No. S-243325
Vancouver Registry

In the Supreme Court of British Columbia

Between

Trial Lawyers Association of British Columbia
and Kevin Westell

Plaintiffs

and

Attorney General of British Columbia,
His Majesty the King in right of the Province of British Columbia,
and Lieutenant Governor in Council of British Columbia

Defendants

and

Canadian Bar Association, Indigenous Bar Association,
Society of Notaries Public of British Columbia,
Law Foundation of British Columbia, and Law Society of Manitoba

Interveners

APPLICATION RESPONSE

Application response of: Attorney General of British Columbia

THIS IS A RESPONSE TO the notice of application of the Trial Lawyers Association of British Columbia and Kevin Westell (collectively, the "**Trial Lawyers**") filed on April 7, 2025.

The Attorney General estimates that the applications will take 14 days.

PART 1: ORDERS CONSENTED TO

The Attorney General consents to the granting of the orders set out in the following paragraphs of Part 1 of the notice of application: **none**.

PART 2: ORDERS OPPOSED

The Attorney General opposes the granting of the orders set out in **all** of the paragraphs of Part 1 of the notice of application.

PART 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Attorney General takes no position on the granting of the orders set out in **none** of the paragraphs of Part 1 of the notice of application.

PART 4: FACTUAL BASIS

1. The Attorney General adopts part 4 of her application response in *Law Society of British Columbia v. Attorney General of British Columbia et al.,* Supreme Court of British Columbia, Vancouver Registry Action No. S-243258 filed May 23, 2025 ("**Response to the Law Society**").

PART 5: LEGAL BASIS

A. Suitability for summary trial

2. The Attorney General agrees this matter is suitable for summary trial.

B. Relevant principles of constitutional interpretation

3. Courts must approach constitutional challenges on the presumption that the impugned statute was validly enacted. The plaintiffs have the burden of displacing this presumption. Similarly, courts should prefer constitutionally conforming interpretations.[1]

4. Courts assess legislation on the presumption that any discretion created by the statute will be exercised constitutionally. Statutes are not assessed on speculative worst-case scenarios: there is "no proposition of law that legislation, to pass constitutional muster, must exclude all possibility of unconstitutional exercises of discretion".[2] If there are defects in administration, those defects are remediable on judicial review on a case-by-case basis.[3]

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[1] *Reference re Impact Assessment Act*, 2023 SCC 23 at paras. 69-73.
[2] *Brown v. Canada (Citizenship and Immigration)*, 2020 FCA 130 at paras. 61-88; see also *Slaight Communications Inc v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Conway,* 2010 SCC 22 at paras. 41-48.
[3] *Brown* at paras. 65-77, 80; see also *Reference re Impact Assessment Act* at para. 74; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 at para. 71.

C. Act does not infringe any constitutional requirement for lawyer independence

(i) Trial Lawyers' arguments duplicating Law Society's should not be accepted for reasons set out in the Response to the Law Society

5. In response to the Trial Lawyers' arguments that duplicate those of the Law Society,[4] the Attorney General adopts her Response to the Law Society.

(ii) Trial Lawyers have not established the Act infringes individuals' rights under ss. 7, 10(b), or 11(d) of the *Charter*

6. The Trial Lawyers argue that the new *Legal Professions Act*, S.B.C. 2024, c. 26 (the "***Act***") infringes ss. 7, 10(b) and s. 11(d) of the *Charter* by undermining lawyer independence. For the reasons set out in her Response to the Law Society, the Attorney General submits that the *Act* does not affect lawyer independence as traditionally understood: freedom from improper interference with lawyers' advice or advocacy on behalf of clients. The Trial Lawyers have not shown that the *Act* will lead to anyone being denied a fair trial or effectively deprived of the right to counsel because their lawyer is not independent. This argument is entirely speculative and should be dismissed.

D. Trial Lawyers health-related s. 7 argument misinterprets the Act and is inconsistent with settled authority

(i) Overview

7. The Trial Lawyers argue that ss. 68, 76-78, 88, 198, and 202 of the *Act* infringe lawyers' rights under s. 7 of the *Charter* by interfering with their medical autonomy. This argument should be dismissed for three main reasons:

   a. The impugned provisions do not change the status quo. The power for a regulator to require a lawyer to receive medical treatment, backed by potential ineligibility to continue practising law if the lawyer declines, already exists in British Columbia, Ontario, Newfoundland, and Saskatchewan.

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[4] Trial Lawyers Notice of Application at paras. 16-18.

b. The constitutionality of the *Act* cannot be impugned with speculation that the regulator may exercise its discretion unreasonably or in a discriminatory manner. Were that ever to occur, remedies would be available from the tribunal, the Human Rights Tribunal, and/or the courts.

c. In any case, s. 7 is not engaged. Section 7 protects medical autonomy but does not guarantee that the exercise of medical autonomy will be free from consequences, including ineligibility to practice a chosen profession.

(ii) Power to require treatment not new

8. As an initial point, the power to require a lawyer to receive medical treatment is not new. It exists in the Rules of the Law Society of British Columbia, the current *Legal Profession Act*, S.B.C. 1998, c. 9 (the "***Current Act***"), and—contrary to the CBA's assertion that "no other province or territory forces lawyers to undergo medical treatment without consent"[5]—legal professions legislation and/or law society rules in Ontario, Newfoundland, and Saskatchewan.

9. The Rules of the Law Society of British Columbia empower the Law Society's Practice Standards Committee to impose conditions on a lawyer's practice, including conditions "requiring that the lawyer obtain a medical assessment or assistance, or both".[6]

10. The Law Society Tribunal of British Columbia has interpreted ss. 38(5)(c) and (7) of the *Current Act* to empower the Tribunal to require a lawyer to receive medical treatment. Those provisions state that, if the Tribunal makes an adverse determination against a lawyer, the Tribunal may impose "conditions or limitations" on the lawyer's practice. The Tribunal has held, at the urging of the Law Society,

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[5] Canadian Bar Association ("**CBA**") Application Response at para. 49.
[6] BC Rule 3-20(e). The Committee must first make a recommendation, but if the lawyer does not complete the recommendation, the Committee may then make an order: see BC Rule 3-19(1)(b)(v).

that such conditions may include mandatory medical treatment in appropriate circumstances where required in the public interest.[7]

11. For nearly two decades, the *Ontario Act* has empowered the Law Society Tribunal of Ontario to order a licensee to "obtain or continue treatment or counselling, including testing and treatment for addiction to or excessive use of alcohol or drugs, or participate in other programs to improve his or her health".[8] Such an order may be made when a licensee is found to be "incapacitated", which for two decades has been defined as follows: "A licensee is incapacitated for the purposes of this *Act* if, by reason of physical or mental illness, other infirmity or addiction to or excessive use of alcohol or drugs, he or she is incapable of meeting any of his or her obligations as a licensee".[9]

12. The Newfoundland legislation and Rules of the Law Society of Saskatchewan also authorize orders requiring a lawyer to receive medical treatment.[10] Similarly, the Nova Scotia legislation authorizes orders requiring a lawyer to "submit to a medical assessment to determine whether the member has the capacity to practise law".[11]

13. There are reported decisions in which law society tribunals have ordered a lawyer to receive medical treatment, ordered a lawyer to enter into a "medical monitoring agreement" or "medical supervision agreement" including terms relating to treatment, or suspended a lawyer or made their eligibility to practice law conditional

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[7] *Grewal (Re)*, 2022 LSBC 22 at paras. 81, 93 [*Grewal*].
[8] *Law Society Act,* R.S.O. 1990, c. L.8, s. 40(1)(2) [*Ontario Act*].
[9] *Ontario Act*, s. 37(1). Originally enacted by *Access to Justice Act, 2006*, S.O. 2006, c. 21, Sched. C, s. 33 (1). On the purposes of the definition of "incapacitated", see *Law Society of Ontario v. Fiorillo*, 2024 ONLSTH 17 at para. 64 [*Fiorillo*].
[10] *Law Society Act,* 1999, S.N.L. 1999, c L-9.1, ss. 46(3)(c)(ii), (iii), (iv), 48(3)(m) [*Newfoundland Act*]; Rules of the Law Society of Saskatchewan, s. 1131(3)(a)(iii)(D) (Newman #1, Ex D at pp. 286-287).
[11] *Legal Profession Act,* S.N.S. 2004, c. 28, s. 45(1)(d) [*Nova Scotia Act*]. See also Québec *Professional Code*, C.Q.L.R. c. C-26, s. 48 ("The board of directors of an order may order the medical examination of a person who is a member of such order [...] where it has reason to believe his physical or mental condition is incompatible with the practice of his profession").

on receiving medical treatment or demonstrating to a committee that their competence is no longer impaired by a health condition.[12]

14. In short, there is nothing new about the power in the *Act* to require a lawyer to receive medical treatment, backed by potential ineligibility to continue practising law if the lawyer declines. That power already exists in British Columbia, Ontario, Newfoundland, and Saskatchewan.[13]

15. On a related note, the Trial Lawyers and CBA seem to be envisaging that the *Act* ends the Law Society's Alternative Discipline Process and replaces it with a regime of 'forced treatment'. It does not. The *Act* empowers the regulator to enter into a consent agreement with a licensee at any time during an investigation, and resolve complaints through alternative resolution processes in accordance with any rules made by the board.[14] These provisions are intended to empower the regulator to continue the Alternative Discipline Process—which by all accounts has been a success—and to develop additional similar programs if the board so chooses. The power to require a lawyer to receive medical treatment is not a replacement for the Alternative Discipline Process but a complementary tool that, when used appropriately, can protect the public.

(iii) Power to require treatment must be exercised in accordance with administrative law principles and *Human Rights Code*

16. The Trial Lawyers and CBA speculate that the regulator will exercise its power to require lawyers to receive medical treatment in unreasonable and draconian ways. One of the expert reports seems to assume it will be akin to involuntary committal

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[12] See e.g. *Seeger (Re)*, 2022 LSBC 29 at para. 55(a); *Knight (Re)*, 2021 LSBC 36 at para. 62(a); *Ahuja (Re)*, 2021 LSBC 44 at para. 59(b); *Law Society of Ontario v. Hutton*, 2023 ONLSTH 161 at para. 38, aff'd 2025 ONLSTA 6; *Law Society of Ontario v. Doucet*, 2019 ONLSTH 65 at para. 19; *Law Society of Saskatchewan v. Armitage*, 2014 SKLSS 14 at para. 13.

[13] It also exists in a few hundred other enactments across Canada relating to other professions.

[14] *Act*, ss. 91-92.

in psychiatric institutions under the *Mental Health Act*.[15] The CBA invokes the spectre of "electroconvulsive therapy".[16]

17. Like the Law Society, the regulator must exercise all of its statutory powers reasonably (in an administrative law sense) and in accordance with the *Human Rights Code*. If a lawyer's conduct is being impaired by a health or substance use issue that constitutes a disability, the regulator must accommodate that disability to the point of undue hardship to the regulator's public interest mandate.[17]

18. As noted above, the constitutionality of the *Act* cannot be impugned with speculation that the regulator may exercise its discretion unreasonably or in a discriminatory manner. If the regulator were to exercise its authority unreasonably, remedies would be available on that specific occasion. A licensee who disagrees with an order may appeal it to the tribunal and then to the Court of Appeal, or make a human rights complaint against the regulator.

(iv) Section 7 not engaged

19. In any case, s. 7 is not engaged. The Trial Lawyers' argument (that ss. 68, 76-78, 88, 198, and 202 of the *Act* infringe s. 7 by interfering with lawyers' medical autonomy) is inconsistent with a settled body of jurisprudence on s. 7. Section 7 protects medical autonomy but does not guarantee that the exercise of medical autonomy will be without consequences, including professional or economic consequences such as ineligibility to continue practising law.

20. The s. 7 liberty interest protects "the right to make fundamental personal choices free from state interference".[18] Similarly, security of the person protects "a notion of personal autonomy involving control over one's bodily integrity free from state

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[15] Ganesan Report dated March 28, 2025 at p. 5 (Affidavit #1 of Dr. Soma Ganesan made March 29, 2025, Ex. A).
[16] CBA Application Response at para. 44(b).
[17] Law *Society of Ontario v. Khan*, 2018 ONLSTH 131 at paras. 51-66, aff'd 2020 ONLSTA 18; see also *Law Society of Ontario v. Stewart*, 2019 ONLSTH 118.
[18] *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 64.

interference".[19] Liberty and security of the person both include a right of medical self-determination,[20] which includes a right to refuse unwanted medical treatment.

21. Importantly, the "right of medical self-determination is not vitiated by the fact that serious risks or consequences, including death, may flow from the patient's decision".[21] In other words, s. 7 includes the right to refuse medical treatment, but s. 7 does not guarantee that refusing medical treatment will be free from consequences. Thus, the Court of Appeal has held, for example, that s. 7 was not engaged where a teacher's employment was terminated because she declined to submit to a psychiatric examination.[22] The same reasoning applies here. If the regulator makes a competence or professional conduct order requiring a lawyer to

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[19] *Carter* at para. 64
[20] *Carter* at para. 67.
[21] *Carter* at para. 67; see also *Lewis v. Alberta Health Services*, 2022 ABCA 359 at para. 47, cited with approval in *Warner v. British Columbia (Provincial Health Officer)*, 2025 BCCA 21 at para. 47 [*Warner*].
[22] *B.C. Teachers' Federation v. School District No. 39 (Vancouver)*, 2003 BCCA 100 at paras. 203-210 [*BCTF 2003*]; see also *Warner* at paras. 43-52; *Hoogerbrug v. British Columbia*, 2024 BCSC 794 at paras. 276-278, appeal quashed as moot May 6, 2025 (oral reasons not yet published); *Weisenburger v. College of Naturopathic Physicians of British Columbia*, 2024 BCSC 1047 at para. 89 [*Weisenburger*]; *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2020 BCSC 1310 at para. 1766, aff'd 2022 BCCA 245; *Tanase v. College of Dental Hygienists of Ontario*, 2021 ONCA 482 (five-member panel) at para. 40; *Mussani v. College of Physicians and Surgeons of Ontario*, 2004 CanLII 48653 (O.N.C.A.) at para. 41; *Ouellette v. Law Society of Alberta*, 2019 ABQB 492 at para. 52 [*Mussani*], application for leave to appeal dismissed 2021 ABCA 99; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at p. 1179, *per* Lamer J., as he then was, concurring; *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3 at para. 46. The Trial Lawyers' argument harkens back to *Wilson v. Medical Services Commission of British Columbia*, 1988 CanLII 177 (B.C.C.A.), which was overruled by subsequent Supreme Court of Canada authority: see e.g. *BCTF 2003* at paras. 201-205; *Mussani* at para. 42.

receive treatment and the lawyer declines, the regulator may suspend the lawyer's licence to practice law but that economic consequence does not engage s. 7.

(v) In any event, impugned provisions not arbitrary, overbroad, and/or grossly disproportionate

22. Alternatively, if the Court concludes s. 7 is engaged, the impugned provisions are not arbitrary, overbroad, and/or grossly disproportionate to the legislative objective of protecting the public.

23. The Trial Lawyers' arguments on arbitrariness, overbreadth, and gross disproportionality are variations on the theme that the Act causes harm by defining incompetence as including having a health condition. The Trial Lawyers say that, if having a health condition constitutes incompetence, lawyers will be reluctant to seek treatment because seeking treatment would be tantamount to admitting that they have a condition and are, by definition, incompetent.

24. The expert evidence is relevant to these arguments. After any further steps regarding the expert evidence have occurred, the Attorney General will have submissions to make on the weight that should be afforded to the expert reports and related submissions on arbitrariness, overbreadth, and gross disproportionality.

25. Irrespective of the expert evidence, however, the Trial Lawyers' arguments misinterpret the *Act*. Having a health condition does not constitute incompetence. "Incompetence", a noun, is not even a defined term. "Incompetently", an adverb, is defined as including practising law "in a manner that demonstrates [...] a health condition that prevents a licensee from practising law with reasonable skill and competence".[23] In other words, a licensee cannot be incompetent for having a health condition. A licensee can practise law incompetently if a health condition is preventing them from practising with reasonable skill and incompetence. The focus is on the conduct, not the condition.

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[23] *Act*, s. 68 *sv* "incompetently".

26. Although many lawyers will experience health conditions that never affect their ability to practise law, it is unquestionably the case that health issues (including substance use issues) "can be a contributing factor in some instances of lawyer misconduct".[24] The purpose of recognizing this reality in the definition of "incompetently" is the same as the purpose of the longstanding definition of "incapacitated" in the Ontario legislation: to recognize "that sometimes behaviours exhibited by a lawyer or paralegal, which would otherwise constitute professional misconduct, actually are the result of illness and infirmity and should be treated accordingly".[25] Such treatment should ideally be sought out by licensees voluntarily, but when a licensee is unwilling to get treatment, the power to require them to do so in order to continue to practice—when exercised reasonably in an administrative law sense and in accordance with the *Human Rights Code*—can help to protect the public.[26]

27. Properly interpreted, the impugned provisions of the *Act*, if they engage s. 7 at all, do not do so in a manner that is arbitrary, overbroad, or grossly disproportionate.

E. Section 8 argument must be dismissed

28. Section 78 of the *Act* establishes a reasonable and properly constrained system for investigating complaints against licensees, trainees, and law firms. Contrary to the Trial Lawyers' assertion, it does not authorize fishing expeditions. Section 78 authorizes the chief executive officer, for the purpose of an investigation under the *Act*, to do any of the following without a warrant:

    a. during business hours, enter a business premises[27] in which a licensee, practises law;

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[24] Recommendation on the Development of an Alternative Discipline Process (2021) (Greenberg #1, Ex. 49 at p. 866).
[25] *Fiorillo* at para. 64.
[26] *Grewal* at para. 93.
[27] Except a business premises located in a licensee's residence, for which the licensee's consent or a warrant is required: *Act*, s. 78(2).

b. inspect or examine the records, or any other thing, of a licensee that relate to the practice of law; and

c. observe the licensee's practice of law or supervision of the practice of law.[28]

29. These powers are not materially different from the provisions of the *Current Act* and Rules of the Law Society of British Columbia, which the Court of Appeal has found compliant with s. 8 of the *Charter*.[29]

30. Under s. 8 of the *Charter,* the presumption that a warrantless search or seizure is unreasonable may be rebutted where the search or seizure is: (1) authorized by law; (2) the law itself is reasonable; and (3) the manner in which the search is carried out is reasonable.[30]

31. The Trial Lawyers do not allege (nor could they allege) that any search or seizure has taken place pursuant to s. 78 of the *Act*, such that the manner of the search can be put in issue. Nor do they allege that a search under the *Act* is not authorized by law. Accordingly, the only criterion at issue is whether the law itself is reasonable.

32. Where an impugned law's purpose is regulatory and not criminal, a more flexible approach to the standard of reasonableness under s. 8 of the *Charter* will apply.[31] A court will generally consider the nature and purpose of the legislative scheme, the mechanism employed and the degree of potential intrusiveness, and the availability of judicial supervision.[32]

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[28] The powers in s. 78 are also subject to any limits or conditions imposed by the rules set by the board under s. 84 of the *Act*.
[29] *A Lawyer v. The Law Society of British Columbia,* 2021 BCCA 437, aff'g 2021 BCSC 914 ["*A Lawyer*"].
[30] *R. v. Collins*, [1987] 1 S.C.R. 265 at para. 23; *R. v. Caslake*, [1998] 1 S.C.R. 51, at paras. 10-11.
[31] *A Lawyer* (BCCA), at paras. 38-39; *A Lawyer* (BCSC) at para. 152. See also, *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3; *Mulgrew v. Law Society of British Columbia,* 2016 BCSC 1279 [*Mulgrew*].
[32] *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 at para. 57.

33. Section 78 is reasonable when considering:

a. the regulatory nature and public protection purpose of the *Act*;

b. regulated professionals' diminished expectation of privacy with respect to a search by their regulator of their place of business;

c. the availability of judicial supervision; and

d. the protections afforded to solicitor client privilege in ss. 209-210 of the *Act.*[33]

34. Indeed, across Canada, provincial legislation regulating the legal profession contains provisions authorizing the warrantless inspection of lawyers' documents kept at their business premises.[34] To date, no court has found these provisions to contravene s. 8 of the *Charter*.[35] If the regulator were to exercise its authority in a manner that contravened s. 8 of the *Charter*, then a licensee could challenge that particular search or seizure.

F. Section 2(d) claim must be dismissed

(i) Overview

35. The Trial Lawyers argue that the *Act* infringes lawyers' freedom of association under s. 2(d) of the *Charter*. In making this argument, the Trial Lawyers cast the Law Society as an association of lawyers through which lawyers pursue shared

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[33] Notably, s. 209 of the *Act* mirrors the protections provided for in s. 88 of the *Current Act.*
[34] *Current Act,* ss. 26(4)(b) and 36(b); *Legal Profession Act*, R.S.A. 2000, c. L-8, s. 55(2); *The Legal Profession Act*, 1990, S.S. 1990-91, c. L-10.1, s. 63(1); *Legal Profession Act,* C.C.S.M. c. L107, s. 67; *Ontario Act*, s. 49.3(2); *Act respecting the Barreau du Québec*, C.Q.L.R. c. B-1, s. 76; *Nova Scotia Act*, s. 35A; *An Act Respecting the Law Society of New Brunswick*, S.N.B. 1996, c. 89, s. 17(2); *Legal Profession Act*, R.S.P.E.I. 1988, c. L-6.1, s. 38; *Newfoundland Act*, s. 45; *Legal Profession Act, 2017*, S.Y. 2017, c. 12, ss. 61-62; *Legal Profession Act,* R.S.N.W.T. 1988, c. L-2, s. 24.1; *Legal Profession Act*, R.S.N.W.T. (Nu.) 1988, c. L-2, s. 24.
[35] See: *A Lawyer*; *Mulgrew*; *Greene v. Law Society of British Columbia et al.*, 2005 BCSC 390; *Law Society of Alberta v. Sidhu*, 2017 ABCA 224; *Law Society of Saskatchewan v. Abrametz*, 2016 SKQB 320.

objectives. Notably, the Law Society does not describe itself in this way nor invoke s. 2(d).

36. The Trial Lawyers' s. 2(d) argument should be dismissed for two main reasons:

a. The Law Society is not an association of lawyers of the kind protected by s. 2(d); it regulates lawyers in the public interest. Regulating and being regulated are not associational activities protected by s. 2(d).

b. The *Act* does not, in purpose or effect, interfere with lawyers' right under s. 2(d) to associate in pursuit of shared objectives through lawyers' associations like TLABC and the CBA.

(ii) Framework for s. 2(d)

37. The purpose of s. 2(d) of the *Charter* is to recognize the "profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of [their] ends".[36] Section 2(d) protects three classes of activities:

a. the constitutive right to join with others and form associations;

b. the derivative right to join with others in the pursuit of other constitutional rights; and

c. the purposive right to join with others to meet on more equal terms the power and strength of other groups or entities.[37]

38. Courts use a two-step framework under s. 2(d) of the *Charter*:[38]

a. Do the activities in question fall within the range of activities protected under the freedom of association guarantee?

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[36] *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 at para. 54.
[37] *Mounted Police* at para. 66.
[38] *Société des casinos du Québec inc. c. Association des cadres de la Société des casinos du Québec*, 2024 SCC 13 at paras. 5, 8, 17.

b. Does the legislation or government action, in purpose or effect, substantially interfere with those activities?

(iii) Law Society is a regulator, not an association protected by s. 2(d)

39. The Law Society's activities do not fall within the range of activities protected by s. 2(d). The Law Society is not an association of lawyers. It does not undertake representative functions, nor does it represent the interests of lawyers. Rather, the Law Society regulates lawyers in the public interest. The Law Society must act in the public interest no matter how unpopular it is with the lawyers it regulates.[39]

40. The European Court of Human Rights has held that equivalent freedom of association protections under art. 11 of the *European Convention on Human Rights* do not apply to legal regulators because such regulators exercise public law functions for the protection of the public.[40] Similarly, Canadian jurisprudence has held that s. 2(d) does not apply to restrictions or requirements put in place for the purpose of regulating a profession.[41] In short, regulating and being regulated are not associational activities protected by s. 2(d) of the *Charter*.

(iv) Act does not inhibit lawyers from associating

41. The Act does not, in purpose or effect, interfere with lawyers' right under s. 2(d) to associate in pursuit of shared objectives through lawyers' associations like TLABC and the CBA. Section 2(d) of the *Charter* applies where the state precludes an activity because of its associational nature.[42] The *Act* does not preclude any associational activity.

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[39] *Current Act*, s. 3; Greenberg XFD at Q209-217. See generally Charles C. Locke, "Reflections of the Governance of the Legal Profession in the British Columbia, Part I" (2002) 60:5 *Advocate* 689.

[40] *A. and Others v. Spain*, no. 13750/88, Commission decision of 2 July 1990, D.R. No. 66, p. 193. See also *Bota v. Romania,* no. 24057/03, ECHR 2004-II.

[41] *Murtaza v. Registrar of the Association of Professional Engineers of Ontario*, 2016 ONSC 1745 at paras. 16-17, citing *Mussani*.

[42] *Harper v. Canada (Attorney General)*, 2004 SCC 33 at para. 125. *Barber v. A.G. Canada*, 2018 ONSC 493 at para. 10.

G. Section 1

42. If this Court concludes that ss. 68, 76-78, 88, 198, and/or 202 of the *Act* infringe s. 7 of the *Charter*, or that s. 78 of the *Act* is unreasonable within the meaning of s. 8 of the *Charter*, the Attorney General acknowledges these infringements are unlikely to be justified under s. 1 of the *Charter*. Sections 7 and 8 incorporate many of the elements that are considered under s. 1 for other rights.

43. However, if this Court finds the *Act* engages s. 2(d) of the *Charter,* the Attorney General submits that any limits are reasonable limits that can be demonstrably justified in a free and democratic society.

H. Remedy

44. Despite impugning only certain provisions of the *Act*, the Trial Lawyers ask this Court to declare the whole *Act* unconstitutional.[43] There is no legal basis to do so.

45. If this Court decides that a provision of the *Act* violates the *Constitution*, then the appropriate remedy is to declare that provision unconstitutional only to the extent of the inconsistency.[44]

I. Evidentiary issues

(i) Expert evidence

46. The Trial Lawyers have filed expert reports from Dr. Ganesan and Mr. Gold on matters relating to lawyers' health and medical treatment. The Attorney General accepts that these reports meet the *Mohan* criteria to be admitted as expert evidence.

47. The Attorney General anticipates that the parties will discuss possible further steps regarding the expert evidence to occur before or during the October 2025 hearing dates (including potential cross-examination). After any further steps have been

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[43] Trial Lawyers Notice of Application, Part 1.
[44] *Ontario (Attorney General) v. G*, 2020 SCC 38 at paras. 97, 108-109. *R. v. Moriarity,* 2015 SCC 55 at para. 58, citing *Schachter v. Canada*, [1992] 2 S.C.R. 679 at p. 702.

completed, the Attorney General will have submissions to make on the weight that should be afforded to these expert reports.

(ii) Argumentative affidavits

48. The Trial Lawyers have filed affidavits from lawyers who believe that the *Act* would diminish their independence. These affidavits consist almost entirely of inadmissible argument and opinion.[45]

(iii) Discovery read-ins

49. The Trial Lawyers are precluded by R. 9-7(9) and (10) from reading-in any answers of their examination for discovery of the Attorney General's representative.

50. The Trial Lawyers have attached the entire transcript of their examination for discovery of the Attorney General's representative, and counsel's response to requests left at that discovery, to an affidavit.[46] However, the notice of application filed by the Trial Lawyers does not identify any discovery answers they want to read in. R. 9-7(9) and (10) require a party who intends to rely on discovery answers on a summary trial application to give notice of that fact in accordance with R. 8-1(7) and (8), i.e., in their application materials, so the other party or parties know the case to meet and have the opportunity to lead evidence in response. It is not sufficient to list the entire examination for discovery transcript as material to be relied on: a party must specify which portions it wishes to rely on.[47] The Trial Lawyers have not done so.

J. HMTK should be removed

51. His Majesty the King in right of the Province of British Columbia (i.e., the government)[48] should be removed as a party under R. 6-2(7)(a) and the style of

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[45] Affidavit #1 of Simon Collins made May 24, 2024, at paras. 5-30; Affidavit #1 of Kevin Gourlay made May 27, 2024, at paras. 20-25, 28-32, 36-42, 44; Affidavit #1 of Rajiv Gandhi made May 27, 2024, at paras. 7-20, 22; Affidavit #1 of Kevin Westell made April 3, 2025, at paras. 7-25.
[46] Affidavit #2 of Gregory Berry made April 3, 2025, Ex. D and E.
[47] *Pareto Capital Partners (2011) Ltd. v. DVRM Investments Ltd.*, 2020 BCSC 1570 at para. 90, aff'd 2021 BCCA 305.
[48] *Crown Proceeding Act,* R.S.B.C. 1996, c. 89, s. 7.

cause should be amended accordingly.[49] In a proceeding about the structural principles of the Constitution, the government should not be conflated with the legislature. The proper defendant in a challenge to the constitutional validity of legislation is the Attorney General.[50]

K. Costs should follow event

52. There is no basis for an award of special costs to the Trial Lawyers. Costs should follow the event in accordance with the usual principles.

PART 6: MATERIAL TO BE RELIED ON

53. The evidence admitted in the parallel summary trial application in *Law Society of British Columbia v. Attorney General of British Columbia et al.,* Supreme Court of British Columbia, Vancouver Registry Action No. S-243258.

54. Possible responsive report to the reports of Dr. Ganesan and Mr. Gold, to be determined.

55. The pleadings and other material filed herein;

56. Such further and other material as counsel may advise and this Honourable Court permit.

The Attorney General has filed in this proceeding a document that contains her address for service.

Dated: May 23, 2025

emily Lapper

Emily Lapper, Trevor Bant,
Sergio Ortega, Karin Kotliarsky,
and Solomon Kay-Reid
Counsel for the Attorney General
of British Columbia

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[49] See *B.C. Teachers' Fed. v. B.C.*, 1985 CanLII 304 (B.C.S.C.) at para. 16.
[50] See e.g. *Allen v. British Columbia (Superintendent of Motor Vehicles)*, 1986 CanLII 1044 (B.C.S.C.), (1986) 2 B.C.L.R. (2d) 255 at paras. 14-16; *Weisenburger* at para. 129.