society pursuant to Rule 7-7(1) on March 28, 2025. Mr. Heller argues the response of the Law Society was evasive and obstructionist.

[51] Mr. Heller also argues the Law Society has not complied with its document disclosure obligations. He argues the first list of documents produced by the Law Society in June 2025 was incomplete. The Law Society in late October 2025 produced a supplementary list of documents. Mr. Heller argues this second list is also incomplete, as there are documents which ought to have been listed but have not been with no explanation.

[52] I have reviewed the notice to admit and the Law Society's response. In my view, the response was not evasive or obstructionist. The Law Society set out clearly what was denied and what was not answered on the basis of relevance.

[53] With respect to Mr. Heller's complaints about document discovery, I note the Law Society has produced two lists of documents since he filed this application. If

there are still documents Mr. Heller seeks, he ought to make a new demand, and if necessary, file a separate notice of application for document production.

Conclusion

[54] The application of the plaintiff to strike the defendant's Response and for an order that it produce a further list of documents and an affidavit verifying documents is dismissed.

[55] The Law Society is directed to amend the passages in the Response at paras. 81, 83(c), 101 to delete "offensive" and rewrite with a more appropriate word.

"Chan J."