



Court of Appeal File No.: CA51536

COURT OF APPEAL

BETWEEN:

LAW SOCIETY OF BRITISH COLUMBIA,

Appellant

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA and
LIEUTENANT GOVERNOR IN COUNCIL OF BRITISH COLUMBIA

Respondent

Court of Appeal File No.: CA51535

COURT OF APPEAL

BETWEEN:

TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA
And KEVIN WESTELL

Respondent

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA and
LIEUTENANT GOVERNOR IN COUNCIL OF BRITISH COLUMBIA

Appellant

FACTUM OF THE INTERVENER CRIMINAL DEFENCE ADVOCACY SOCIETY

**Counsel for the intervener, the
Criminal Defence Advocacy Society
British Columbia**

Richard C.C. Peck, K.C.
Caroline Senini

Peck and Company, Barristers
610-744 West Hastings Street
Vancouver, BC V6C 1A5
T: (604) 669-0208
F: (604) 669-0616
E: rpeck@peckandcompany.ca
csenini@peckandcompany.ca

David Crossin, K.C.

Dennis Dawson James Aitken LLP
770 – 666 Burrard Street
Vancouver, BC V6C 2X8
T: (604) 659-9479
E: dcrossin@djacounsel.com

William B. Smart, K.C.

Hunter Litigation Chambers
2100 – 1040 West Georgia Street
Vancouver, BC V6E 4H1
T: (604) 891-2400
E: wsmart@litigationchambers.com

**Counsel for the respondent, Attorney
General of British Columbia and the
Lieutenant Governor in Council**

Emily Lapper, K.C.
Trevor Bant
Karin Kotliarsky
Sergio Ortega

Ministry of Attorney General
1301-865 Hornby Street
Vancouver, BC V6Z 2G3
T: (604) 660-6795
E: emily.lapper@gov.bc.ca
trevor.bant@gov.bc.ca
karin.kotliarsky@gov.bc.ca
sergio.ortega@gov.bc.ca

**Counsel for the appellant, the Law
Society of British Columbia**

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

Lawson Lundell LLP
1600-925 West Georgia Street
Vancouver, BC V6C 3L2
T: (604) 685-3456
E: cferris@lawsonlundell.com
lbevan@lawsonlundell.com
jandrews@lawsonlundell.com
nwelsh@lawsonlundell.com

Counsel for the intervener, Lawyers' Rights Watch Canada

Joey Doyle

Doyle Defence
401-73 Water Street
Vancouver, BC V6B 1A1
T: (604) 499-2509
E: joey@doyledefence.ca

Counsel for the intervener, Law Foundation of British Columbia

Brent Olthuis, K.C.
Charlotte Crane

Olthuis van Ert
1915 – 1030 West Georgia Street
Vancouver, BC V6E 2Y3
T: (236) 330-2666
E: bolthuis@ovcounsel.com
ccrane@ovcounsel.com

Counsel for the intervener, British Columbia Paralegal Association

Jamie Maclaren, K.C.

Maclaren Law Office
300 – 845 Cambie Street
Vancouver, BC V6B 4Z9
T: (604) 726-7274
E: jmaclaren@accessprobono.ca

Counsel for the appellant, the Trial Lawyers Association of British Columbia and Kevin Westell

Gavin Cameron
Tom Posnyiak
Laura Abrioux
Will Andrews

Fasken Martineau DuMoulin LLP
Barristers and Solicitors
2900-550 Burrard Street
Vancouver, BC V6C 0A3
T: (604) 631-3131
E: gcameron@fasken.com
tposyniak@fasken.com
labrioux@fasken.com
wandrews@fasken.com

Counsel for the intervener, Law Society of Manitoba

Lynda Troup

Thompson Dorfman Sweatman LLP
1700-242 Hargrave Street
Winnipeg, MB R3C 0V1
T: (204) 934-2337
E: lkt@tdslaw.com

Counsel for the intervener, Society of Notaries Public of British Columbia

Ian Knapp
Alanna Mackenzie
Brian Duong

MacKenzie Fujisawa LLP
1600 – 1095 West Pender Street
Vancouver, BC V6E 2M6
T: (604) 689-2381
E: iknapp@macfuj.com
amackenzie@macfuj.com
bduong@litigationchambers.com

Counsel for the intervener, Indigenous Bar Association in Canada

Declan C. Redman
David W. Wu

Arvay Finlay LLP
1512 – 808 Nelson Street
Box 12149 Nelson Square
Vancouver, BC V6Z 2H@
T: (604) 696-9828
E: dredman@arvayfinlay.ca
dwu@arvayfinlay.ca

Counsel for the intervener, Federation of Law Societies of Canada

Roy Millen
Nicholas Tollefson

Blake, Cassels & Graydon LLP
3500 – 1133 Melville Street
Vancouver, BC V6E 4E5
T: (604) 631-4220
E: roy.millen@blakes.com
nicholas.tollefson@blakes.com

Counsel for the intervener, The Advocates' Society

J. Kenneth McEwan, K.C.
Emily Kirkpatrick
Merran Hergert

McEwan Cooper Kirkpatrick LLP
1500 – 733 Seymour Street
Vancouver, BC V6B 0S6
T: (604) 283-7740
E: kmcewan@mcewanpartners.com
ekirkpatrick@mcewanpartners.com

Counsel for the intervener, Canadian Bar Association

Connor Bildfell
Daniel Siracusa

McCarthy Tétrault LLP
2400 – 745 Thurlow Street
Vancouver, BC V6E 0C5
T: (604) 643-5877
E: cbildfell@mccarthy.ca
dsiracusa@mccarthy.ca

Counsel for the intervener, British Columbia Access to Justice Centre for Excellence

Catherine Dauvergne, K.C.

Hunter Litigation Chambers
2100 – 1040 West Georgia Street
Vancouver, BC V6E 4H1
T: (604) 891-2400
E: cdauvergne@litigationchambers.com

Counsel for the intervener, Workers for Ethical Substance Use Policy

Kyla Lee

Acumen Law Corporation
215 – 114 East 7th Avenue
Vancouver, BC V5T 1M6
T: (604) 685-8889
E: kyla@vancouvercriminallaw.com

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PART I – BACKGROUND

1) Overview

1. The existence of a bold and independent bar is indispensable to the rule of law. In the realm of the criminal law, we have adopted the adversarial system as the means of resolving disputes between the Crown and the accused. This system is predicated on three critical components: 1) an independent judge; 2) an independent prosecutor and; 3) an independent defence counsel.

2. To diminish the independence of any of these actors, even to the slightest degree, risks placing improper weight in the delicate balance of the scales. As one legal scholar noted: “In the pans of judgement sit imponderable weights”.¹

2) Independence of the Bar

3. Independence of the Bar is a precept of our justice system: “The bar has a duty to see to its independence, not for its own sake, but for the sake of the due administration of justice”.² It is no less important to the rule of law than the independence of the Judiciary or that of the Crown. It is implicit in the Barristers’ and Solicitors’ Oath which is required of every person upon being called to the Bar of British Columbia. For decades it has been embedded in s. 3 of the *Legal Profession Act*.³

4. It is in the public interest to have access to independent legal professionals. Lawyers must be independent of external influence, not for their own benefit but for the benefit of their clients. As one judge said, many years ago: “...the rights and privileges of members of the Bar...are given to them for the sake of suitors in Courts of Justice”.⁴

5. In our legal system, the need for a bold and independent Bar is accentuated when the liberty of fellow citizens is at stake. Criminal defence lawyers are the only

¹ Anthony G. Amsterdam, “Perspectives on the Fourth Amendment”, (1974) 58:349 Minn L Rev, 354.

² Mary F. Southin, “An Independent Bar, Sham or Reality,” (1967) 25:6 Advocate (Vancouver) 229.

³ *Legal Profession Act*, SBC 1998, c 9, s 3.

⁴ Mary F. Southin, “An Independent Bar, Sham or Reality,” (1967) 25:6 Advocate (Vancouver) 227, citing Cockburn C.J., Ex. P. Pater (1864) 5 Best and Smith 297 at 311.

bulwark between the accused and the state. Lord Brougham's exhortation in his defence of Queen Caroline in the House of Lords in 1820 exemplifies this:

That an advocate, by the sacred duty of his connection with his client, knows, in the discharge of that office, but one person in the world, that client and none other. To save that client by all expedient means – to protect that client at all hazards and costs to all others, and among others to himself – is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other; nay, separating even the duties of a patriot from those of an advocate, he must go on reckless of the consequences, if his fate it should unhappily be to involve his country in confusion for his client.⁵

6. The existence of an independent Bar is one of the “hallmarks of a free society” and this independence is emphasized for the practice of criminal law, as noted by Estey, J., speaking for a unanimous Court in *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307:

The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally.⁶

7. It is the duty of criminal defence lawyers to scrutinize, criticize, and, where necessary, assail proposed legislative responses to odious incidents that present an affront to the dignity and worth of the individual.

8. Criminal defence lawyers must defend even those charged with the most heinous acts and be prepared to challenge the executive when their conduct undermines the

⁵ Lord Brougham, “Defence of Her Majesty”, HL Deb, 03 October 1820, vol 3, 114, online: <https://api.parliament.uk/historic-hansard/lords/1820/oct/03/defence-of-her-majesty>

⁶ *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 at 335-36.

rights of unpopular accused. For instance, in the cases of Omar Khar⁷ and Maher Ara⁸. Lawyers representing such individuals not only face the weight of the State but must carry out their oath in the face of intense systemic, political and public backlash. An independent Bar is fundamental to the criminal defence lawyer's ability to carry out their role free from external influence.

PART II AND III – ISSUES ON APPEAL AND ARGUMENT

9. Bill 21 designates all lawyers as “licensees” under the *Act*, removing the definition of barrister and solicitor. While the *Act* requires the Regulator to “ensure the independence of licensees”,⁹ several provisions in the *Act* have a chilling effect on independence.

10. Beyond the issues in the makeup of the Board set out by the Law Society in its factum, it is notable that the offences in the new *Legal Professions Act* cover a variety of areas, and subject offenders to penalties of “...a fine not exceeding \$200,000 or to imprisonment for a term not exceeding 2 years, or to both.” Offences under the *Act* include the unauthorized practice of law, providing incomplete information when applying to be a licensee, using confidential and privileged information, and interfering with or obstructing a person in exercising their power, performing a duty, or carrying out an order under the *Act*.¹⁰ Such charges may be laid on oath of the chief executive officer, or by a person authorized by the board.¹¹ Given that the offences in the *Act* subject persons to a possibility of imprisonment, they engage the “liberty” clause in section 7 of the *Charter*.¹²

11. Like all members of society, lawyers are subject to sanction for conduct constituting a criminal offence, whether it occurs in their role as a private citizen or in the context of their legal work. However, to subject lawyers to two years imprisonment for violations of professional rules and requirements, has the potential of profound

⁷ *Canada (Justice) v. Khadr*, 2008 SCC 28, and *Canada (Prime Minister) v. Khadr*, 2010 SCC 3.

⁸ Government of Canada, News Release, “Arar Commission Releases its Findings on the Handling of the Maher Arar Case” (18 September 2006), online: <https://www.canada.ca/en/news/archive/2006/09/arar-commission-releases-findings-handling-maher-arar-case.html>

⁹ *Legal Professions Act*, SBC 2024, c 26, s. 6(1)

¹⁰ *Legal Professions Act*, SBC 2024, c 26, s. 198(2).

¹¹ *Legal Professions Act*, SBC 2024, c 26, s. 198(4)

¹² *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC); *R. v. Mills*, 1999 CanLII 637 (SCC) at para. 62.

implications to the independence of the Bar. Advocacy in our adversarial system of criminal justice demands independence of thought and action on the part of each essential component: the judge, the prosecutor and defence counsel.

12. The impact of these provisions is daunting. The mere fact of an allegation comes with a host of potentially adverse consequences including stigma and the accompanying diminishment of reputation. A lawyer's reputation is critical to their standing before the Court – both as an advocate and as an officer of the Court. Our very oath of office speaks to this:

Do you sincerely promise and swear (or affirm) that you will diligently, faithfully and the best of your ability execute the offices of Barrister and Solicitor; that you will not promote suits upon frivolous pretences; that you will not pervert the law to favour or prejudice anyone; but in all things conduct yourselves truly, and with integrity; and that you will uphold the rule of law and the rights and freedoms of all persons according to the laws of Canada and of the Province of British Columbia, including the Constitution, which recognizes and affirms the Aboriginal and treaty rights of First Nations, Inuit and Métis peoples?

13. Adhering to the commandments of this oath is vital to one's reputation as counsel. So too are civility and a spirit of independence. Independence often comes in the form of forceful advocacy in circumstances where both the forces of the state and public sentiment run strongly against a client for whom you act. Willingness of counsel to take on such cases is central to the adversarial system. This, in turn, requires courage – what Plato referred to as “thoughtful courage” – as opposed to some ill-tempered reaction to what may seem like overwhelming odds.

14. The spirit of independence is instilled in counsel over years of advocacy. It is fuelled by a firm belief that in many circumstances the advocate stands alone between the citizen and oblivion: circumstances that require the advocate to “uphold the rule of law and the rights and freedoms of all persons...”

15. The fundamental importance of the independence of the Bar was captured by the late Justice G. Finlayson in the following passages from an article he penned when he was still at the Bar:

A vital role of the lawyer is to stand between the citizen and the state, and this role is more important now than ever before. The extent of government interference in the lives of citizens can only be described as massive. It is at every level -- municipal, provincial and federal -- and whether it is for good or ill is irrelevant. The law is the instrument of government and lawyers form the only profession trained in the law.

Lawyers could not advise citizens as to their responsibilities with respect to particular legislation or governmental action if they cannot maintain their independence as individuals. It is almost impossible to do this if the society that governs them is under the day to day control of government. It is imperative that the public have a perception of the legal profession as entirely separate from and independent of government, otherwise it will not have confidence that lawyers can truly represent its members in their dealings with governments.¹³

16. At the stroke of a royal pen, Bill 21 strikes through one and a half centuries of self-governance by the Law Society. Over 150 years of overseeing the conduct of the Bar of this Province by senior, and seasoned, members of our profession. People with a deep understanding of the demands and requirements of the profession who have devoted untold hours of time to the betterment of the profession and its role in serving the public interest.

PART IV – NATURE OF ORDER SOUGHT

17. CDAS takes no position on the outcome of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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



Richard C.C. Peck, K.C.
David Crossin, K.C.
William B. Smart, K.C.
Caroline Senini
Intervener

¹³ *Labelle v. Law Society of Upper Canada*, [2001] O.J. No. 60 at para. 34, citing G.D. Finlayson, K.C. "Self-Government of the legal profession -- can it continue?" (1985), 4 Advocates' Soc. J. No. 1, 11-16.

APPENDICES: LIST OF AUTHORITIES

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