

05-Oct-26

COURT OF APPEAL
REGISTRY

APPEAL FILE NO. CA51535

Trial Lawyers Association of British Columbia v. Attorney General of British Columbia
Factum of the Intervener The Advocates' Society

COURT OF APPEAL

ON APPEAL FROM the order of the Honourable Chief Justice Skolrood of the Supreme
Court of British Columbia pronounced on April 29, 2026.

BETWEEN:

AND:

Trial Lawyers Association of British Columbia and Kevin WestellAPPELLANTS
(PLAINTIFFS)**The Attorney General of British Columbia and the Lieutenant Governor in Council**RESPONDENTS
(DEFENDANTS)

APPEAL FILE NO. CA51536

Law Society of British Columbia v. Attorney General of British Columbia et al.
Memorandum of Argument for Leave to Intervene

COURT OF APPEAL

BETWEEN:

LAW SOCIETY OF BRITISH COLUMBIAAPPELLANT
(Plaintiff)

AND:

**ATTORNEY GENERAL OF BRITISH COLUMBIA,
LIEUTENANT GOVERNOR IN COUNCIL OF BRITISH COLUMBIA**RESPONDENTS
(Defendants)

**FACTUM OF THE INTERVENER
THE ADVOCATES' SOCIETY**

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PART 1: BACKGROUND

Overview

1. At issue on this appeal is the constitutional status of an independent bar, the functional content of “independence”, and the standard required of legislation that seeks to regulate the bar. What aspects of an “independent bar” enjoy some form of constitutional protection? Is it sufficient that legislation not directly interfere with independence of the bar, or is it required to meet a minimum threshold of protection?
2. The Society intervenes in this appeal to address these questions. The Society proposes a framework for analyzing legislation alleged to imperil the public’s right to an independent bar. This framework draws from and builds on jurisprudence related to the independence of the judiciary. The Society submits that the proper starting point is to identify the constitutional functions that an independent bar fulfills. From there, the court may identify the minimum conditions necessary for those functions to operate. An impugned legislative scheme can then be assessed on whether it adequately protects those minimum constitutional functions.
3. As addressed in greater detail below, the proposed three-part test asks:
 - a. What are the objective institutional conditions necessary to achieve the constitutional purpose of an independent bar?
 - b. Does the proposed scheme protect these conditions to a degree sufficient to ensure a reasonable perception of independence?
 - c. Under the proposed scheme, does the public have a bar that is free, and reasonably perceived to be free, to perform its constitutional function?

The Decision Below

4. The trial judge addressed three questions with respect to the *vires* of Bill 21.
5. First, he considered whether independence of the bar was an unwritten constitutional principle, concluding that it was.¹ This was the first time in Canadian jurisprudence the constitutional status of an independent bar had been directly ruled

¹ *Trial Decision* at para. 95.

upon. Without a developed framework, the trial judge went on to consider some – but, respectfully, not all – aspects of a proper analysis.

6. Second, the trial judge asked what content or meaning was to be given to the principle of independence of the bar. In considering this, he appears to have been concerned with what lawyers *do* with their independence,² not with either the preconditions necessary for that independence to exist, or the specific functions that the constitution relies upon independent lawyers to perform.
7. Third, the trial judge considered whether Bill 21, in whole or in part, infringed on the principle of an independent bar. He rejected each of the appellants' arguments in this regard, including by finding that "...[t]here is nothing inherent to the exercise of [...Cabinet] powers that threatens the ability of lawyers to fulfill their duties as independent advocates, nor does it threaten the ability of the regulator to act independently in regulating lawyers."³ The trial judge acknowledged that "it is possible in an extreme scenario for such a power to be used in a way that threatens the independence of the Bar."⁴ However, he reasoned that such a threat "ignore[s] the presumption that executive actors will exercise their delegated authority constitutionally."⁵ He considered that, if such a threat manifested, it could be challenged on judicial review.⁶

PART 2 – ISSUES

8. The Society takes no position on the disposition of the Appeal. Its role on this Appeal is limited to articulating and advocating for the adoption of an analytical framework for assessing legislation alleged to threaten independence of the bar.

² Including "impartial advice and zealous advocacy (*Trial Decision* at para. 98) and "duties owed by lawyers, both to their clients and to the administration of justice more broadly..." (*Trial Decision* at para. 108).

³ *Trial Decision* at para. 201.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Trial Decision* at para. 202.

PART 3 – ARGUMENT

Summary of Society's Proposed Framework

9. The Society submits that the framework for considering the constitutionality of legislation regulating lawyers pursuant to ss. 92(13) and (14) may be derived from the jurisprudence concerning judicial independence.⁷ The central insight of that jurisprudence is that constitutional independence is not protected by any single institutional model, but rather by objective conditions necessary to permit an institution to perform its constitutional function in the public interest. This reinforces the view that the constitutional significance of lawyer independence does not lie in protecting lawyers as a professional class but rather preserving *the public's* right to their constitutional functions.
10. Accordingly, the Society does not contend that self-governance, self-regulation, or any other specific regulatory arrangement is constitutionally entrenched. Rather, a constitutional inquiry is properly directed at whether a legislative scheme adequately safeguards the conditions necessary for the bar to perform its constitutional role.
11. In the Society's submission, the proper framework is:
 - a. What are the objective institutional conditions necessary to achieve the constitutional purpose of an independent bar?⁸
 - i. What are the constitutional functions of an independent bar?⁹

⁷ The Supreme Court of Canada in *Valente v. The Queen*, 1985 CanLII 25 (SCC), [1985] 2 SCR 673 [*Valente*] first established the need for objective conditions or guarantees to preserve judicial independence. This principle was subsequently developed in the seminal case of *Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, 1997 CanLII 317 (SCC), [1997] 3 SCR 3 [*Judges Reference*] where the Supreme Court first expressly identified judicial independence as an unwritten constitutional principle and provided the most expansive view of what institutional guarantees it requires.

⁸ *Judges Reference* at paras. 3, 118-120, 123-131; *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13 [*Mackin*] at paras. 38, 40.

⁹ *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7 at paras. 82, 83, 95-102.

- ii. What objective institutional conditions are necessary for the bar to perform those functions?¹⁰
- b. Does the proposed scheme protect the objective conditions to a degree sufficient to ensure a reasonable perception of independence?¹¹
 - i. Does the legislation affect an essential condition of independence?¹²
 - ii. What degree of executive or legislative control is introduced by the scheme?¹³
 - iii. What institutional safeguards does the scheme contain to protect the objective conditions?¹⁴
- c. The overarching question is whether public has a bar that is free, and reasonably perceived to be free, to perform its constitutional function?¹⁵

Judicial Independence Cases Provide a Helpful Methodology

12. In *Valente*, the Court held that judicial independence is secured through objective conditions or guarantees. Those conditions were not derived from a particular model of court administration, nor from a desire to maximize judicial autonomy. Rather, they were derived from the constitutional function of adjudication and the forms of influence capable of undermining that function.
13. This same functional approach has been consistently applied since *Valente*. Judicial independence is secured through institutional arrangements capable of safeguarding the conditions necessary for performance of the institution's constitutional role.¹⁶ It need not rely on the goodwill of future governments or officeholders.¹⁷

¹⁰ *Valente* at paras. 20, 24, 25.

¹¹ *Valente* at paras. 31, 34; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 [*Imperial Tobacco*] at paras. 50-55; *R v. Edwards*, 2024 SCC 15 [*Edwards*] at paras. 94, 96-97; *Judges Reference* at para. 113.

¹² *Valente* at paras. 47-52.

¹³ *Edwards* at paras. 82-83.

¹⁴ *Judges Reference* at para. 29; *Ell v. Alberta*, 2003 SCC 35 at paras. 18-31; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 at paras. 32-39 [*Trial Lawyers Association*]; *Mackin* at paras. 67-69.

¹⁵ See by analogy *Imperial Tobacco* at paras. 46-47.

¹⁶ *Valente* at paras. 11, 22

¹⁷ *Valente* at para. 36

14. The same methodology can be applied to independence of the bar: the question is whether the legislative scheme can reasonably be seen to ensure that the bar remains independent.¹⁸ That occurs where each condition of independence is appropriately protected from interference.¹⁹

15. The proper inquiry therefore proceeds from function, to conditions, to safeguards.

First Question: What are the objective institutional conditions necessary to achieve the constitutional purpose of an independent bar?

16. Following the methodology as outlined above, the first stage of the inquiry is two-fold: 1) asking what constitutional functions an independent bar performs; and 2) asking what institutional conditions are necessary (or, put differently, what forms of influence must be guarded against²⁰) for those functions?

17. Importantly, not everything lawyers do is constitutionally protected, nor does constitutional independence require complete separation of lawyer regulation from government. The focus is on *constitutional* functions: those essential purposes that Canada's constitutional framework presupposes that independent lawyers will be available to perform. This is mirrored in the judicial independence jurisprudence, where courts have (for example) distinguished between conditions that are essential to independence and arrangements that may provide desirable or greater autonomy without being constitutionally required.²¹

18. Authorities make clear that the overarching constitutional function of lawyers is to aid in and maintain confidence in the administration of justice.²² Canadian²³ and international authorities consistently recognize that that overarching function manifests in:

¹⁸ *Valente* at para. 22

¹⁹ *Judges Reference* at para. 112; *Ell v. Alberta*, 2003 SCC 35 at para. 32

²⁰ See by analogy *The Queen v. Beauregard*, 1986 CanLII 24 (SCC), [1986] 2 SCR 56 at paras. 30-31.

²¹ *Valente* at paras. 47-52. See also for e.g. *Judges Reference* at para. 131, 140-142; *Beauregard* at paras. 30-31

²² *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 at 187-188; *Federation of Canadian Law Societies* at para. 83.

²³ Including the trial judge: *Trial Reasons* at paras. 96-110.

- a. providing effective representation to those whose rights and interests require legal protection, including unpopular people and causes;²⁴
- b. serving as an intermediary between individuals and the state, ensuring that persons can obtain meaningful access to legal advice, representation, and the justice system free from improper interference;²⁵
- c. preserving the solicitor-client relationship by upholding the duty of loyalty, including the duty of commitment to a client's cause, and by maintaining solicitor-client privilege;²⁶
- d. acting as officers of the court to ensure the orderly and ethical resolution of legal disputes, including by facilitating access to alternative dispute resolution methods;²⁷
- e. facilitating access to justice and upholding the rule of law by working to ensure that unlawful private and state action do not go unaddressed;²⁸
- f. preserving the impartiality, independence, and proper functioning of the courts and the justice system;²⁹ and

²⁴ *Omineca Enterprises Ltd. v. British Columbia (Minister of Forests)*, 1993 CanLII 1366 (BC CA) at para. 53, 85 B.C.L.R. (2d) 85 (per McEachern CJ., in dissent but not on this point); *Medcalf v. Weatherill*, [2002] UKHL 27 at paras. 51–57 (per Lord Hobhouse of Woodborough, concurring in result); Law Society of Upper Canada, “Protecting the Public through an Independent Bar: The Task Force Report”, in *In the Public Interest: The Report and Research Papers of the Law Society of Upper Canada’s Task Force on the Rule of Law and the Independence of the Bar* (Toronto: Irwin Law, 2007) at 4-5.

²⁵ *Canada (Attorney General) v Law Society of British Columbia*, [1982] 2 SCR 307 at pp. 335-336; *Finney v Barreau du Quebec*, 2004 SCC 36 at paras 1; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7 at paras. 77, 81, 97, 102.

²⁶ *R. v. McClure*, 2001 SCC 14 at paras. 2, 32–35; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61 at paras. 21, 24; *R. v. Neil*, 2002 SCC 70 at paras. 12–13; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at para. 9; *Federation of Canadian Law Societies* at paras. 82, 83, 96–103.

²⁷ *Fortin v. Chrétien*, 2001 SCC 45 at paras. 49, 52–54; *R. v. Sinclair*, 2010 SCC 35 at para. 161 (per Lebel and Fish JJ., in dissent but not on this point); *R. v. Lyttle*, 2004 SCC 5 at para. 66; *Rondel v. Worsley* [1967] UKHL 5 at p. 2.

²⁸ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at pp. 187-188 (per McIntyre J., dissenting in part but not on this point); *British Columbia (Attorney General) v. Christie*, 2007 SCC 21 at para. 22.

²⁹ *Law Society of British Columbia v. Mangat*, 2001 SCC 67 at para. 45; *Fortin v. Chrétien*, 2001 SCC 45 at para. 49; *Lavallee* at para. 68 (per Label J., dissenting in part

- g. maintaining the integrity, competence, and ethical standards of the legal profession to preserve public confidence in the administration of justice and the rule of law.³⁰
19. Through these constitutional functions the independence of the bar serves the public interest: it protects the *public's* right to lawyers with the capacity to represent clients fearlessly and in accordance with law, including where a client's interests conflict with the interests or policies of government.³¹
20. Having identified those constitutional functions, the next step of the inquiry is directed at identifying the conditions necessary for their performance.
21. In the Society's submission, four conditions form the constitutional baseline:
- a. *Security of professional status*: systems of admission, discipline, suspension, and removal must be insulated from controls unconnected to or inconsistent with lawyers' constitutional role. This protects clients' right to representation even when adverse to government or unpopular, guarding against the risk that professional status could be used as a lever of retaliation or influence.³²
 - b. *Security of professional role*: the core obligations constituting lawyering must not be subject to external control or redefinition in a manner contrary to the administration of justice or other aspects of lawyers' constitutional function. This protects clients' rights to independent advice, loyalty, confidentiality, candour and

but not on this point); *D'Orta-Ekenaike v Victoria Legal Aid*, [2005] HCA 12 per McHugh J. (concurring) at paras. 105–106.

³⁰ *Green v Law Society of Manitoba*, 2017 SCC 20 at para. 79 (per Abella J., in dissent but not on this point); *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para. 40; *General Council of the Bar of South Africa v Jiba and Others*, 2019 ZACC 23 at paras. 1-2; Senior Judiciary of Scotland, *Response to the Robertson Report: Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland*, June 2019.

³¹ *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 at 335–36.

³² *Finney v. Barreau du Quebec*, 2004 SCC 36 at para. 17; United Nations, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, UNHRCOR, 50th Sess, UN Doc A/HRC/50/36 (2022) at paras. 15-16 [2022 *Special Rapporteur Report*]; United Nations, *Basic Principles of the Role of Lawyers*, in Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders: Havana, UN Doc A/CONF.144/28/Rev.1 (1991) 118 at principles 16-18 [UN *Basic Principles*].

commitment, and lawyers' duties to both clients and courts. It guards against the risk of the lawyer's role being redefined in a manner inconsistent with the constitutional function of an independent bar.³³

- c. *Security of confidential representation*: clients must be able to obtain legal advice through relationships protected from external intrusion. This ensures access to justice and maintenance of public confidence in the administration of justice by ensuring that clients remain willing to seek assistance without fear of state leverage through access to client information or lawyers' being implicated as instruments for state surveillance.³⁴
- d. *Institutional separation from interested actors*: the legal profession must remain institutionally independent from actors whose interests may conflict with the constitutional function of lawyers. Institutional separation safeguards the provision of independent legal advice and fearless representation thereby ensuring that individuals have meaningful access to justice³⁵, and the integrity of the independent judiciary is maintained^{36,37}. This condition preserves the primacy of the rule of law over governmental, political, or majoritarian interests.³⁸

Second Question: Does the proposed scheme protect the objective conditions to a degree sufficient to ensure a reasonable perception of independence?

22. Having identified the objective institutional conditions necessary to preserve the independence of the bar, the next inquiry asks whether the impugned scheme contains safeguards sufficient to protect those conditions.

³³ *Federation of Law Societies* at paras. 81–84; *2022 Special Rapporteur Report* at para. 57; Council of Europe, *Explanatory Report to the Convention on the Protection of the Profession of Lawyer* at para. 26; *UN Basic Principles* at principles 13-14, 16.

³⁴ *Federation of Law Societies* at paras. 82-83; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61 at paras. 34-39; *UN Basic Principles* at principle 22; International Bar Association, *Standards for the Independence of the Legal Profession* (1990) at paras. 12-13.

³⁵ *I.e.*, advice and representation untainted by political pressure.

³⁶ *I.e.*, by preventing the state or other actors from influencing the courts indirectly through control of those who provide access to, and appear before, the courts.

³⁷ *2022 Special Rapporteur Report* at paras. 9-14.

³⁸ *Trial Decision* at paras. 106-109; *Beauregard* at p. 73; United Nations, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, UNHRCOR, 56th Sess, UN Doc A/HRC/56/62 (2024) at paras. 13-19, 30-22.

23. This stage of the inquiry is institutional in nature. The constitutional principle protects the conditions necessary for constitutional function, not merely against proven instances of interference, but also against schemes that do not adequately *prevent* interference. The judicial independence jurisprudence is instructive in this regard: constitutional safeguards are required precisely because constitutional institutions cannot depend exclusively on the presumption that future governments will exercise their powers appropriately. Accordingly, the question is not whether improper conduct has already occurred or is inevitable. Nor is it whether future abuses are subject to challenge through judicial review. The question is whether the scheme is protective of the constitutional conditions through objective institutional safeguards.³⁹

24. Three considerations – all viewed from the perception of the reasonable and informed person, viewing the matter realistically and practically⁴⁰ – are particularly relevant:

- a. whether the legislative scheme affects an objective condition of independence;
- b. the degree of external influence the scheme permits over that condition; and
- c. the nature and effectiveness of any safeguards provided by the scheme.

25. In general, the consideration of the safeguards in place will address the purpose of the legislation imposed, as well as the need to ensure that it is not used in a manner that is arbitrary, abusive, or otherwise destructive of the constitutional conditions.⁴¹ Depending on the condition at issue, relevant safeguards could include: independent decisionmakers, defined statutory criteria, procedural protections, limits on executive discretion, necessary consultation with or approval by the profession's regulator, or independent review mechanisms.

Overarching Question: does the public have a bar that is free, and reasonably seen to be free, to perform its constitutional function without interference?

26. In *Imperial Tobacco*, the Court stated:

³⁹ *Mackin* at paras. 38–40.

⁴⁰ *Judges Reference* at para. 113.

⁴¹ See, e.g., *Valente* at paras. 16–18, 31, 36 where, in the context of judicial tenure, executive involvement was required to be constrained to protect against arbitrary or discretionary executive interference. See also *Judges Reference* at paras. 133, 147

...even where the essential conditions of judicial independence exist, and are reasonably seen to exist, judicial independence is not necessarily ensured. The critical question is whether the court is free, and reasonably seen to be free, to perform its adjudicative role without interference, including interference from the executive and legislative branches of government.⁴²

27. The Society submits that this same overarching question is apposite in the context of an independent bar. It incorporates both individual and institutional dimensions of independence, addressing not only whether individual lawyers remain capable of independent action, but whether the profession, as an institution, retains the conditions necessary to perform its constitutional role.

PART 4: ORDER SOUGHT

28. The Society takes no position on the outcome of the Appeal.

29. The Society does not seek costs, and requests that no costs be ordered against it.

All of which is respectfully submitted.

Dated at the City of Vancouver, Province of British Columbia, this 5th day of October, 2026.



J. Kenneth McEwan, KC
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Counsel for the Intervener,
The Advocates' Society

⁴² *Imperial Tobacco* at para. 47.

APPENDICES: LIST OF AUTHORITIES

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