No. S-243325
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA and KEVIN WESTELL

PLAINTIFFS

AND:

HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, the ATTORNEY GENERAL OF BRITISH COLUMBIA, and the LIEUTENANT GOVERNOR IN COUNCIL

DEFENDANTS

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OVERVIEW

1. On November 26, 2018, in the Legislative Assembly of British Columbia, the Honourable David Eby, K.C. stated: "The Law Society is independent of government—and necessarily so."[1] The Defendants have not addressed or clarified this statement. Instead, they have obfuscated through objections or non-answers in two examinations for discovery[2] and responses to requests left at those discoveries.[3]

2. That can only be because the statement was and remains true, and represents a shared understanding of the constitutional fabric of our nation.

3. Despite this recent acknowledgement of the constitutional imperative of the independence of the Law Society of British Columbia (the "**Law Society**"), the Legislature introduced the *Legal Professions Act*, S.B.C. 2024, c. 26 ("**Bill 21**") to eliminate the Law Society.

4. The Plaintiffs, the Trial Lawyers Association of British Columbia ("**TLABC**") and Kevin Westell (the "**Plaintiffs**"), challenge the constitutionality of Bill 21 on the basis it undermines the independence of the bar and violates lawyers and the public's constitutional rights (the "**TLABC Action**").

5. This action is similar to but broader than the Law Society's parallel action, because it raises and seeks to defend the *Charter* rights of every individual in British Columbia.

6. Bill 21 is unconstitutional. The Plaintiffs agree with the Law Society that it is *ultra vires* ss. 92(13) and (14) of the *Constitution Act, 1867* because it trenches on the independence of the bar and judiciary by eliminating self-regulation. The legislation attacks institutions fundamental to Canadian democracy and essential to the maintenance of the rule of law.

7. These Plaintiffs also submit that beyond the institutional effects of Bill 21, the legislation violates the public and lawyers' rights protected by the *Charter of Rights and Freedoms*.

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[1] British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 41-3, No. 192 (26 November 2018) at p. 6872 ("**Hansard (November 26, 2018)**").

[2] Affidavit #2 of Gregory Berry, made April 3, 2025 (TLABC Action), Ex. D, p. 282 ("**Armitage Examination for Discovery (March 17, 2025)**"); Affidavit #3 of Mia Liang, made July 30, 2025 (TLABC Action) ("**Liang Affidavit #3**"), Ex. A at p. 17 ("**Armitage Examination for Discovery (July 2, 2025)**").

[3] Liang Affidavit #3, Ex. B.

8. Without an independent bar, there is a substantial impairment of individual rights to effective assistance of counsel, to a fair trial, to retain counsel, and to a fair hearing before an independent judge.

9. For lawyers, Bill 21 infringes their rights to associate for purposes including self-regulation (s. 2(d)); to be secure against unreasonable search and seizure (s. 8); and to life, liberty, and security of the person in a manner that is not in accordance with the principles of fundamental justice (s. 7). None of these infringements are justified as reasonable limits in a free and democratic society.

10. Bill 21 undermines the independence of the bar and judiciary, threatens the rule of law, and will also undermine public confidence in the administration of justice.

FACTS

The Parties

The Plaintiffs in the TLABC Action

11. The Plaintiffs in the TLABC Action are TLABC and Mr. Westell.

12. TLABC is a non-profit society with a membership of approximately 1,600 legal professionals. Its mission is to support and promote the rights of individuals in British Columbia. TLABC members represent individuals, rather than corporations, and practice in a breadth of areas of law, including family, employment, criminal defence, and personal injury.

13. Mr. Westell is a criminal defence lawyer practicing in Vancouver, British Columbia. Mr. Westell is a member and elected Bencher of the Law Society.

The Law Society of British Columbia

14. The Law Society is the plaintiff in a separate action also challenging the constitutionality of Bill 21 (the "**Law Society Action**").

15. The Law Society is an independent, non-profit, and self-regulating society continued by s. 2(1) of the *Legal Profession Act*, S.B.C. 1998, c. 9 ("***LPA***"), to govern the professional bar

of lawyers in British Columbia. The mandate of the Law Society is to uphold and protect the public interest in the administration of justice.[4]

16. The membership of the Law Society is comprised of approximately 14,000 practicing lawyers, 1,550 non-practicing lawyers, and 1,070 retired lawyers. The Law Society is governed by a board, the members of which are known as Benchers.

17. The Defendants acknowledge that the Law Society as an institution and the Benchers date back to 1869 and 1884, respectively—the former being before British Columbia became a province in Canada.[5] In what was known as Vancouver's Island and the Colony of British Columbia, an association of lawyers first formed in 1869 by order of the first justice of the Colony (Justice Begbie) and the *Legal Professions Act* of 1863.[6] At the time, the sole purpose of the association was to gain control of the profession's admission and discipline, which had previously been under the purview of the courts.[7] Accordingly, the association provided that "the affairs of the society shall be managed by a council consisting of seven members (exclusive of the Attorney-General and Solicitor-General)".[8] Two decades later, a revised *Legal Professions Act*—envisaged and drafted by the then Benchers—provided for the election of "Benchers" and the formal naming of "The Law Society of British Columbia".[9]

18. In 1987, the legislature enacted the *Legal Profession Act*, which formally recognized the duty of the Law Society to uphold and protect the public interest in the administration of justice.[10] The *Legal Profession Act* reflected consensus amongst the British Columbian and Canadian bar as to how the Law Society should discharge its mandate.[11]

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[4] *LPA*, s. 3.

[5] Liang Affidavit #3, Ex. B.

[6] Alfred Watts, K.C., *History of the Legal Profession in British Columbia, 1869-1984* (Law Society of British Columbia, 1984) at pp. 3–4.

[7] Watts at p. 4.

[8] Watts at p. 5.

[9] Watts at p. 5.

[10] *Legal Profession Act*, S.B.C. 1987, c. 25, s. 3.

[11] Affidavit #1 of Gregory Berry, made May 27, 2024 (TLABC Action), Ex. B, at p. 5 ("**Berry Affidavit #1**")

19. In 1998, the *LPA* was enacted, and later amended in 2018 by the *Attorney General Statutes Amendment Act, 2018*, S.B.C. 2018, c. 49. The then-Attorney General described the amending Act as permitting, not requiring, the Law Society to regulate paralegals: "All [the Act] does is that it gives them the authority to do it if they wish."[12] In other words, the Act provided a framework "if the Law Society decide[d] to move in that direction".[13]

The Defendants

20. The defendant in both Actions is His Majesty the King in Right of British Columbia, represented by the Attorney General of British Columbia. The government is also represented in the Actions by the Lieutenant Governor in Council.

The Legislative History of Bill 21

21. In March 2022, the government announced its intention to combine the regulation of lawyers, notaries public, and licensed paralegals under a single regulator.[14]

22. The Attorney General did not open meaningful consultation on Bill 21 to lawyers or the public subsequent to the announcement and prior to the tabling of Bill 21.[15]

23. On September 14, 2022, the Ministry of Attorney General released an Intentions Paper on Legal Professions Regulatory Modernization (the "**Intentions Paper**"), in which it outlined its plans to "modernize the regulatory framework for legal service providers in British Columbia to help make it easier for the public to access legal services and advice".[16]

24. In November 2022, the Law Society issued a response to the announcement of Bill 21 and the Intentions Paper.[17] The Law Society expressed concern that the proposed model did not directly disclose an intention to protect the institutional dimension of the independence of the bar, including by ensuring that the majority of the governing board is comprised by lawyers—who are elected by lawyers.

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[12] Hansard (November 26, 2018) at p. 6871.

[13] Hansard (November 26, 2018) at p. 6871.

[14] *Law Society of British Columbia v. British Columbia*, 2024 BCSC 1292 at para. 19 [***Injunction Reasons***].

[15] Affidavit #1 of Kevin Gourlay, made May 27, 2024 (TLABC Action), at para. 26 ("**Gourlay Affidavit**").

[16] Affidavit #1 of Brook Greenberg, K.C., made May 24, 2024 (LSBC Action), Ex. 24 ("**Greenberg Affidavit #1**").

[17] Greenberg Affidavit #1 at para. 78, Ex. 25.

25. In January 2024, the Federation of Law Societies of Canada wrote to the Attorney General, seeking an opportunity to review and comment on the draft legislation that would become Bill 21.[18] The Attorney General ignored the request.

26. In March 2024, the Attorney General released an update on the proposed legislation. The Law Society responded again, encouraging the government to recognize and address its concerns that the legislation did not adequately protect the independence of the bar.[19] TLABC and other bar associations throughout the province similarly called on the Attorney General to consult with lawyers and the public. The government refused.

27. On April 10, 2024, Bill 21 was introduced to the Legislature. It was the first time the text of Bill 21 was made publicly available.[20]

28. TLABC followed with a statement the same day:

> "Bill 21 is an egregious assault on the principle of lawyer independence, which is fundamental to the legal professions' integrity and the justice system at large. Lawyer independence ensures we can serve our clients without government interference, maintaining the trust that is paramount to our work. Bill 21 is about one thing- government control over the legal system and the professions working in it," said Michael Elliott.
>
> Bill 21 ends the elected-lawyer majority that currently exists on the Law Society of B.C.'s board. Just five of seventeen board seats will be elected lawyers under the new regulatory structure, and the remaining twelve board seats will be direct or indirect government-appointments. In comparison, in Ontario's single legal regulator model, the board has forty elected lawyers, eight government appointments, and five paralegal representatives. Bill 21 is an enormous departure from the norms governing legal regulation in liberal, democratic societies.[21]

[18] Injunction Reasons at para. 23.

[19] Greenberg Affidavit #1 at paras. 83–84.

[20] Injunction Reasons at para. 24.

[21] Gourlay Affidavit, Ex. B, TLABC Statement dated April 10, 2024, p. 1.

29. Despite vigorous opposition from the Law Society, TLABC, other associations, and members of the public, the government closed debate on May 15, 2024. Bill 21 remained in Committee Stage at that time.[22]

30. Consistent with the expedited schedule, Bill 21 received third reading on May 15, 2024, and Royal Assent on May 16, 2024.[23]

31. The Plaintiffs and the Law Society commenced their respective actions within a week of Bill 21's enactment.[24]

Overview of Bill 21

32. Bill 21 fundamentally undermines the independence of the bar in British Columbia. It does so by eliminating the Law Society and the institutional design of self-regulation of legal professionals in British Columbia. Under Bill 21, elected lawyers no longer have majority control of and oversight over the legal profession, or the rules governing lawyers and the practice of law. Instead, Bill 21 imposes a governance model giving a functional majority to non-lawyers, including government appointees and representatives of Indigenous governments and groups, who will impose a set of rules on lawyers.

33. Bill 21 enables the new regulator—Legal Professions British Columbia—to directly regulate the conduct of lawyers. It creates a prescriptive governance regime, including by codifying matters of conduct, competence and discipline, removing the authority of the regulator to make fundamental decisions about the conduct of lawyers and the regulation of the practice of law.[25] When, by regulation, it is put into force, there will be significant impacts on the legal system and lawyers. In summary:

    a. **Bill 21 directly regulates the mental health of regulated persons through the definition of competence.** Bill 21 regulates lawyers by prohibiting, by legislation, a licensee, law firm or trainee from engaging in conduct that constitutes

[22] Injunction Reasons at para. 27.
[23] Injunction Reasons at para. 28.
[24] Injunction Reasons at para. 29.
[25] Bill 21, Parts 5 and 6.

professional misconduct or conduct unbecoming a professional, or practicing law incompetently. "Incompetently" is defined to include having "a health condition that prevents a licensee from practicing law with reasonable skill and competence."[26]

b. **Bill 21 authorizes the chief executive officer to conduct investigations into a person's mental health.** Bill 21 authorizes the chief executive officer of Legal Professions British Columbia, on their own motion, to conduct an investigation to determine whether a lawyer has, among other things, practiced law "incompetently", which again includes a lawyer's mental health condition.[27]

c. **Bill 21 authorizes sweeping and warrantless searches by a regulator who is not made up of and controlled by lawyers.** Bill 21 authorizes the chief executive officer of Legal Professions British Columbia to conduct a warrantless entry into business premises, and inspect or examine the records of a licensee, trainee or law firm that "relate to the practice of law by the licensee, trainee or law firm", for the purposes of "investigating" whether the licensee has practiced law "incompetently."[28] Bill 21 also authorizes the chief executive officer to compel any person who may have information or records that are relevant to the investigation (including records relating to a health condition) to attend and give evidence, give written answers to questions, or produce records to the chief executive officer.[29]

d. **Bill 21 empowers the chief executive officer to force lawyers to receive medical treatment.** Bill 21 authorizes the chief executive officer to compel a lawyer to receive medical treatment or counselling, the refusal of which, or other wilful interference with an order made by the chief executive officer is an offence which may be punishable by up to 2 years in prison. Any orders made by the chief executive officer to compel a lawyer to receive medical treatment or counseling may form part of a licensee's or trainee's disciplinary record, which must include

[26] Bill 21, ss. 68, 72(2).
[27] Bill 21, s. 77(2)(b).
[28] Bill 21, s. 78.
[29] Bill 21, s. 78(3).

any remedial action taken in relation to a licensee or trainee.[30] If a lawyer refuses, they may be prosecuted for obstructing the executive director in the performance of their duty, which may be punishable by imprisonment.[31]

e. **Lawyers will be disciplined by non-lawyers**. The discipline committee which approves charges, and hearing panels which adjudicate them, need not have a single lawyer among them. The tribunal assessing the competence or conduct of a lawyer could be entirely made up of non-lawyers.[32]

34. Currently, only the transitional provisions of Bill 21 set out in Part 18 are in force. The remainder of the legislation will come into force by regulation of the Lieutenant Governor in Council.[33] The transitional provisions:

a. create the transitional board, which is comprised of a narrow majority of members elected by benchers of the Law Society;

b. create the transitional Indigenous council, which is comprised of members appointed by the BC First Nations Justice Council, the Métis Nation of British Columbia, and the transitional board itself;

c. create the advisory committee, which is comprised of each of the executive directors of the Law Society, Society of Notaries Public, and Law Foundation, and an employee of the Attorney General; and

d. establish the basic governance and financial structures for the transition to Bill 21, including a single person to oversee the transition, who becomes the chief executive officer of Legal Professions British Columbia.[34]

35. An independent bar is not a new thing—it is foundational to our society and system of governance, and has been since before confederation. The government of today seeks, for

[30] Bill 21, ss. 1, 88.
[31] Bill 21, ss. 198, 202.
[32] Bill 21, ss. 89(6), 123.
[33] Bill 21, s. 317.
[34] Bill 21, ss. 215, 223–229.

reasons known to itself which it has shielded from effective discovery, to create the "end" Thomas Erskine spoke of more than two centuries ago.

> 'I will for ever, at all hazards, assert the dignity, independence and integrity of the English Bar, without which impartial justice, the most valuable part of the English Constitution, can have no existence. From the moment that any advocate can be permitted to say that he will, or will not, stand between the Crown and the subject arraigned in the court where he daily sits to practise, from that moment the liberties of England are at an end. If the advocate refuses to defend, from what he may think of the charge or of the defence, he assumes the character of the Judge; nay, he assumes it before the hour of judgment; and in proportion to his rank and reputation, puts the heavy influence of, perhaps, a mistaken opinion into the scales against the accused, in whose favour the benevolent principle of English law makes all presumptions.'[35]

Mental Health in the Legal Profession

There is a crisis in mental health in the legal profession in Canada

36. Lawyers in Canada are suffering from significant mental health and substance use issues.

37. The full complexity and magnitude of the challenge of lawyers' mental health has only now come into focus in North America. Through a series of comprehensive studies sponsored by the American Bar Association in the U.S., and the Federation of Law Societies in Canada, we now know that mental health and substance issues affect the profession as a whole and land disproportionately on vulnerable persons.

38. In the U.S., a study conducted by the American Bar Association and Betty Ford Foundation (the "**ABA Study**") concluded substantial levels of substance use dependency and other health issues existed in many of the nearly 13,000 lawyers surveyed. It also found that:

    a. more than 60% of lawyers in the United States reported experiencing anxiety issues over the course of their careers;

    b. 45% had experienced depression;

[35] Lloyd Paul Striker, *For the Defence: Thomas Erskine, The Most Enlightened Liberal Of His Times*, *1750–1823* (Garden City: Doubleday and Company, 1947) at p. 217.

c. rates of panic disorder, bipolar disorder and self-injurious behaviour were also notable;

d. more than 11% of lawyers reported having suicidal thoughts at some point during their career;

e. 0.7% of lawyers in the study reported at least one prior suicide attempt; and

f. more than 36% of respondents provided answers consistent with potential alcohol dependence.[36]

39. Until very recently, one could not say with certainty whether and to what extent a similar phenomena was occurring among Canadian lawyers. One could guess or assume, but there was no Canadian counterpart to the ABA Study. That changed in October 2022, with the publication of *Towards a Healthy and Sustainable Practice of Law in Canada: National Study on the Psychological Health Determinants of Legal Professionals in Canada*, Phase I (the "**National Study"**). The National Study was prepared by a research team from the Université de Sherbrooke, led by Dr. Nathalie Cadieux. The National Study was commissioned by the National Wellness Study Steering Committee (the "**Steering Committee**") of the Federation of Law Societies and the Canadian Bar Association.[37]

40. The National Study provides a compelling and troubling window into the state of the legal profession in Canada. It is the first and only comprehensive scientific study to do so. It is based on data from 7,300 legal professionals from all over the country, including from British Columbia. The National Study is the quantitative data set.

[36] Affidavit #3 of Brook Greenberg, K.C., made April 3, 2025 (LSBC Action) at paras. 92-93, Ex. 99 ("**Greenberg Affidavit #3**").

[37] Greenberg Affidavit #3 at paras. 164–166, Ex. 105 ("**National Study**").

41. The National Study confirms that Canadian legal professionals are at a significantly elevated risk of experiencing mental health issues as compared to the general population. In particular:

a. Among legal professionals that participated in the study, 29% provided responses consistent with experiencing moderate to severe depression disorder[38] and 36% provided responses consistent with experiencing moderate to severe anxiety disorder.[39]

b. A majority provided responses consistent with burnout (56%)[40] and psychological distress (60%).[41] Potential alcohol dependence was observed in 37% and 42% of male and female respondents, respectively.[42]

c. Approximately one in four respondents reported having had suicidal thoughts in the course of their careers.[43] In particular, 24.4% of lawyers reported this, while 61.9% of legal professionals who identify as non-binary reported having suicidal thoughts.[44]

d. A majority of legal professionals that felt they could benefit from assistance for a mental health issue did not seek support for a variety of reasons, including those related to the regulatory environment.[45]

42. The National Study also showed that mental health concerns land particularly on certain groups:

a. women legal professionals (63.7%);

[38] National Study at p. 34.
[39] National Study at p. 34.
[40] National Study at p. 47.
[41] National Study at p. 27.
[42] National Study at p. 248.
[43] National Study at p. 40.
[44] National Study at p. 42.
[45] National Study at pp. 55-56.

b. legal professionals working in the public or not for profit sectors (58.0%) and private practice (58.4%);

c. legal professionals between the ages of 26 and 35 (71.1%);

d. legal professionals with less than 10 years of experience (70.8%);

e. articling students (72.0%; unweighted), Ontario paralegals (65.9%) and Quebec notaries (65.9%);

f. legal professionals living with a disability (74.3%);

g. legal professionals identifying as members of the LGBTQ2S+ community or indigenous legal professionals (69.3%); and

h. legal professionals working in Nunavut (76.4%).[46]

43. The National Study confirms that many lawyers' with mental health concerns are not seeking the help they need. It found that nearly 50% (46.8%) of respondents reported wanting to seek professional support because of psychological health problems, but did not.[47] 66.8% of professionals who reported having suicidal thoughts since starting their practice had not sought help when they felt the need.[48]

44. There were a number of reasons provided for not seeking help.[49] [50] Significantly, 36.5% of professionals who did not seek psychological support reported not being confident to use their law society's assistance programs, and 39.8% of professionals who did not use

[46] Greenberg Affidavit #3 at para. 169, citing National Study at p. 27.

[47] National Study at p. 55.

[48] National Study at p. 55.

[49] The nature of the legal profession attracts certain personality characteristics, which contribute to career success, albeit at the cost of individual well-being. Such personality traits include, among many others: being perfectionistic; valuing money and professional prestige; tending to compare achievements and status to others; and viewing mental health and substance use challenges as failing, resulting in feelings of shame and isolation. Affidavit #1 of Doron J. Gold, made March 3, 2025 (TLABC Action), Ex. A, at p. 3 ("**Gold Report**").

[50] These personality traits, along with the time, client, and financial pressures of the legal profession, combine to cause increased distress for lawyers. However, that distress is considered shameful or a weakness by lawyers, who feel compelled to hide to avoid reputational damage. Mr. Gold opines that "the first instinct of most lawyers is to protect their reputations by ensuring that no one knows of their difficulties. Asking for help is viewed as likely imperiling one's standing in the profession": Gold Report at p. 5.

the assistance programs associated with their law society reported that they worried that what they will say "will be shared with the law society/regulator".[51]

45. In other words, mental health and substance use are a deep and systemic issue for lawyers. On average, half of all lawyers are suffering. More than half of female lawyers, racialized, Indigenous, 2SLGBTQ+ legal professionals and professionals living with a disability are suffering. A significant number of these lawyers are not seeking help. And a significant part of the reason they are not seeking help is fear of a regulator, and potentially, a punitive regulatory response.

46. Dr. Cadieux and her team carried out a second phase of their research between 2023 and 2024. The second phase of their research was focused on gathering and analyzing qualitative evidence from legal professionals. This work was produced in consultation with the Steering Committee. In October 2024, the Federation released this report to the public (the "**National Study, Phase II"**). The National Study, Phase II's qualitative evidence mirrored the quantitative evidence provided in Phase I.

The Law Society took significant steps to destigmatize mental health and seeking help in the profession

47. Beginning in 2018, the Law Society undertook to re-evaluate how it, as a regulator, addressed mental health and substance use among lawyers. This was the work of the Mental Health Task Force (the "**Task Force**") which operated for five years (2018-2023) and produced a number of reports and recommendations aimed at improving lawyer mental health to assist the profession generally in improving its ability to deliver services in the public interest. These reports and recommendations were adopted and confirmed by the Benchers. The work of the Task Force is described in detail in the affidavits of Mr. Greenberg, K.C.[52]

48. The Law Society directed the Task Force to identify "ways to reduce the stigma of mental health issues and developing an integrated mental health review concerning regulatory

[51] National Study at p. 57.

[52] Greenberg Affidavit #1 at para. 111; Greenberg Affidavit #3 at paras. 85–163.

approaches to discipline and admissions."[53] The Task Force specifically sought to avoid the incorrect and stigmatizing assumption that lawyers experiencing mental health or substance use issues are less capable or less competent than those who are not. To this end, the Task Force recommended, and the Law Society adopted a number of measures intended to reduce the stigma of mental health and substance issues, with a view to increasing voluntary help-seeking among lawyers, which the Law Society judged to enhance the protection of the public. Some of these measures include changing the way applicants and lawyers are regulated, including the following:

a. eliminating stigmatizing language and approaches to the reporting requirements in BC Code provision 7.1-3(d) [Duty to report] and the associated Commentary;[54]

b. eliminating the "medical fitness questions" in the application forms for the Law Society Admissions Program;[55] and

c. adopting pilot alternative disciplinary process (the "**ADP**") for eligible lawyers subject to a conduct complaint who are experiencing mental health or substance use issues. The ADP is "a voluntary, confidential, and no-risk to participants process designed to customize the regulatory response in circumstances where a lawyer's conduct issues were linked to a remediable health condition." [56]

49. Each of these measures was specifically designed to bring mental health issues out into the open and destigmatize them among lawyers. The Law Society correctly judged that lawyers who seek help early or at all are less likely to harm the public or themselves. The Law Society recognized that stigmatizing language, which appeared in the Law Society Rule requiring lawyers to report other lawyers and in the medical fitness questions for applicants to the profession, harmed applicants and lawyers because the language openly signaled that such conditions were themselves problematic, discouraged applicants and lawyers from

[53] Greenberg Affidavit #3 at para. 86.
[54] Greenberg Affidavit #3 at paras. 103, 118–129.
[55] Greenberg Affidavit #3 at paras. 110–117.
[56] Greenberg Affidavit #3 at paras. 136–163.

seeking support resources, and more generally created unwarranted association between mental health issues and competency.

50. Similarly, the Law Society adopted the ADP process as a change in regulatory focus from one that linked mental health and misconduct to one that disassociated the two and focused on the actual conduct and how to protect the public, while also protecting the public by seeking ways for lawyers to voluntarily seek help. As Mr. Greenberg states:

> … the Law Society's regulatory processes must be better equipped to encourage openness and disclosure by lawyers about mental health and substance use and to integrate support and treatment into the regulatory response. An ADP process was proposed to achieve these ends. As with the changes recommended to the admissions process, regulatory measures can have the unintended consequences of driving lawyers to hide rather than seek support for mental health and substance use issues they may be experiencing. Such outcomes are not in the lawyer's or the public's interest.[57]

51. The latter program has gone from a pilot program in 2022 to one of the Law Society's permanent disciplinary programs. The results have been uniformly positive, with staff reporting the following:

> c) A lawyer is an expert in their own care, and they know what treatments work best for them. Coerced or forced medical care is less likely to be effective, and giving a lawyer autonomy over the care they receive can empower that lawyer to take more responsibility for their recovery, and help to rebuild some of the self-esteem they may have lost while they were experiencing a health issue and having a conduct concern or complaint brought to the attention the Law Society;
>
> d) ADP has been transformational for lawyers engaged in the process. As a result of ADP, lawyers have left the process having more tools to support them in maintaining their health and well-being. Additionally, the insights gained from ADP have led lawyers to change areas of practice or employment setting to better align with their health needs.[58]

[57] Greenberg Affidavit #3 at para. 141.

[58] Greenberg Affidavit #3 at paras. 161, 162.

52. In short, rather than relying on unwarranted, incorrect and harmful assumptions about the connection between health conditions and competency or conduct, the Task Force shifted the focus to conduct, not health conditions, as the appropriate and adequate trigger for regulatory attention. Where regulatory attention was required, the Law Society had ample tools at its disposal: suspension powers and the power to limit a lawyer's practice.

53. The Law Society has considered and concluded that a voluntary approach to medical treatment is more effective and in the public interest, both for individual legal professionals, and in respect of limiting the systemic effects of stigma within the profession overall. Legal professionals feeling free to use supports absent fear of compelled treatment is in the overall public interest. [59] Stigma, fear of reputational damage, and retaliation by the regulator combine to discourage lawyers from seeking help.[60] There are pervasive beliefs in the legal profession that mental health and substance use challenges are signs of weakness or moral failings.[61] This directly prevents lawyers from seeking treatment,[62] which further isolates them from their community and help, and deepens stigma surrounding mental health and substance use.[63]

The evidence tendered in this case supports the proposition that a regulatory scheme does impact stigma and help-seeking behaviours by lawyers

54. By adopting the conclusions and recommendations of the Task Force, the Law Society accepted the scheme for regulating lawyers and the implementation of that scheme have a powerful impact on lawyers' mental health and their mental health outcomes. The Task Force understood that a regulatory system that focused on and punished (either in the orders made or through the very process of regulating) lawyers because they had a mental health concern would enhance stigma and could potentially result in fewer lawyers seeking help, which is not in the lawyer's interest or the public's. The National Study bears this out by

[59] Greenberg Affidavit #1 at paras. 113-115; National Study at pp. 70-81, 96-98, 208-277.

[60] Gold Report at p. 11; Affidavit #1 of Dr. Soma Ganesan, made March 29, 2025 (TLABC Action), Ex. A at p. 5 ("**Ganesan Report**").

[61] Gold Report at p. 7.

[62] Gold Report at p. 7, citing National Study at p. 55.

[63] Gold Report at pp. 8–9.

reference to the data showing lawyers' concern for revealing their condition to the regulator as a basis for not seeking help.[64]

55. The authors of the National Study also made recommendations consistent with those of the Task Force.

56. Following the National Study, in December 2022, Dr. Cadieux and her team at Université de Sherbrooke published a report that provided the Federation of Law Societies a series of recommendations designed to address the problem of lawyers' mental health and substance use: *Towards a Healthy and Sustainable Practice of Law in Canada: National Study on the Health and Wellness Determinants of Legal Professionals in Canada, Phase I* (2020-2022) (the "**Recommendations Report**").

57. Based on the findings of the National Study, Dr. Cadieux identified approximately 50 recommendations, grouped into 10 key general recommendations, to address the consequences that stem from the causes of mental health and substance use among legal professionals. Among other things, these included the following:

a. Recommendation 5: Implement actions aimed at destigmatizing mental health issues in the legal profession; and

b. Recommendation 6: Improve access to health and wellness support resources and break down barriers that limit access to these resources.

58. The Recommendations Report agreed with and adopted the approach taken by the Task Force. In relation to recommendation 5, the Recommendations Report endorsed the Law Society's ADP as an example of a program designed to implement recommendation 5:

> By seeking help early enough, professionals can avoid more serious health issues. They should therefore never hesitate to ask for help in any form (e.g., delegate a case, consult a psychologist, ask a relative for help).
>
> However, many legal professionals with mental health issues perceive a stigma in the legal community. Some are concerned that their law society will take action against them if they disclose their condition. Not only does

[64] National Study at p. 57.

> this situation delay their seeking help, but it also undermines transparency about mental health issues while potentially exacerbating the professionals' health issues. Law societies have to play a role as mental health partners for professionals. While it is clear that law societies regulate legal professionals to protect the public interest, this duty should not be seen as a barrier to using alternative, non-punitive approaches to respond to challenges a practitioner is facing where the underlying cause for problematic behaviour is linked to mental health issues [Footnote: See, for example: Recommendation on the Development of an Alternative Discipline Process ("ADP")]. To the contrary, ensuring that their discipline and regulatory processes properly account for mental health issues, promotes the public interest, as this creates a more mental health-positive regulator. By being more supportive of legal professionals dealing with mental health issues, law societies can help dispel the stigma and perception, as reported by survey participants, that experiencing mental health challenges while practising law is likely to lead to an overly punitive response from their regulator.
>
> Several complementary actions can be taken to reduce the stigma surrounding mental health issues in the practice of law: 1) implement a support/coaching program for professionals returning from prolonged health-related leave or experiencing a health issue without leave; 2) develop a mental health awareness campaign/activities; 3) where applicable, remove mental health disclosure from law society admission applications; 4) frame the ability of legal professionals to share mental health challenges with each other in a confidential way; 5) where applicable, develop alternative discipline processes for professionals dealing with health issues; 6) create a "Health and Wellness Week in Law" highlighting the importance of work-life balance; and 7) create a wellness section on law society, professional association and legal workplace websites.
>
> [Emphasis added.]

59. The Recommendations Report agreed with the Task Force that the virtue of programs such as the Law Society's ADP is that they destigmatize mental health among lawyers:

> The purpose of this recommendation [to develop ADPs] is to avoid using a punitive system that places professionals on the margins of their profession and tends to stigmatize them when they are experiencing health issues that are impacting their ability to comply with their professional obligations (rather than helping them). These alternative discipline processes [Footnote: See, for example: Alternative Discipline Process] are particularly important for reintegrating professionals with health issues into the profession.

60. In short, the only comprehensive quantitative and qualitative study of lawyers' mental health in Canada's recommendation to regulators is to avoid stigmatizing lawyers mental health in the process of regulation, lest it discourage help seeking behaviours and harm the public interest.

61. The expert evidence tendered in this case supports the connection between regulatory systems for lawyers and the enhancement or reduction of stigma. The Plaintiffs rely on the expert reports of Doron J. Gold and Dr. Soma Ganesan in relation to the impacts of Bill 21 on the likelihood of legal professionals self-reporting and seeking treatment for mental health or substance use concerns.

62. Mr. Gold is a trained lawyer, social worker, psychotherapist, and advocate in areas of mental health, substance use, and well-being in the legal profession.[65] Mr. Gold has experience in continuing education and academic programming on mental health and wellness in the legal profession, in connection with the Canadian Bar Association, Bell Let's Talk, and the Ontario Law Society Tribunal.[66] Mr. Gold contributed to the Law Society of Ontario's 2016 Mental Health Strategy Task Force Report and was on the Steering Committee for the National Study.[67]

63. Dr. Ganesan is a registered psychiatrist in British Columbia and former head of the Department of Psychiatry at Vancouver General Hospital, UBC Hospital, GF Strong Rehabilitation Centre, and Vancouver Community Mental Health Services from 1998 to 2016.[68] Dr. Ganesan was the first medical director of the BC Mental Health and Addiction Program of the Provincial Services Authority.[69]

[65] Gold Report at p. 1.
[66] Gold Report at p. 2.
[67] Gold Report at p. 2.
[68] Ganesan Report at p. 2.
[69] Ganesan Report at p. 2.

64. The evidence from Mr. Gold and Dr. Ganesan supports three general propositions:

a. A regulatory system, such as Bill 21, does have a negative impact on lawyers' liberty and security of the person because it creates fear and stigma that inhibits lawyers from seeking help;

b. Compelled treatment is in general ineffective; and

c. Mental health issues and substance use cannot be conflated with competence.

65. Mr. Gold and Dr. Ganesan both opine that the regulatory system created by Bill 21 will have maladaptive effect on lawyers because it makes the unwarranted but very public assumption that mental health and substance use are invariably linked to competence.

66. Despite elevated risks of mental health and substance use disorders, lawyers are reticent to seek help due to stigma, fear of reputational damage, or retaliation by the regulator. Mr. Gold opines that this is in part due to the regulator's link between mental health and substance use, and competence: "knowing that this provision in [Bill 21] exists, they will deliberately and forcefully deny the existence of any such alleged underlying conditions".[70]

67. Within lawyers' social or professional circles, it is common to find peers who maintain that those with mental health and substance use challenges are weak or lack moral fortitude.[71] Lawyers are unlikely to acknowledge, discuss, or seek treatment in those environments,[72] which only isolates them from their community and help—and deepens stigma surrounding those conditions.[73]

68. That stigma and fear worsens when lawyers are concerned that their regulator can expose their conditions through investigations, revoke or suspend their license (threatening their livelihood), compel treatment, or irreparably harm their reputation in the community.[74] Bill

[70] Gold Report at p. 11.
[71] Gold Report at p. 7.
[72] Gold Report at p. 7, citing National Study at 55.
[73] Gold Report at pp. 8–9.
[74] Gold Report at p. 9; Greenberg Affidavit #3 at para. 126.

21 provides no assurances of confidentiality in the investigative process, thus permitting the exposure of lawyers' most intimate details to the public.

69. The history of psychiatric care (*i.e.*, forced institutional care) has contributed to the stigma and lack of understanding of mental health treatment and illness.[75] There are pervasive views that mental illness is untreatable and must be hidden from view, particularly in certain ethnic communities.[76]

70. Dr. Ganesan and Mr. Gold both agree that compelled treatment is not generally effective.

71. Based on their varied professional backgrounds, Dr. Ganesan and Mr. Gold agree that compelled treatment for mental health and substance use is ineffective and, in some circumstances, counterproductive.[77] Long-term compliance with treatment, which reduces relapse and morbidity,[78] requires individuals be participants in their care.[79]

72. In these circumstances, effective treatment is voluntary. It requires the individual to be aware of their distress, believe that change is possible, and be ready to undergo that change.[80] None of those essential elements can be imposed by the regulator. This was the basic, but critical assumption underlying the Law Society's adoption of the ADP program, which has at its core active participation, confidentiality, and autonomy.[81]

73. Dr. Ganesan and Mr. Gold are also critical of the idea that mental health and substance use are directly and invariably tired to competence and misconduct. This assumption is an oversimplification of mental health and substance use, which arises from a discriminatory and stigmatizing perspective.

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[75] Ganesan Report at p. 4.
[76] Ganesan Report at p. 4.
[77] Gold Report at p. 12; Ganesan Report at p. 5.
[78] Ganesan Report at p. 6.
[79] Ganesan Report at p. 7.
[80] Gold Report at p. 13.
[81] Greenberg Affidavit #3 at paras. 136–140.

74. The existence of a mental health condition or substance use disorder alone has no bearing on a lawyer's competence.[82] A causal connection cannot always be assumed between a lawyer's condition and their competence. Indeed, although over half of legal professionals experience psychological distress, only a small fraction display conduct that justifies discipline.[83] Mr. Gold opines that "[c]ompetence is performance-based, not mental health dependent".[84] Common sense proves this out—nothing near half or 1% of British Columbia lawyers are the subject of genuine competency concerns in a given year. Clearly the connection, if any, is rare.

75. The Law Society's mental health and substance use reforms, undertaken by the Task Force between 2018 and 2023, operate on the same premises as Dr. Ganesan and Mr. Gold's evidence, that is:

a. Mental health and substance use disproportionately affect lawyers, who are less likely than the general population to seek help;

b. Mental health and substance use are not a proxy for competence;

c. Regulation which ties mental health and substance use to a lawyer's competence or misconduct runs the risk of discouraging lawyers from help seeking behaviours; and

d. Stigmatizing mental health and substance use, as a regulator, is harmful to lawyers and counter-productive to the goal of protecting the public.

The government's evidence does not contradict most of the essential allegations underlying the Plaintiffs' claims

76. The government has tendered little if any evidence in this summary trial on the issue of lawyers' mental health and substance use and the impact of professional regulation on lawyers.

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[82] Gold Report at p. 10.

[83] Gold Report at p. 10; Greenberg Affidavit #1 at para. 113.

[84] Gold Report at pp. 10, 11.

77. This is remarkable because the government asserted at the start of the reform process that culminated in Bill 21 that it was pursing "legislative change" that would "modernize the regulatory framework" for lawyers and legal professionals. The government's legislative proposal would be "consistent with best practices in professional regulatory government".[85]

78. Despite these lofty statements, the government has produced no evidence of the kind of "modern" or "best" regulatory practices that it considered in developing Bill 21. It has adduced no evidence of consulting with mental health experts or how mental health may be impacted by regulation. It has adduced no evidence that it even reached out to the Task Force or the Steering Committee to download what those bodies have learnt.

79. The position of the government is rather that Bill 21 represents the status quo and that status quo is constitutional.

80. The only evidence tendered by the government comes from Dr. Michael Colleton, MD, FRCPC, a forensic psychiatrist. Dr. Colleton's evidence generally supports, rather than contradicts, the central thesis of the Plaintiffs. For example:

    a. Dr. Colleton agrees that lawyers are professionals that suffer from mental health and substance use issues at a higher rate than other professionals and a much higher rate than the general public. "I agree with the assertion that the prevalence of mental health conditions is a unique and significant problem among lawyers."[86]

    b. The statistics on lawyers' mental health from Canadian, American, and Australian sources support the assertion that lawyers are susceptible to mental health and substance use issues and the "various adverse consequences that may follow". The data from the National Study is consistent with these sources.[87]

    c. It is in the interest of the profession, their clients, and the public that "efforts are undertaken to reduce the burden of MD/SUD within the legal profession. Efforts to

[85] Greenberg Affidavit #3 at para. 201, Ex. 109.

[86] Expert Report of Dr. Michael Colleton, dated June 27, 2025 (TLABC Action), at para. 16, p. 8 ("**Colleton Report**").

[87] Colleton Report at para. 15, p. 8.

reduce stigma and thereby increase the number of legal practitioners who seek help is obviously desirable, not only for lawyers and their health, but for their clients, as well." Dr. Colleton opines that a focus on stigma reduction is "unbalanced" because it does not account for risks to clients. [88]

d. "It is true (and it is de-stigmatizing to point out) that not all mental health conditions cause impairment to the point of affecting professional practice, and that mental illness does not equate with incompetence, but it is also true that in some cases, professional practice is affected by MD/SUD, and in these the regulator must intervene to protect client interests."[89]

e. "Education, awareness, and stigma reduction initiatives should be undertaken to reduce the perceived or actual reputational costs of help-seeking and health management and thereby encourage help-seeking";[90]

f. "If the regulatory process (Bill 21) is maximized to address client interests, the health of lawyers likely will suffer and paradoxically this may well increase the risks to clients from unaddressed mental health conditions in lawyers."[91]

g. There are no provisions to preserve confidentiality of a lawyer subject to discipline under Bill 21 for mental health and substance use issue affecting their ability to competently practice, but this is necessary for the public good. [92]

h. Dr. Colleton generally agrees that "coercive treatment for substance use disorders is ineffective and generally counterproductive", but says that it is necessary sometimes and therefore in the public interest. [93]

[88] Colleton Report at para. 18, p. 9.
[89] Colleton Report at para. 21, p. 10.
[90] Colleton Report at para. 49, p. 20.
[91] Colleton Report at para. 8, p. 6.
[92] Colleton Report at para. 57, p. 22.
[93] Colleton Report at para. 58, p. 22.

i. Dr. Colleton agrees, wholeheartedly with the sentiment that "[l]awyers and regulators are trying to strike a balance between the protection of the public and the rights of the lawyer and within that balance is the unmistakable fact that the public is better protected when a lawyer whose mental health or substance use challenges are in fact affecting their conduct", though he adds this statement overlooks a lawyer's duty to take maintain physical and mental health as part of a lawyer's ethical and fiduciary duty. [94]

j. "The fundamental role of the regulator is to ensure competence and protect the interests of clients. That is not to say that the regulator should be unconcerned with the mental health of lawyers; clients are better served when mental health is better within the profession, and this is a desirable and reasonable undertaking."

81. At no point does Dr. Colleton dispute the central thesis of the Plaintiffs' case: that the effect of Bill 21's avowed link between "health conditions", including mental health and substance use and competence, combined with the threat of unilateral, summary orders for compelled treatment, has an impact on lawyers' perception of how their mental health conditions will be received by their regulator and thereby increases, rather than decreases, voluntary help seeking behaviour by lawyers and participation in voluntary treatment.

82. What Dr. Colleton does say is the Plaintiffs take an undue focus on the lawyers' perspective and interest at the expense of the client and public interest. At some point competence and conduct are compromised by mental health and substance use and the regulator needs an ability to intervene. The gist of his opinion on this point is distilled as follows:

> (22) Bill 21 recognizes that competence can be compromised by the presence of a MD/SUD and that a mandatory treatment and monitoring plan might be necessary in some cases. This may be a harsh reality for some afflicted individuals, but the practice of law is not a right, it is a privilege that requires maintenance of competence.
>
> (23) In his discussion, Mr. Gold asserts a false dichotomy where either one (stigma reduction) or the other (involuntary treatment) may be pursued; realistically, both efforts will be necessary to maximize both lawyer mental

[94] Colleton Report at para. 61, p. 23 – where that particular duty is found is, unclear.

> health and the protection of client interests. Stigma reduction should increase the number of lawyers who seek help for MD/SUD, while the provisions of Bill 21 will be available for those cases where this does not happen and untreated MD/SUD poses a risk to client interests.[95]

83. None of this is, or anything else in Dr. Colleton's report, opines that a regulator's power to order compelled treatment based on its own opinion on whether and when a lawyer is compromised by mental health conditions has no effect on whether lawyers will seek help.

84. Relying on instructions from counsel, Dr. Colleton asserts that Bill 21 makes no connection between mental health and competence and that the only link is conduct which demonstrates a mental health or substance use issue prevents a lawyer from practicing competently:

> *The plaintiffs instructed Dr. Ganesan and Mr. Gold to assume that the Act defines "incompetently" as including* ***having a health condition*** *that prevents a licensee from practicing law with reasonable skill and competence. Please assume that assumption is incorrect and the Act instead defines "incompetently" as including* ***practising law*** *in a manner that demonstrates a health condition that prevents a licensee from practicing law with reasonable skill and competence. (bolding is mine)*
>
> (42) The former definition, as put to the plaintiff experts, does raise concern about conflation of an illness with incompetence without reference to impaired professional practice. The latter definition focuses on an individual who continues to practice despite impairment that results from a health condition.[96]

85. As explained below, this semantic distinction is of no moment. Bill 21, on either conception, draws a direct association between mental health and substance use to the competent practice of law. The result on either formulation is the same: lawyers will perceive that their regulator is monitoring their mental health and substance use and any information that comes into contact with the regulator may result in a regulatory proceeding if the non-expert opinion of the regulator (here, the unilateral opinion of the chief executive officer) is that the connection between mental health and competence is met.

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[95] Colleton Report at paras. 22–23, p. 10.

[96] Colleton Report at paras. 41–42, pp. 17–18 [italics and bold emphasis in original].

86. As the Plaintiffs have not yet had an opportunity to cross-examine Dr. Colleton, they reserve the right to make further submissions on the weight that may be given to his evidence and what use the Court may make of his evidence more generally.

PLAINTIFFS' POSITIONS AND RELIEF SOUGHT

87. In respect of Bill 21, or alternatively, portions of Bill 21, the Plaintiffs' positions on the issues in the TLABC Action are:

a. Bill 21 is *ultra vires* ss. 92(13) and (14) of the *Constitution Act, 1867* because it imperils the independence of the bar and judiciary by imposing a co-governance model, which imbues private and government interests into the regulation of lawyers that act in the public interest;

b. Bill 21 violates ss. 2(d) of the *Charter* because it eliminates the Law Society: the institution through which lawyers effect their associative rights and meet the government on equal footing;

c. Bill 21 violates s. 8 of the *Charter* because it authorizes unreasonable searches and seizures, including on matters relating to their mental health or client business;

d. Bill 21 violates s. 7 of the *Charter* because it interferes with lawyers' psychological and bodily autonomy by permitting the regulator to impose medical treatment with threat of criminal sanction;

e. Bill 21 violates s. 10(b) of the *Charter* because, absent independent lawyers, the right to retain and instruct counsel on arrest or detention is meaningless in the criminal justice system; and

f. Bill 21 violates s. 11(d) of the *Charter* because, absent independent lawyers, there is no possibility of a fair and public hearing before an independent judiciary.

88. The Plaintiffs seek:

a. declarations that Bill 21, or alternatively, portions of Bill 21, are *ultra vires* provincial authority in ss. 92(13) and (14) of the *Constitution Act, 1867*;

b. declarations that Bill 21, or alternatively, portions of Bill 21, violate ss. 2(d), 7, 8, 10(b), and 11(d) of the *Charter*, in a manner that cannot be justified under s. 1 of the *Charter*;

c. a declaration under s. 52 of the *Constitution Act, 1982* that Bill 21, or alternatively, portions of Bill 21, is of no force and effect to the extent of any inconsistency with the Constitution; and

d. special costs of the TLABC Action, or alternatively, costs at Scale C.[97]

ARGUMENT

TLABC and Mr. Westell have standing

89. In its pleadings, the government denies that the Plaintiffs have standing to advance the claims made in the action.[98]

90. The government's application response does not join this issue. From this, it can be taken as not an issue for this summary trial application. In any event, the government adduced no evidence which would detract from the Plaintiffs' public interest standing to advance this action.[99]

Judicial review cannot solve institutional problems

91. As an overall response to the TLABC Action, the Defendants claim that the constitutionality of legislation is not assessed on "speculative worst-case scenarios"; unconstitutional exercises of discretion are remediable on judicial review.[100]

92. This misses the point.

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[97] Notice of Application of the Trial Lawyers Association of British Columbia and Kevin Westell, dated April 7, 2025 (TLABC Action) at Part 1 ("**Plaintiffs' Application**").

[98] Defendants' Amended Response to Civil Claim, filed October 17, 2024 (TLABC Action) at Part 3, para. 0.1-0.2.

[99] *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27.

[100] Application Response of the Attorney General of British Columbia, dated May 23, 2025 (TLABC Action) at para. 4 ("**Defendants' Application Response (TLABC Action)**").

93. The effects of which the Plaintiffs complain are only speculative because of the status of Bill 21. Only the transitional provisions are in effect. Further, the unconstitutional effects are not "worst-case scenarios". They are plainly contemplated by the text of Bill 21. It is not just maladministration that is unconstitutional. Bill 21 cannot be saved by judicial review.[101]

94. Put differently, Bill 21 as a whole creates an unconstitutional effect. Judicial review that challenges provisions as issues arise and lawyers are compelled to challenge them is not an answer to a structural problem. It wholly fails to protect the independence of the bar and the *Charter* rights of all lawyers and the public.

95. The presumption of constitutionality cannot be used to shield Legislatures when the source of the infringement is the law itself.[102] In the case of Bill 21, there are not two reasonably competing interpretations; to adopt a constitutional interpretation would be to disregard the text of Bill 21.[103]

Bill 21 violates the constitutional right to an independent bar

96. The independence of the bar is a conventional constitutional rule that limits the provinces' power under s. 92 of the *Constitution Act, 1867*.[104] The legislative branch of government has the power to enact laws and regulations, but must do so in accordance with the *Constitution Act, 1867*, *Constitution Act, 1982*, and the unwritten constitutional principles that animate those texts. The Defendants acknowledge that independence was "absolutely" a "paramount consideration" in the intention and development of Bill 21,[105] and that "[t]he

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[101] *Reference re Impact Assessment Act*, 2023 SCC 23 at para. 74 [***IAA Reference***].

[102] *IAA Reference* at para. 73.

[103] *Law Society of British Columbia v. Mangar*, 2001 SCC 67 at para. 66.

[104] *A.G. Can. v. Law Society of B.C.*, [1982] 2 S.C.R. 307 at pp. 335-336; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869 at p. 887; *Omineca Enterprises Ltd. v. British Columbia (Minister of Forests)* 1993 CanLII 1366 (BC CA) [***Omineca***]; *Federation of Law Societies of Canada v. Canada (Attorney General),* 2013 BCCA 147 at paras. 105-113 [***Federation of Law Societies CA***], reversed in part but not on this point, *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7 [***Federation of Law Societies SCC***]; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 187; *LaBelle v. Law Society of Upper Canada*, 2001 CanLII 28255 (ONSC) at para. 31 [***Labelle SC***], affirmed *Labelle v. Law Society of Upper Canada*, 2001 CanLII 5226 (ONCA) [***Labelle CA***].

[105] Armitage Examination for Discovery (July 2, 2025) at answer 294, p. 104; answer 306, p. 107.

policy intention of the project was to see a regulator for lawyers and other legal professions that continued to be independent from the government".[106]

97. The importance of the independence of the bar to Canadian society and its legal system is not just recognized by the Defendants, but has been repeatedly recognized by our courts:

a. The Court of Appeal for British Columbia concluded that the independence of the bar is a principle of fundamental justice.[107] "The independence of the Bar is fundamental to the way in which the legal system ought fairly to operate."[108]

b. in *Pearlman v. Manitoba Law Society Judicial Committee*, the Supreme Court of Canada wrote: "[s]tress was rightly laid on the high value that free societies have placed historically on an independent judiciary, free of political interference and influence on its decisions, and an independent bar, free to represent citizens without fear or favour in the protection of individual rights and civil liberties against incursions from any source, including the state."[109]

c. in *Omineca Enterprises Ltd. v. British Columbia (Minister of Forests)*, our Court of Appeal wrote: "[o]ne of the great and often unrecognized strengths of Canadian society is the existence of an independent bar. Because of that independence, lawyers are available to represent popular and unpopular interests, and to stand fearlessly between the state and its citizens."[110]

Lack of consultation results in inadequate respect for independence of the bar

98. Bill 21 fails to adequately consider, let alone respect, the independence of the bar because of the lack of consultation by the government.

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[106] Armitage Examination for Discovery (July 2, 2025) at answer 339, p. 120; answer 340, p. 121.

[107] *Federation of Law Societies* at paras. 105–114. Justice Cromwell declined to decide the issue on appeal: *Federation of Law Societies SCC* at para. 80.

[108] *Federation of Law Societies CA* at para. 107.

[109] *Pearlman* at p. 887.

[110] *Omineca* at para. 53 (McEachern C.J.B.C., dissenting not on this point).

99. The government's refusal to consult with the Law Society and the bar on Bill 21 is contrary to settled practice and constitutional convention which requires consultation and consensus to be formed between government and the Law Society, as the body corporate and representative of all practicing lawyers in the province, on significant legislative changes to legal regulation in British Columbia.[111]

100. Past governments have recognized and followed this convention. For example, in the course of the second reading of *Bill 25 - 1987 Legal Profession Act* in the House on May 19, 1987, the Honourable B.R. Smith described the involvement of the Law Society as follows:

> …The process of revision has involved input from benchers, officers and a number of members of the Law Society and government drafters. Through 30 drafts, a membership review, two special general meetings and the involvement of the Canadian bar, a high degree of consensus among the 5,800-member legal profession has emerged as to how to fulfil their statutory mandate to govern the profession and protect the public interest. I mention this process because, as the member for Esquimalt-Port Renfrew (Mr. Sihota) and I both know, a lot of broad consensus has been achieved in order to produce the bill that is here today. I want to commend the benchers, the members of the Law Society and the Canadian bar for their process and for the product. These efforts have been significantly assisted in the work that's been done by my department and by legislative counsel, and we think the legislation has been improved. An overwhelming majority of the Law Society's proposals have been incorporated, but some have not.[112]

101. The major provisions of *Bill 21 – 1987* related to the public interest, the public powers and functions of the benchers, credentials, competency and disciplinary committees, confidentiality and financial responsibility, fees and taxation, distribution of unclaimed trust funds, and the practice of law by corporations.[113] On the issue of how those provisions had been developed, Mr. Sihota added the following:

> I want to talk a little bit about the process in this legislation. I think that in principle the type of approach taken to the introduction of this legislation is the type of approach we on this side of the House would like to see taken to

[111] Berry Affidavit #1 at paras. 2-3; Ex. B, Bill 25 – 1987 – Second Reading (May 19, 1987), at pp. 5-6.

[112] Berry Affidavit #1, Ex. B, Bill 25 – 1987 – Second Reading (May 19, 1987), at pp. 5-6.

[113] Berry Affidavit #1, Ex. B, Bill 25 – 1987 – Second Reading (May 19, 1987), at p. 6.

> other forms of legislation. This government went out of its way for something like five years to consult with the legal profession with respect to the provisions of this act, to talk to them about what it is that they wanted to see as part and parcel of changes to the old Barristers and Solicitors Act. As a consequence of that dialogue and consultation, we've now been able to come up with legislation that is not only to the satisfaction of the Attorney-General and those of us on this side of the House but also to the individuals practising in the field and the various representative groups of the legal profession.
>
> …
>
> If you want to argue about that, Mr. Member, the fact remains that this legislation is a model of consultation, whereas that one [in the case of teachers] is the exact opposite. The legislation the member makes comments about is simply legislation which reflects a doctrinaire point of view on the part of this government. In my view, it did not involve adequate, ongoing, effective, meaningful consultation with the profession. If it had, we wouldn't have the type of chaos that we have right now in this province; we wouldn't have the type of rally we're supposed to be seeing on the steps of the Legislature tomorrow with respect to Bills 19 and 20. I can only say to the member opposite that I would hope he takes the message back to his colleagues and suggests that in future the type of approach that was embraced with respect to Bill 25 ought to be the type of approach taken with all forms of legislation dealing with various professions. [114]

102. Similarly, in the second reading of *Bill 15 – 1998 Legal Profession Act*, which, amongst other things, doubled the number of public members on the board of the Law Society, Geoff Plant (who later became the Attorney General), described the involvement of the Law Society as follows:

> I believe it was the Deputy Attorney General who approached the Law Society in 1993 and said that he wanted the legal profession to redraft its governing statute in a way which would give more rule-making power to the Law Society and thereby reduce the need for ongoing annual routine housekeeping amendments to the Legal Profession Act. The Law Society responded by preparing the statute that is now before us - - and I am told that the Law Society supports this bill…[115]

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[114] Berry Affidavit #1, Ex. B, Bill 25 – 1987 – Second Reading (May 19, 1987), at pp. 8, 11.

[115] Berry Affidavit #1, Ex. E, Bill 15 – 1998 – Second Reading (May 11, 1998), at p. 24; see also p. 28.

103. In line with settled convention, the Defendants acknowledge the "historical practice" of consulting with the Law Society before tabling bills that relate to legal profession.[116]

104. Yet the approach in preparing and enacting Bill 21 dramatically differed. Bill 21 was prepared behind closed doors and moved through the Legislature with utmost haste and no meaningful consultation, never mind consensus, with the Law Society, bar associations, or the legal profession more generally. It was developed and enacted without the transparency, clarity, or consultation customarily associated with changes to the governance and regulation of the legal profession.[117]

105. The result, as members of the Law Society and TLABC warned, is that Bill 21 fails to adequately protect the independence of the bar in British Columbia and the fundamental rights of lawyers and members of the public.

The independence of the bar, in text and principle, limits the Province's authority

106. Contrary to the Defendants' suggestions, this case does not founder on the majority's discussion of "unwritten constitutional principles" in *Toronto (City) v. Ontario (Attorney General)*.[118] This is for two reasons: the text of the Constitution contains the principle; and, in any event, *Toronto (City)* allows principles to aid in the interpretation of constitutional provisions.[119]

107. First, the independence of the bar is a structural concept that is derived from the text of the Constitution. The independence of the bar is established in:

    a. the preamble to and ss. 96–101 of the *Constitution Act, 1867*;

    b. the rule of law, also reflected in the preamble of the *Constitution Act, 1982*; and

[116] Liang Affidavit #3, Ex. B at p. 2.
[117] Gourlay Affidavit at para. 29.
[118] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34.
[119] *Toronto (City)* at para. 55.

c. *Charter* rights, including ss. 7 (right to life, liberty and security of the person), 10(b) (right to counsel on arrest or detention), and 11(d) (right to a fair hearing when charged with an offence).

108. The independence of the bar is not merely an unwritten constitutional principle.

109. It is impossible to imagine Canada—a constitutional regime, built on limited government, the rule of law, and constitutionally entrenched rights—without institutionally and individually independent lawyers. The independence, impartiality, and availability of lawyers and legal services to the public is dependent on legal regulation free from state interference.[120]

110. In other words, an independent bar is the linchpin to principles that go to the core of Canadian society. It serves the public interest and upholds the independence of the judiciary. As the Defendants conceded on discovery, independence is a condition of ensuring clients have access to independent legal advice.[121]

111. An independent bar is the public's line of defence against the government. Lawyers stand between the state and its citizens. Government influence or control erodes lawyers' ability to represent unpopular interests or interests adverse to the government.[122] Absent independence of the bar, the public is deprived of access to effective representation, and lawyers cannot act as a check on the executive's power.[123] Self-regulation was created in the public interest.[124]

112. In addition to the public's ability to access advocates for justice, an independent bar is a condition precedent to the independent adjudication of their causes by the superior courts our constitution has created for that purpose:

> An independent bar is essential to the maintenance of an independent judiciary. Just as the independence of the courts is beyond

[120] *Law Society of B.C.* at pp. 335–336.

[121] Armitage Examination for Discovery (July 2, 2025) at answer 343, p. 123.

[122] Gourlay Affidavit at para. 37.

[123] Gourlay Affidavit at para. 38.

[124] *Pearlman* at p. 887.

> question (see *Valente v. R.*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673; 14 O.A.C. 79), so the independence of the bar must be beyond question. The lawyers of the independent bar have been the constant source of the judges who comprise the independent judiciary in English common law history. The "habit" of independence is nurtured by the bar. An independent judiciary without an independent bar would be akin to having a frame without a picture.[125]

113. An independent judiciary relies on an independent bar.[126] To discharge this role, lawyers must be free of improper and extraneous constraints, including the government through their regulator. Legal representation tainted by state interference necessarily taints the perceived, if not the actual, outcome of the judiciary's determination of the cases brought before it. The legal profession, and judiciary, must therefore operate independently of the executive. The effects of government influence or control over the regulation of lawyers will be immediate, steady, and irreversible.

114. Beyond the interdependent relationship between lawyers and judges in the adversarial system, members of the independent bar eventually comprise the independent judiciary. In this way, "[j]udges are only unelected lawyers who happen to hold a judicial commission".[127]

115. Without an independent bar, the written text of the Constitution is meaningless, and the specific rights granted by it are not only infringed, but are robbed of meaning.

116. In addition to the textual basis for the independence of the bar, constitutional principles can be used to interpret the text.[128] Such principles can be used to develop structural doctrines that are unstated in the text but are fundamental to the "coherence of, and flowing by

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[125] *LaBelle SC* [emphasis added], affirmed *Labelle CA*.

[126] *Andrews* at pp. 187–188.

[127] *Canada (Attorney General) v. Utah*, 2020 FCA 224 at para. 15.

[128] *Toronto (City)* at para. 55.

implication from, its architecture".[129] The Supreme Court of Canada in *Reference re Secession of Quebec* described their role:

> Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to the *Constitution Act, 1867*, it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood.[130]

117. Unwritten principles, such as the independence of the bar, fill gaps to create the complete and evolving Constitution.[131]

118. Based on these understandings, in a decision released after *Toronto (City)*, our Court of Appeal confirmed that unwritten constitutional principles have "full legal force", "constitute substantive limitations upon government action", and can contribute to the invalidation of legislation.[132]

119. The independence of the bar is an actual limit on the legislative competence of the government under s. 92 of the *Constitution Act, 1867*. The scope of the Legislature's authority, pursuant to ss. 92(13) and (14), must be interpreted in the context of the independence of the bar.

120. Any legislation, like Bill 21, that is inconsistent with independence is therefore inconsistent with ss. 92(13) and (14) of the *Constitution Act, 1867* and thus *ultra vires* the province.

Self-regulation is inherent to the independence of the bar

121. The Defendants, through their materials and the sworn admissions made by their representative, do not appear to seriously challenge that an independent bar is essential as

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[129] *Toronto (City)* at para. 56. See also *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 51 [***Secession Reference***]: "Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to the *Constitution Act, 1867*, it would be impossible to conceive of our constitutional structure without them."

[130] *Secession Reference* at para. 51.

[131] *Secession Reference* at para. 53.

[132] *Kitsilano Coalition for Children & Family Safety Society v. British Columbia (Attorney General)*, 2024 BCCA 423 at paras. 55–56.

a constitutional imperative. They debate what "independence" means. The content of that constitutional imperative is not as barren as the Defendants suggest.

122. The substance and perception of independence of the bar depends on self-regulation. One cannot exist without the other.

123. The Law Society symbolizes, protects, and upholds the independence of the bar as the mechanism of self-regulation. It is the institution that protects lawyers from government influence, thus ensuring that lawyers are individually and institutionally free to zealously advocate against the government in their clients and public's interests.

124. In *Canada (Attorney General) v. Law Society (British Columbia)*, the Supreme Court inextricably linked independence with self-regulation:

> 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… The uniqueness of position of the barrister and solicitor in the community may well have led the province to select self-administration as the mode for administrative control over the supply of legal services throughout the community.[133]

125. Two decades later, the Supreme Court reiterated the necessity of self-regulation to achieve independence, in *Finney v. Barreau du Québec*:

> An independent bar composed of lawyers who are free of influence by public authorities is an important component of the fundamental legal framework of Canadian society. In Canada, our tradition of allowing the legal profession to regulate itself can largely be attributed to a concern for protecting that independence and to lawyers' own staunch defence of their autonomy. In return, the delegation of powers by the State imposes obligations on the governing bodies of the profession, which are then responsible for ensuring the competence and honesty of their members in their dealings with the public.[134]

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[133] *Law Society of B.C.* at pp. 335–336.

[134] *Finney v. Barreau du Québec*, [2004] 2 S.C.R. 17 at p. 21 [emphasis added].

126. There is an obvious interconnection between independence and self-regulation. As recognized by the Law Society's Independence and Self-Governance Committee, chaired by Gordon Turriff, K.C. in 2005, self-governance is imperative to achieve independence because it "most clearly distances the profession from the state, thereby assuring the public of lawyers' independence and freedom from conflicts with the state".[135] This principle is also reflected in the United Nations Human Rights Commission's declaration on the Basic Principles on the Role of Lawyers, which affirms lawyers' rights to "form and join self-governing professional associations"—without external interference.[136]

127. The Supreme Court has recognized this symbiotic relationship between independence and self-regulation, noting that, where a legislature delegates professional regulation to a professional body, the delegation "recognizes the body's particular expertise and sensitivity to the conditions of practice … [and] maintains the independence of the bar; a hallmark of a free and democratic society".[137]

128. Self-regulation of the legal profession as a means to protect the independence of the bar is an old idea. It originated in the United Kingdom centuries ago and wound its way to Canada and this province.[138] As acknowledged by the Defendants, the principle of self-regulation has grown separately and been constitutionalized in our country; the independence of the bar was already in place before British Columbia became a province in Canada.[139] As early as 1869, the architects of what became the Law Society designed a "council" independent of the courts, Attorney-General, and Solicitor-General, and provided for the independent election of governing Benchers.[140] Self-regulation is a necessary adjunct to the independence of the bar. Canada has made the concept of an independent bar a constitutional imperative.

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[135] Greenberg Affidavit #1, Ex. 20, p. 4.

[136] Affidavit #1 of Patti Lewis, made May 24, 2024 (LSBC Action), Ex. O.

[137] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at paras. 37–38.

[138] Roy Millen, "The Independence of the Bar: An Unwritten Constitutional Principle" (2005) 84:1 Can Bar Rev 107 at p. 111, citing William Ralph Lederman, "The Independence of the Judiciary" (1956) 34 Can. Bar Rev. 769 at p. 775; Richard Peck, K.C., "The Independence of the Bar" in Jack Giles K.C., ed., *The Splendour of the Law: Allan McEachern – A Tribute to a Life in the Law* (Toronto: Dundurn Press, 2001) at p. 47; Jack Giles, K.C., "The Independence of the Bar" (2001) 59 Advocate (B.C.) 549.

[139] Watts at pp. 2–5; Liang Affidavit #3, Ex. B.

[140] Watts at p. 5.

129. Self-regulation specifically is necessary to achieve independence of the bar because independence must be seen and done. In assessing whether lawyers can be individually and institutionally committed to their client's cause, the courts must be concerned with the perception of independence by a reasonable person.[141] A lawyer that is governed and can be disciplined by a government-influenced regulator cannot be institutionally committed to their client's cause. The external, government influence inherent to the lawyer's governance tarnishes the perception that they can zealously advocate for their client, particularly against the government.[142] This places the entire legal system in a "parlous state".[143]

The proposed board cannot be independent

130. The board contemplated by Bill 21 cannot be independent, by virtue of its structure and influence by external actors.

131. This is not, as alleged by the Defendants, an issue of administration.[144] It arises from the text of Bill 21 itself.

132. A co-regulatory or co-governance model by nature creates a real, and perceived, derogation from the independence of lawyers as an institution and individually.

133. In addition to the structural impossibility of independence, the Indigenous council further trenches on the constitutionally-protected zone of an independent bar.

134. The Defendants and the Indigenous Bar Association in Canada (the "**IBA**") have claimed that the Indigenous council's role is to act in the public interest[145] and will have a merely "participatory and consulting role" with "very limited approval powers".[146]

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[141] *Federation of Law Societies SCC* at para. 97.

[142] Affidavit #1 of Winston Sayson, K.C., made March 28, 2025 (TLABC Action) at para. 7 ("**Sayson Affidavit**").

[143] *Federation of Law Societies SCC* at para. 97, citing *Andrews* at p. 187.

[144] Application Response of the Attorney General of British Columbia, dated May 23, 2025 (LSBC Action) at para. 83 ("**Defendants' Application Response (LSBC Action)**").

[145] Defendants' Application Response (LSBC Action) at para. 94.

[146] Application Response of the Indigenous Bar Association in Canada, dated April 25, 2025 (LSBC Action), at paras. 6, 30 ("**IBA Application Response (LSBC Action)**").

135. However, this is at odds with the IBA's simultaneous description of the Indigenous council's constraint on the board's rule-making powers: "The board of the new regulator is required to consult with the Indigenous council before making any rules, respecting the extent to which the proposed rule accords with the principles set out above."[147] Under the transitional provisions, no board rules can be formed without the collaboration of the Indigenous council.[148] The Defendants confirmed on discovery that "both the board and the Indigenous council must agree with the rules in order for them to be made".[149] Absent the Indigenous council's approval, rules cannot be adopted.[150]

136. The IBA's present assertion of the Indigenous council's limited role also conflicts with its Notice of Application to intervene, wherein it presented that it would "become a significant institution … and regulate, directly or indirectly, members of the Indigenous bar in British Columbia.[151]

137. Regulation by a self-government is no less of a danger than regulation by a Crown government. First Nations are regularly, and increasingly, involved as parties to litigation. The Plaintiffs, and members of the legal profession generally, are regularly involved in advocating for or against First Nations.[152] Lawyers are also called upon to negotiate, conclude, and interpret agreements with governments and First Nations.[153] Bill 21's transitional provisions give members of First Nations direct control over the rules governing the conduct of counsel charged with advocating for or against their interests. That those members are not "representing" their nations, or that their involvement furthers reconciliation, is beside the point. Their effective veto over the rules of professional conduct of lawyers is a plain violation of the independence of the bar.

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[147] IBA Application Response (LSBC Action) at para. 11.

[148] Bill 21, s. 226(1).

[149] Armitage Examination for Discovery (March 17, 2025) at answer 97, p. 28.

[150] Armitage Examination for Discovery (March 17, 2025) at answer 362, p. 130; answer 363, p. 131.

[151] Notice of Application of the Indigenous Bar Association in Canada, dated December 30, 2024 (LSBC Action) at para. 9 [emphasis added].

[152] Gourlay Affidavit at paras. 33–35.

[153] Affidavit #1 of Rajiv Gandhi, made May 27, 2024 (TLABC Action) at para. 13.

138. The IBA further claims that, to the extent that the Indigenous council undermines the independence of the bar, such instances are addressed by judicial review.[154] It is not discrete actions that threaten independence; it is the powers granted to the Indigenous council generally that are unconstitutional. Further, the option of challenging specific rules would fall to individual rulings. This too impacts individual lawyers' independence.

139. Faith in judicial review to remedy a systemic problem is misguided.

The experiences of other commonwealth jurisdictions are irrelevant

140. The Defendants rely on the regulatory models in New Zealand and Australia, which involve shared responsibility between courts, professional associations, and statutory bodies, and co-regulation, respectively.[155] Relying on the expert reports of Professor Christine Parker and Dr. Selene Mize, the Defendants suggest those models do not undermine independence of the bar.[156]

141. The experiences of other commonwealth jurisdictions do not assist the Defendants, particularly when they simultaneously contend that the choice of regulatory model is a policy choice that is irrelevant to the adjudication of Bill 21.[157]

142. The Defendants' references to Australia and New Zealand ignore the material differences in their constitutions as compared to Canada.

143. In setting out the New Zealand regulatory model, Dr. Mize makes no mention of any constitutional basis, in text or in principle, that constrains the government in respect of lawyers. This is in stark contrast to the text and unwritten principles in the *Constitution Act, 1867* and *Constitution Act, 1982* that demand independence of the bar, of which self-regulation is a core component.

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[154] IBA Application Response (LSBC Action) at para. 41.
[155] Defendants' Application Response (LSBC Action) at paras. 49–54.
[156] Defendants' Application Response (LSBC Action) at paras. 50, 54.
[157] Defendants' Application Response (LSBC Action) at paras. 62, 119.

144. Dr. Mize concludes that government influence on lawyer regulation does not undermine independence. [158] She does so on three superficial bases and with caveats that destabilise her conclusions. First, Dr. Mize determines that, based on her experience, lawyers are not hesitant to bring actions against the government.[159] Second, the New Zealand Law Society and the international Rule of Law index suggest that New Zealand respects the rule of law.[160] Finally, the lawyer complaint process is not generally used in a retaliatory manner.[161]

145. These conclusions flow from a superficial analysis of the regulatory model. They focus only on current results without interrogating whether the core is rotten.

146. Dr. Mize recognizes that the model leaves open the possibility of undermining lawyer independence, but theorizes that the probability is slim.[162] Indeed, she acknowledges that the regulatory model permits the appointment of judges to become politicized,[163] the Minister of Justice to unilaterally change Rules of Conduct and Client Care,[164] and the government to restrict lawyers' scope of practice.[165]

147. Notably, Dr. Mize opines that the New Zealand model permits the government to "de-lawyer" areas of law, that is to <u>forbid</u> lawyers from representing clients. The government did so in family law from 2013 to 2020.[166] She cites the Human Rights Tribunal as another prime target if the government sought to suppress dissent.[167]

148. This is not independence from the state.

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[158] Expert Report of Dr. Selene Mize, dated December 3, 2024, at p. 27 ("**Mize Report**").
[159] Mize Report at para. 54.
[160] Mize Report at para. 55.
[161] Mize Report at para. 56.
[162] Mize Report at para. 60.
[163] Mize Report at para. 60.
[164] Mize Report at para. 61.
[165] Mize Report at para. 64.
[166] Mize Report at para. 62, footnote 119.
[167] Mize Report at para. 62.

149. While the current New Zealand government appears restrained in its regulation of lawyers, there is no guarantee that the government of tomorrow will be the same.

150. With respect to Australia, Professor Parker's report suffers from an internal contradiction. She explains that Australia's regulatory regime focuses on "consumer issues, access to justice and competition in the markets for legal services", but does not undermine or threaten lawyers' independence.[168] Yet, Professor Parker acknowledges one page later that emphasis on consumer concerns can compromise lawyers' "independent judgment and advice to client[s]" and their ability to "fearlessly advocate for clients against the state and other powerful interests in the public interest".[169]

151. The structure of Australia's regime also differs from that contemplated in Bill 21. The Legal Services Council and Commissioner for Uniform Law are in part appointed by or composed of the Attorneys General of the Australian states.[170] Both entities have "no power in relation to complaints handling and discipline and extremely limited powers with respect to rules".[171] Professor Parker relies on these facts to conclude that the regime maintains a "large degree" of independence and self-regulation.[172] In comparison, Bill 21 imbues the chief executive officer and board with the exact powers that the Australian entities do not possess.

Bill 21 infringes the public's rights under ss. 7, 10(b), and 11(d)

152. The absence of an independent lawyer, by virtue of their regulation:

a. prevents a fair trial absent abuse of process, guaranteed under s. 7, because a fair trial depends on the integrity of the administration of justice, which is guaranteed by an independent bar and judiciary;[173]

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[168] Expert Report of Christine Parker, dated December 2, 2024, at para. 255, p. 89 ("**Parker Report**").

[169] Parker Report at para. 260, p. 90.

[170] Parker Report at Table 3, p. 33.

[171] Parker Report at para. 272, p. 95.

[172] Parker Report at para. 271, p. 94.

[173] *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at paras. 20–22. 28, 32; *R. v. Rose*, [1998] 3 S.C.R. 262 at para. 96.

b. prevents individuals from retaining and instructing counsel effectively, guaranteed under s. 10(b), because an independent lawyer is required to effectively protect the rights of accused in the criminal justice system;[174] and

c. prevents a fair and public hearing before an independent judiciary, guaranteed by s. 11(d), because an independent judiciary can only be achieved by an independent bar.[175]

Bill 21 infringes on lawyers' s. 2(d) right to associate

153. Bill 21 ends self-regulation in British Columbia, which violates lawyers' freedom of association under s. 2(d) of the *Charter*.[176] Self-regulation and self-governance of the legal profession is defined by rules for the practice of law, competence, and ethics made by lawyers elected by lawyers. The end of the Law Society, in favour of a regulator of which non-lawyers and government representatives hold a functional majority, marks the end of any meaningful self-regulation and self-governance.

154. The purpose of s. 2(d) is to empower groups outside the state sphere, through the protection of the right to join with others (1) to form associations; (2) in the pursuit of constitutional rights; and (3) to meet other groups or entities on more equal power or strength.[177]

155. Bill 21 infringes lawyers' s. 2(d) rights because:

a. the Law Society is a protected association and performs associative functions for lawyers; and

b. Bill 21, in purpose and effect, substantially inferences with those associative activities.[178]

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[174] *R v. Sinclair*, 2010 SCC 35 at para. 26; *R v. Sanclemente*, 2021 ONCA 906 at para. 132.

[175] *Valente v. The Queen*, [1985] 2 S.C.R. 673 at paras. 22–25.

[176] See e.g. Gourlay Affidavit at paras. 21–24.

[177] *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 at para. 66 [***Mounted Police***].

[178] *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.

The Law Society is an association

156. The Law Society is an association within the meaning of s. 2(d) and performs associative functions. As a regulator, it supports and upholds lawyers' collective objectives and the right to self-regulate and self-govern, free from government influence.[179] It uses its power to stand up to governments and allows lawyers to speak with a single voice against governments that threaten the institutions of this country.

157. While this government may not consider itself a threat to the rule of law and other essential constitutional principles, it cannot vouch for other governments that may follow it. Institutions protecting the rule of law must be durable; they must outlast governments and be insulated from government.

158. The Law Society performs associative functions by making rules that govern the practice of law, professional competence, and ethics for lawyers and by lawyers. It also effects lawyers' association interests through its organizational, financial, and physical infrastructure.

159. Section 2(d) is most essential in circumstances where the rights holders can be prejudiced by the actions of a larger and more powerful entity, such as the government.[180] The right empowers individuals, who may not be heard or considered themselves, to assert their voices collectively.[181] In other words, it recognizes that the attainment of goals through the exercise of individual rights is generally impossible without the aid and cooperation of others.[182]

160. Prior to the existence of British Columbia as a Province, the Law Society was the association through which lawyers expressed and effected their interests, pursued their other constitutional rights, and met the government on more equal footing. The latter function is of particular importance where governments can threaten the independence of lawyers, the judiciary, and the rule of law, to the ultimate detriment of the public.

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[179] Gourlay Affidavit at paras. 22–25.

[180] *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at para. 87 [***Alberta Reference***].

[181] *Mounted Police* at para. 55.

[182] *Mounted Police* at para. 33.

161. As a professional regulator, the Law Society is the only institution that can effect lawyers' associative rights. Interest and advocacy groups, such as TLABC or the Federation of Asian Canadian Lawyers of British Columbia, cannot fulfill this role because they lack the regulatory authority or do not represent all lawyers.[183] For example, TLABC has "a voice but no power".[184] Groups lacking regulatory authority are effectively at the mercy of the regulator. Only the Law Society can meet the government on the same level.

162. There are many instances where government has taken public positions against individual lawyers, judges, and courts, which threaten the rule of law.[185] The Law Society has stood up and taken public positions against the government, demonstrating its independence from governments.

163. For example, the Law Society's Ethics Committee played a key role in supporting the collective voice of Crown Counsel in labour relations negotiations with the government.[186] The weight of the Law Society's support ultimately tempered the position of the government, in a manner that individual Crowns or civil society groups could not. Individual Crown Counsel are not permitted to comment on or respond to public criticism. They must rely on the Law Society "to defend [their] role as independent ministers of justice".[187]

164. The constitutional imperative of an independent bar can only be maintained by a legal regulator over which lawyers, elected by lawyers, hold a functional majority. By eliminating such a majority, Bill 21 deprives lawyers of the right to associate in furtherance of the independence of the bar.

165. Furthermore, to the extent that the Plaintiffs are correct that there is a constitutional imperative of independence of the bar that requires self-regulation, lawyers' s. 2(d) right to

[183] Gourlay Affidavit at paras. 22–25; Sayson Affidavit at para. 14.
[184] Gourlay Affidavit at paras. 24–25.
[185] Affidavit #1 of Simon Collins, made May 24, 2024 (TLABC Action) at paras. 22–24.
[186] Sayson Affidavit at para. 11.
[187] Sayson Affidavit at para. 15.

associate flows by implication. The constitutional right to associate, in furtherance of the principles of independence and self-regulation, necessarily flows.

166. The Defendants assert that "regulating and being regulated are not associational activities".[188] This misses the Law Society's history and what it actually does. The Law Society allows a place for lawyers to coalesce around the idea and operation of self-regulation, to exercise the franchise for the purpose of self-regulation and self-government, to advocate on behalf of the public and the legal profession, and to level the playing field with government. That is an association within the meaning of s. 2(d).

Bill 21 substantially interferes with lawyers' associative rights

167. By eliminating the Law Society, Bill 21 terminates the constitutionally-protected right of association to self-regulate without government influence and control. It prevents lawyers from exercising democratic accountability to select the goals and priorities of lawyers in British Columbia.[189] This substantially interferes with the rights protected under s. 2(b), which empower individuals to act with others to determine and control the rules and principles that govern their communities.[190] Bill 21 in effect terminates lawyers' s. 2(d) rights.

168. Democratic participation in the regulator is a core expectation of lawyers entering the profession. That expectation is founded on the importance of meaningfully participating in their own governance: decisions that have significant impact on the way they conduct their practice and serve their clients on a day-to-day basis.[191] Bill 21 results in lawyers being democratically detached and distanced from the board charged with controlling the manner in which they can discharge their duties to their clients, courts, and the public generally.

169. Further, the loss of the Law Society eliminates the one institution that enables lawyers to challenge the government collectively and at the same level. As described above, groups, such as TLABC, that lack regulatory authority have little 'bite' to advocate for lawyers'

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[188] Defendants' Application Response (TLABC Action) at paras. 36(a), 40.

[189] Gourlay Affidavit at paras. 8–9.

[190] *Alberta Reference* at para. 86.

[191] Collins Affidavit at paras. 5, 8.

collective interests. By transferring the functional majority, *i.e.* functional control, over legal regulation to non-lawyers and representatives of government, Bill 21 amounts to state-enforced isolation of lawyers with no forum for self-regulation or self-governance. Quite the opposite of meeting the government on more equal terms, the regulatory body envisaged under Bill 21 grants the government influence and control over lawyers as a profession.[192]

Bill 21 authorizes unreasonable searches and seizures, contrary to s. 8

170. Bill 21 infringes s. 8 of the *Charter* by authorizing unreasonable searches and seizures. This includes searches for matters relating to a lawyers' mental health if the regulator decides to investigate competence.

171. Section 78 of Bill 21 authorizes the chief executive officer of Legal Professions British Columbia to conduct a warrantless entry into business premises, and inspect or examine the records of a licensee, trainee or law firm that "relate to the practice of law by the licensee, trainee or law firm", including for the purposes of "investigating" whether the licensee has practiced law "incompetently", which includes the mental health of a lawyer.[193]

172. Bill 21 also authorizes the chief executive officer to compel any person who may have information or records that are relevant to the investigation (including records relating to a health condition) to attend and give evidence, give written answers to questions, or produce records to the chief executive officer.[194]

173. The authority to conduct warrantless search and seizure is *prima facie* unreasonable.[195] A warrantless search can only be reasonable if it is (1) authorized by law, (2) the law authorizing the search is reasonable, and (3) the search is conducted in a reasonable manner.[196]

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[192] Gourlay Affidavit at para. 25.
[193] Bill 21, ss. 68, 78.
[194] Bill 21, s. 78(3).
[195] *R. v. Tim*, 2022 SCC 12 at para. 45.
[196] *Tim* at para. 46.

174. Searches empowered by Bill 21 are unreasonable because Bill 21 itself is unreasonable.

175. This is so because of the structure and text of Bill 21.

176. The power to conduct the searches derives from a regulator that is not functionally controlled by lawyers and where lawyers do not have final say on the limits or safeguards of such searches. The result is that these are not searches of lawyers by lawyers. These are government searches of lawyer—and client—spaces. This is what distinguishes the searches contemplated by Bill 21 and those permitted under the *LPA* and current regime.

177. The Defendants' reliance on *Greene v. Law Society of British Columbia et al.* is misplaced for the same reason.[197] In *Greene*, the Court concluded that s. 8 had no application to the Law Society's searches of lawyer and client files in the course of a practice review.[198] Relatedly, the Court of Appeal in *Skogstad v. The Law Society of British Columbia* affirmed the *LPA*'s provisions that required a lawyer to answer client-related questions in a Law Society review.[199] In the Court's view, there would be no breach of solicitor-client privilege.[200]

178. The situation created by Bill 21 and those present *Greene* and *Skogstad* are materially different. In *Greene* and under the *LPA*, it was the Law Society's structures—formed of and governed by lawyers—that had conduct of the practice review and the ability to provide (or remove) procedural protections to lawyers subject to that process. Under Bill 21, it is the chief executive officer that may conduct the searches,[201] and the board that governs the rules by which lawyers must abide. The essential distinction between the Law Society and government and the need for that distinction to protect solicitor-client privilege was noted in *Skogstad*:

> [8] The Law Society draws the connection between the protection of solicitor-client privilege and the fundamental importance to our legal

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[197] Defendants' Application Response (TLABC Action) at para. 34; *Greene v. Law Society of British Columbia et al.*, 2005 BCSC 390.

[198] *Greene* at para. 44.

[199] *Skogstad v. The Law Society of British Columbia*, 2007 BCCA 310 at para. 22.

[200] *Skogstad* at para. 18.

[201] Bill 21, s. 78.

> system of the independence of the legal profession from state interference (*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 187-88, per McIntyre J. dissenting in part; *Canada (Attorney General) v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 at 335-36). It makes the point that if lawyers were subject to regulation by the state and the state had access to privileged information during an investigation of a lawyer, solicitor-client privilege would be a hollow right. The independence of the legal profession is in turn protected by self-regulation. (*Finney v. Barreau du Québec*, [2004] 2 S.C.R. 17, 2004 SCC 36). Proper regulation by the Law Society of the competence and integrity of lawyers requires access to confidential, and occasionally, privileged information, such as client instructions.[202]

179. Who is doing the searching, and who has access to the result of the search, matters.

180. By virtue of the language of Bill 21, the breadth of searches leaves open the possibility of intrusion on confidential information, including clients' health, financial, and other private information.[203] This impacts the solicitor-client relationship, particularly a client's willingness to share information crucial to the discharge of their case:

> 16. The potential for Legal Professions British Columbia, and by extension non-lawyers or representatives of government, to, without a warrant, come into my office and look at my clients' documents and information without their knowledge or consent impairs my ability to assure them of the confidentiality of their information. It could seriously impact their willingness to provide me with information which is material and important to their legal claims, and thereby undermine my ability to effectively represent them.
>
> 17. The mere potential of such a search or seizure is enough. My clients' willingness to provide me with full disclosure is dependent not only on my actual independence from government, but also their perception of that independence. If I cannot assure my clients that their information will not be searched or seized by a non-lawyer or representative of government, the damage is done regardless of whether such a search or seizure in fact occurs.
>
> 18. Bill 21 also generates a potential conflict between my professional responsibilities, namely my commitment to my clients' cause, and duties to my new regulator, in circumstances where a search of my business premises is conducted or request for documents or information is made. In such

[202] *Skogstad* at para. 8 [emphasis added].

[203] Collins Affidavit at para. 13.

> circumstances I would be faced with a decision between the delivery of confidential client information to a representative of a non-lawyer and government controlled legal regulator on the one hand, and non-compliance with the provisions of Bill 21 and potential discipline and prosecution on the other. A conflict that, but for the abolition of the self-regulation and the independence of the bar, I would not have to grapple with.[204]

181. In addition to consequences to the solicitor-client relationship and the vitiation of the privilege which belongs to those clients, not the solicitors, the text of Bill 21 permits unreasonable intrusions on lawyers' privacy. Searches may be ordered to investigate whether a lawyer, trainee, or law firm has practiced law incompetently, which includes consideration of a lawyer or trainee's mental health.[205] Bill 21 thus permits a broad scope of searches into a professional's personal and health affairs, which may be found to have no relation to their conduct. These searches are also unreasonable and thus contrary to s. 8.

Bill 21 infringes lawyers' s. 7 right to life, liberty, and security of the person in a manner contrary to the principles of fundamental justice

182. Bill 21 will harm lawyers' liberty and security of the person interests in a way that is inconsistent with s. 7 of the *Charter* and contrary to principles of fundamental justice.

183. A court must conduct a two-stage analysis when government action is challenged under s. 7. First, the court must determine whether the interest asserted falls within the ambit of s. 7. Second, the court must determine whether an individual's s. 7 right is infringed in a manner not in accordance with the principles of fundamental justice.[206] As explained below, Bill 21 engages and infringes the life, liberty, and security interests of lawyers because it sends a signal that mental health and substance use issues are the very subject of professional regulation, leading lawyers to not seek help. This increases the risk of harm. Bill 21's powers to impose unilateral forced treatment patently engage lawyers' liberty interests. None of this is in accordance with fundamental justice.

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[204] Collins Affidavit at paras. 16–18.

[205] Bill 21, ss. 68, 78.

[206] *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44 at para. 47.

The law governing s. 7 of the Charter protects lawyers' autonomy and individual dignity

184. Section 7 of the *Charter* provides that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

185. The first step in a s. 7 analysis requires the claimant to establish that the impugned governmental action (such as a statute) deprives them of "life", "liberty" or "security of the person". To establish such a deprivation, the claimant must establish that the impugned governmental action "'engage[s]' those interests, in the sense that it causes a limitation or negative impact on, an infringement of, or an interference with" something that falls within the scope of life, liberty or security of the person. The claimant need not establish an actual deprivation of life, liberty or security of the person; the "risk of such a deprivation suffices".[207] [208] The test for an infringement of s. 7 is not a high bar. It suffices that there is a "sufficient causal connection" between the state action and the violation of the right; there is no requirement that the state action be the "only or dominant cause of the prejudice suffered by the claimant".[209]

186. The Plaintiffs accept that s. 7 does not encompass economic or property rights, with the exception of economic rights that are "fundamental to human life or survival".[210] Pure "economic interest" is not protected by s. 7, which does not guarantee "[t]he ability to generate business revenue by one's chosen means"[211] or "an unconstrained right to transact business whenever one wishes".[212]

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[207] *Canadian Council for Refugees v. Canada (Citizenship and Immigration),* 2023 SCC 17 at para. 56.

[208] Since *Reference re Section 94(2) of the Motor Vehicle Act*, 1982 CanLII 268 (BCCA) [***Motor Vehicle Reference***], the Court has explicitly affirmed that the principles of fundamental justice are not limited to procedural guarantees in the context of an adjudicative proceeding or administration of justice context. Laws that restrict the life, liberty and security interests protected by the *Charter* must be substantively consistent with the principles of fundamental justice. This includes requirements that a law that restricts an individual's Charter rights must not be substantively overbroad, arbitrary, grossly disproportionate, or vague: *Drover v. Canada (Attorney General),* 2025 ONCA 468 at para. 178, citing *Canada (Attorney General) v. Bedford,* 2013 SCC 72 at paras. 110-123.

[209] *Canadian Council for Refugees* at para. 60, citing *Bedford* at para. 76.

[210] *Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 SCR 927 at p. 1003; *Siemens v. Manitoba (Attorney General),* 2003 SCC 3 at para. 45.

[211] *Siemens* at para. 46.

[212] *R. v. Edwards Books and Art Ltd*., [1986] 2 S.C.R. 713 at p. 786.

187. Nor do the Plaintiffs say that s. 7 protects the right to engage in the business or profession of one's choice.[213] The Plaintiffs accept that state-imposed limitations on employment or the practice of an occupation do not engage the constitutionally protected rights under the *Charter*.[214]

188. This case is not about a right to work as a lawyer or conditions imposed on the practice of a profession. That is a straw man. This case is about something else: a lawyers' right to make fundamental decisions about their life and matters of a most intimate and personal nature: their mental health and the question of whether, when and how they receive treatment for their mental health and substance use.

189. This case falls squarely within the aperture of constitutional rights to liberty and security of the person, which concern themselves with the protection of individual autonomy and dignity.[215]

The right to liberty includes lawyers' right to make fundamental choices about their lives without state interference

190. Along with state-imposed physical restrictions on a person's liberty, the right to liberty is engaged where "state compulsions or prohibitions affect important and fundamental life choices".[216] The Supreme Court of Canada has repeatedly recognized that liberty includes "the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference".[217] The liberty interest is confined to "such matters [that] 'can properly be characterized as fundamentally or inherently

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[213] *R. v. Kloubakov*, 2025 SCC 25 at para. 166.

[214] *Siemens*; *Walker v. Prince Edward Island*, [1995] 2 S.C.R. 407; *Green v. Law Society of Manitoba,* 2017 SCC 20; *B.C. Teachers' Federation v. School District No. 39 (Vancouver),* 2003 BCCA 100 (Prowse J.A. dissenting); *Tanase v. College of Dental Hygienists of Ontario,* 2021 ONCA 482; *Mussani v. College of Physicians and Surgeons of Ontario*, 2004 CanLII 48653 (ONCA); *Maddock v. British Columbia*, 2022 BCSC 1605, appeal dismissed as moot, 2023 BCCA 383.

[215] *Carter v. Canada (Attorney General),* 2015 SCC 5 at para. 64.

[216] *Blencoe* at para. 49.

[217] *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74 at para. 85 [***Malmo-Levine***], citing *Godbout v. Longueuil (City),* [1997] 3 S.C.R. 844 at para. 66; and *B. (R.) v. Children's Aid Society of Metropolitan Toronto,* [1995] 1 S.C.R 315 at para. 80.

personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence'".[218]

191. There is no question that a person's liberty interests to make fundamental personal decisions without state interference includes medical self-determination—the right to consent to or withhold consent from medical intervention.[219]

192. Liberty interests also extend to other basic questions about a person's life. A minority of the Supreme Court of Canada, led by La Forest J., accepted that a person's decision about where to establish one's residence is a "quintessentially private decision going to the very heart of personal or individual autonomy" that falls within the "narrow class of inherently personal matters" deserving of constitutional protection.[220] This conclusion has not been formally endorsed by a majority of the Supreme Court of Canada,[221] though the underlying doctrinal thinking that led to its conclusion has been.[222] This year, a majority of the Ontario Court of Appeal endorsed this very conclusion:

> [216] In general, the choice of where to live is a deeply personal, deeply consequential decision that affects an individual's life, opportunities, health, personal development and quality of life. It determines an individual's proximity to family members and friends; their access to groceries, employment opportunities, medical facilities, schools, religious, cultural and leisure amenities; the nature and extent of their immediate social circle; and their physical environment.
>
> …
>
> [220] I agree with and adopt La Forest J.'s conclusion at para. 68 of *Godbout* that "the ability to determine the environment in which to live one's private life and, thereby, to make choices in respect of other highly individual matters (such as family life, education of children or care of loved ones) is inextricably bound up in the notion of personal autonomy". It implicates "the very essence of what each individual values in ordering his

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[218] *Malmo-Levine* at para. 85, citing *Godbout*; *R. v. Ndhlovu*, 2022 SCC 38 at para. 51.

[219] *Carter at* para. 67; *A.C. v. Manitoba (Director of Child and Family Services),* 2009 SCC 30 at para. 100; *Cambie Surgeries Corporation v. British Columbia (Attorney General),* 2022 BCCA 245 at para. 234, Fenlon J.A. concurring; *Warner v. British Columbia (Provincial Health Officer),* 2025 BCCA 21 at para. 46.

[220] *Godbout* at para. 66.

[221] *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37 at para. 93.

[222] *Malmo-Levine* at para. 85; *Drover* at para. 201; *Association of Justice Counsel v. Canada (Attorney General),* 2017 SCC 55 at paras. 49–50.

> or her private affairs". Given its profound implications, a person's decision about where to live is an inherently personal decision that goes "to the core of what it means to enjoy individual dignity and independence": *Godbout*, at para. 66; see also *Malmo-Levine*, at para. 85.
>
> [221] I accordingly conclude that an individual's choice of where to live falls within the irreducible sphere of deeply personal decision-making with which the state should not interfere except in accordance with principles of fundamental justice.

The right to security of the person protects lawyers' bodily and psychological integrity from state interference

193. The right to security of the person extends at least to actual or potential interferences with bodily integrity, including to health and safety. According to one author, "state-imposed medical treatment is a deprivation of security of the person".[223]

194. A threat to a person's "psychological integrity" constitutes a deprivation of security of the person.[224] In *G.(J.),* the Supreme Court of Canada confirmed that the security of the person right protects both the physical and psychological integrity of the individual. In his majority decision, Chief Justice Lamer distinguished between "serious state-imposed psychological stress" and the "ordinary stresses and anxieties a person of reasonable sensibility will suffer", and articulated the following test for establishing a restriction on security of the person:

> [60] … the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.

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[223] Peter Wardell Hogg, *Constitutional Law of Canada*, 5th ed (Scarborough: Thomson Carswell, 2007) at para. 47.12; *Rodriguez v. British Columbia (Attorney General),* [1993] 3 S.C.R. 519 at p. 618; *Carter*.

[224] *New Brunswick (Minister of Health and Community Services) v. G.(J.),* [1999] 3 SCR 46; *Blencoe*.

The right to life protects lawyers from even an indirect increased risk of death

195. The right to life under s. 7 is engaged by a law that "imposes death or an increased risk of death on a person, either directly or indirectly".[225] "A risk of such a deprivation suffices".[226]

Bill 21 engages and circumscribes a lawyers' life, liberty, and security interests

196. Bill 21 engages lawyers' fundamental life, liberty, and security of the person interests.

197. To understand how this is the case, it is necessary to unpack the legislation.

198. The material provisions are in Part 6 ("professional conduct, competence and discipline"), division 1 ("professional conduct and competence). Section 68 of the Act provides the material definition that grounds regulation of competence. It defines "incompetently" as "in relation to the practice of law, means in a manner that demonstrates **either** of the following:"

> (a) deficiencies, in any of the following, that give rise to a reasonable apprehension that the quality of service to clients of a licensee or law firm may be significantly adversely affected:
>
> (i) the knowledge, skill or judgment of the licensee or law firm;
>
> (ii) the attention to the interests of clients of the licensee or law firm;
>
> (iii) the records, systems or procedures of the professional business of the licensee or law firm;
>
> (iv) other aspects of the professional business of the licensee or law firm;
>
> (b) a health condition that prevents a licensee from practising law with *reasonable skill and competence*;

199. The government and their expert say that the Plaintiffs misinterpret s. 68: "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

[225] *Carter* at para. 62.

[226] *Canadian Council for Refugees* at para. 56, citing *Carter* at para. 62; *Malmo-Levine* at para. 89; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para. 27.

demonstrates [...] a health condition that prevents a licensee from practising law with reasonable skill and competence'".[227] They say a lawyer cannot be "incompetent" for having a health condition. They only can practise law incompetently if a health condition prevents them from practicing with competence. In other words, they say the focus is conduct, not condition.

200. This argument does not avail. It amounts to semantics because the legislation makes the inherent association between health conditions and competence. If it were only about "conduct" not conditions, then why reference any conditions at all? What is the point of that?[228] The association between a person's health condition and competence can be seen by reference to how the current scheme understands competence. Rule 3.1-2 of the BC Code requires that a lawyer must perform all legal services undertaken on behalf of a client to the standard of a competent lawyer. Rule 3.1-1 of the BC Code defines a "competent lawyer" as follows:

> **"competent lawyer"** means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer's engagement, including:
>
> (a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises;
>
> (b) investigating facts, identifying issues, ascertaining client objectives, considering possible options and developing and advising the client on appropriate courses of action;
>
> (c) implementing as each matter requires, the chosen course of action through the application of appropriate skills, including:
>
> (i) legal research;
>
> (ii) analysis;
>
> (iii) application of the law to the relevant facts;

[227] Defendants' Application Response (TLABC Action) at para. 25.

[228] The government has adduced no evidence of the reason for this legislative change.

(iv) writing and drafting;

(v) negotiation;

(vi) alternative dispute resolution;

(vii) advocacy; and

(viii) problem solving;

(d) communicating at all relevant stages of a matter in a timely and effective manner;

(e) performing all functions conscientiously, diligently and in a timely and cost-effective manner;

(f) applying intellectual capacity, judgment and deliberation to all functions;

(g) complying in letter and spirit with all rules pertaining to the appropriate professional conduct of lawyers;

(h) recognizing limitations in one's ability to handle a matter or some aspect of it and taking steps accordingly to ensure the client is appropriately served;

(i) managing one's practice effectively;

(j) pursuing appropriate professional development to maintain and enhance legal knowledge and skills; and

(k) otherwise adapting to changing professional requirements, standards, techniques and practices.

201. In other words, the current system does not define competence with any reference to conditions or causes for the incompetence. It sets a standard and does not ask for causes for why a person fails to meet it (at least at the stage of determining whether there is an act of incompetence). Bill 21 sets out a statutorily defined cause for the incompetence practise of law: a lawyer's health, including their mental health. That is new. That is a critical departure from the status quo.

202. And lawyers will read and fear it no matter how it is applied. They can fear an investigation even if they are not practicing incompetently, simply because they fit within a category—

which they must decidedly eschew anyone knowing they fit within lest they be investigated simply because of it.

203. Section 71 states that a lawyer must not practice law "incompetently", which means they must not practice law if they have a health condition that prevents them from practicing law with reasonable skill and competence.

204. Sections 76-79 govern the investigatory powers of the new chief executive officer of Legal Professions British Columbia. Section 76 allows any person to make a complaint to the chief executive officer if that person "believes" a lawyer "may" have practised law incompetently. On receiving such a complaint, the chief executive officer must investigate whether the lawyer practised incompetently, and a lawyer must cooperate with that investigation.[229] Under s. 78, the chief executive officer is empowered to enter a lawyer's office, inspect records, and observe a lawyer practising law without a warrant (unless their office is a personal residence). The chief executive officer may order a person to attend and answer questions from the executive, provide written answers to written questions, or produce documents and records relating to the investigation over a lawyer's alleged incompetence.

205. Sections 85-94 deal with discipline, including in relation to practising law incompetently. Section 85 is significant. It empowers the chief executive officer to make significant interim orders during the course of a investigation into an allegation that a lawyer has practiced law incompetently:

> At any time after an investigation into a matter has begun, the chief executive officer may, by order, do one or more of the following if the chief executive officer considers it necessary in the public interest:
>
> …
>
> (g) require a licensee or trainee to undergo an examination by a medical practitioner in order to determine if the licensee or trainee has sufficient capacity to practise law competently.

[229] Bill 21, s. 77.

206. This section hands the chief executive officer sweeping discretion to order a lawyer into a medical examination on the basis of either a complaint or a chief executive officer's opinion that the lawyer is practising law incompetently because of a health issue. Although the section does provide a lawyer with limited procedural protections (the order must be in writing, must include reasons and duration which must not exceed three months, and a lawyer has a right to seek a review), s. 85 hands regulatory staff of Legal Professions British Columbia significant unilateral power to order a lawyer into a medical procedure.

207. If, after an investigation, the chief executive officer determines that the lawyer has practised law incompetently (*i.e.*, has not practised law with reasonable skill and competence), they may make a "competence order", or submit a citation to the discipline committee.[230] Under s. 88, the legislation sets out "competence orders":

> i. (1) If the chief executive officer determines that a licensee, trainee or law firm has practised law incompetently, the chief executive officer may, by order, do one or more of the following:
>
> (a) require the licensee to submit to a practice review;
>
> (b) require the licensee or trainee to complete a remedial program;
>
> **(c) require the licensee or trainee to receive counselling or medical treatment, including treatment for a substance use problem or substance use disorder;**
>
> (d) impose limits or conditions on the licensee's licence or on the trainee's enrolment as a trainee;
>
> **(e) suspend the licensee's licence, the permit of the law firm or the trainee's enrolment as a trainee**
>
> (i) for a specified period,
>
> (ii) until the licensee or trainee meets a requirement imposed under paragraph (a), (b) or (c) or a condition imposed under paragraph (d),
>
> (iii) from a specified date until the licensee or trainee meets a requirement imposed under paragraph (a), (b) or (c) or a condition imposed under paragraph (d), or

[230] Bill 21, s. 86.

> (iv) for a specified minimum period and until the licensee or trainee meets a requirement imposed under paragraph (a), (b) or (c) or a condition imposed under paragraph (d);

208. Section 198 of Bill 21 makes it an offence to willfully interfere with or obstruct another person (*i.e.*, the chief executive officer) in the performance of a duty under the law. Under s. 202, a person may be subject to imprisonment or a fine.

Bill 21 engages lawyers' liberty interest

209. Bill 21 engages lawyers' liberty interest because it intervenes in one of the most fundamentally personal decisions a person can make: decisions about their own mental health, including whether a person makes the decision to seek help.

210. Bill 21 interferes with lawyers' liberty interests in two significant ways. The first way is the most obvious: it gives the chief executive officer of Legal Professions British Columbia the unilateral power to order a person into a compelled medical examination. Following an investigation, the chief executive officer can order a lawyer into treatment as a result of a finding that they have practised law "incompetently" as a result of a mental health or substance use issue. This is a clear infringement of a lawyer's right to medical self-determination, a core liberty interest.

211. The government position is that lawyers' liberty interest is not engaged because while lawyers do have a right to medical self-determination, they do not have a constitutional right to be free from the consequences of that self-determination. As the government puts it in its application response:

> 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". 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. The same reasoning applies here. If the regulator makes a competence or professional conduct order requiring a lawyer to receive treatment and the lawyer

> declines, the regulator may suspend the lawyer's licence to practice law but that economic consequence does not engages. 7.[231]

212. This argument misses the point and seeks to put the Plaintiffs in a familiar analytical box (*i.e.*, constitutional challenges by regulated professionals or employees to state enforced treatment backed up by dismissal or sanction). The Plaintiffs do not take issue with a lawyer being suspended, having their practice subject to conditions, or a lawyer being subject to economic consequences from regulatory action. Rather, the argument is that the treatment is in and of itself is inherently the problem and the harm, not the sanction or the consequences arising from the fact of being a regulated professional. If the regulator wants to suspend a professional because they are concerned that a lawyer practised law incompetently, that is part of the regulatory bargain.

213. What is problematic from a liberty interest perspective is invading a private, personal space of a lawyer's mental health and the decision whether to receive treatment for their mental health. Decisions about one's mental health are fundamentally private, personal, and of utmost importance to a person's autonomy. A power to intervene on that decision engages one's liberty interest, whether or not it carries with it a threat of sanction.[232]

214. The second way Bill 21 invades a lawyers' liberty interest is more subtle, but no less problematic. The expert evidence tendered by the Plaintiffs supports the proposition that the presence of powers to compel treatment based on associations between incompetence and mental health contains a powerful enhancement of the already prevalent stigma against help seeking behaviours. Bill 21 adds a layer of regulatory interference with a lawyers' decision-making about whether to seek help. As Dr. Ganesan puts it, Bill 21 would "create a barrier for the legal profession to have their minds open to self-reporting and seeking appropriate treatment related to mental health concerns of substance use. This is because of the stigma, potential denial, and barriers in accessing and receiving the appropriate service on time and as needed."[233]

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[231] Defendants' Application Response (TLABC Action) at para. 21.

[232] *Godbout*; *B.C. Teacher's Federation*, per Prowse J.A., dissenting; *United Steelworkers, Local 2008 v. Attorney General of Canada,* 2022 QCCS 2455; *Malmo-Levine*; *Drover* at paras. 216–221.

[233] Ganesan Report at p. 5.

215. Mr. Gold's evidence is consistent with this view:

> A regulatory regime which coercively triggers precisely the fear that I, as a clinician, am trying to alleviate so as to be able to help the individual, is an inhumane and counterproductive regime which will lead to the avoidance of help-seeking by the very individuals who so urgently need it and deserve it.
>
> The prospect of having the regulator oversee an individual's recovery from a mental health or substance use condition will, in my opinion, likely dissuade lawyers from self-reporting. They are already generally predisposed to keep their vulnerabilities to themselves. That such disclosure would be bound up in a regulator's potentially arbitrary and misinformed use of that diagnosis to compromise a lawyer's ability to practice law, would be a chance most lawyers would refuse to take. This would be especially so if their mental health vulnerability could be misconstrued as incompetence.[234]

216. Put simply, the scheme developed by the government in Bill 21 is a state produced interference on the critical question of whether a lawyer seeks help. That is a question of fundamental personal autonomy.

217. The final way Bill 21 implicates a lawyer's liberty interest is that could lead to potential imprisonment should a lawyer refuse or otherwise obstruct Legal Professions British Columbia. While the government will say such an outcome is implausible, the legal pathway to such a result is available and therefore a risk of a deprivation.

Bill 21 engages lawyers' security of the person

218. Bill 21 engages lawyers' security of the person interests in at least three different ways.

219. First, Bill 21's provisions for compelled medical examination on an interim basis (s. 85) and compelled medical treatment and counselling after an investigation (s. 88) may be made by the chief executive officer in their sole discretion (acting in the public interest). There is no requirement in the scheme that the chief executive officer or any hearing panel be qualified to make these kinds of medical decision or to only make these decisions on receipt of advice from a qualified medical professional. In other words, the state is

[234] Gold Report at p. 12.

empowering a regulator of legal professionals to make orders in relation to health without any safeguards as to how such orders may impact that person. The risk to lawyers' physical and mental integrity is apparent.

220. The second way Bill 21's regulation of lawyers' competence impacts lawyers' security of the person is by interfering with lawyers' healthcare and healthcare decision-making.

221. The Plaintiffs' evidence in this case establishes that there is a real risk that Bill 21's unwarranted association between mental health and competence, combined with unilateral powers of the chief executive officer to compel medical examinations and treatment will cause lawyers to delay seeking help or not seek help at all for fear of a regulatory response. This is harm to security of the person.

222. The uncontested evidence in this case is that lawyers are suffering in far greater numbers than other professionals and the general population. They also seek help less often than others. This is because they face a number of psychological barriers to seeking help.

223. The evidence establishes that an association between mental health and competence and powers to directly control one's mental health treatment will have a negative impact on some lawyers' decision to seek help. Dr. Ganesan's opinion is that Bill 21 creates additional barriers to seeking help. Those additional barriers would:

> pose a risk psychological harm to some individuals who reluctantly access appropriate healthcare and mental health services. The delay in access proper treatment would cause more psychological and physical harm to the individual, his/her family, and their community's clients that they are serving. This would affect how care providers provide the service, as well as their professional life, family life and social life.

224. Mr. Gold's clinical experience supports this. His experience is that a regulatory system that enhances "fear" simply leads to more avoidance of help seeking behaviour.[235] Mr. Gold

[235] Gold Report at p. 12.

adds that Bill 21 would contribute to stigma and lawyers' avoidance of help-seeking behaviours because it does not make the regulatory process in any way confidential:

> I note as well that nowhere in Bill 21 is provision made for the confidentiality of the individual who is subject to the investigatory and disciplinary process. If, as I noted above, lawyers guard their reputations vigorously and protect themselves from others becoming aware of their mental health or substance use challenges, a process which exposes those struggles publicly, further triggers fears of stigmatization and substantially diminishes the chances of individuals self-reporting. Medical matters are private matters. Making them public is cruel and compromises the individual's health.[236]

225. This is not just the evidence of the Plaintiffs' experts. The authors of the National Study agree that one of the principle barriers for lawyers seeking help is the perception that "their law society will take action against them if they disclose their condition."[237] This delays lawyers seeking help, which "undermines transparency about mental health issues while potentially exacerbating the professionals' health issues".[238] "By seeking help early enough, professionals can avoid more serious health issues. They should therefore never hesitate to ask for help in any form."[239] Regulators, while still serving the public, can reduce these barriers by disassociating mental health and substance use from the punitive aspects of professional regulation. The authors add:

> However, psychological health is a skill and an essential condition for the quality of a professional's practice. For this reason, when a professional's well-being is compromised, <u>they should be able to seek help without fear of facing regulatory repercussions</u>. Unfortunately, the survey results show that legal professionals fear regulatory repercussions for disclosing their psychological health problems. This suggests that many professionals associate their psychological health with their ability to fulfill their professional and ethical obligations. They worry that disclosing their condition could lead the regulator to question their ability to practise.[240]

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[236] Gold Report at p. 12.

[237] Greenberg Affidavit #3, Ex. 107 at p. 33 ("**National Study Recommendations Report**").

[238] National Study Recommendations Report at p. 28.

[239] National Study Recommendations Report at p. 28.

[240] National Study Recommendations Report at p. 33.

226. The evidence establishes that Bill 21's association between mental health and competence risks causing lawyers psychological harm beyond ordinary stress and anxiety by making it less likely that they will voluntarily seek help in a timely way. It does so by putting mental health and substance issues back into the closet, by discouraging and stigmatizing a condition.

227. Lawyers who delay seeking help are subject to state induced psychological harm and deteriorating physical and mental health generally. Their condition may exacerbate or may become more complicated. The delay in seeking help can in some cases lead to serious physical self-harm, or even death.

228. The line between a regulator making an association between mental health and competence and a delay or avoidance of help seeking among lawyers is clearly drawn in the record and the government has no direct answer. The only real answer it has adduced is to argue that once a person becomes a lawyer, they check their s. 7 rights at the door because they can simply leave the profession and the harm comes to an end.

229. The problem for the government is that this argument is designed for the case where a professional refuses to receive a COVID-19 vaccine and complains about the repercussions when they refused such treatment. The government's theory of how s. 7 rights work does not account for an ambient (that is, generally prevailing) harm caused by a regulatory system that makes the direct association between mental health and competence and sets out specific and potentially draconian powers to order examination and treatment to non-medical professionals in their own discretion. That harm exists for lawyers who do not interact with the regulator. They simply fear.

230. The only other response to this point comes from the Defendants' expert, Dr. Colleton, who indicates that he has some "uncertainty as to where this fear of the regulator originates. If a lawyer on their own accord seeks help from a family physician, a psychiatrist, or a counsellor, how would the regulator come to know about this personal health information in the absence of regulator involvement?"[241]

[241] Colleton Report at para. 25, p. 11.

231. The question is misplaced for a few reasons. The question assumes that a conduit for help seeking are only those sources described above: medical professionals that would not ordinarily disclose such conditions to the Law Society. But people, lawyers included, may be inclined to seek help from any number of sources and those sources may feel, rightly or wrongly, that they can or should report to the Law Society. More importantly, Dr. Colleton's question fails to accept the fear at face value; lawyers are protecting themselves from any kind of regulatory scrutiny. The fact that there is now a patent association between mental health and substance use and competence in the regulation of lawyers makes this fear not irrational.

232. The third way Bill 21 implicates the security interest of lawyers is by outing lawyers' mental health and substance use conditions for full public scrutiny. The absence of any guarantees of confidentiality means that any lawyer caught in the scrutiny of Legal Professionals British Columbia risks having their deepest personal challenges (and in some cases, shame) made public, including the potential for public orders relating to details of their treatment. While this lack of confidentiality in the legislative scheme contributes to lawyers avoiding seeking help, it also would create a risk of severe psychological harm by the plain fact that lawyers would be required to air such highly personal issues to the regulator and the public.

233. Dr. Colleton agrees that confidentiality is important, but argues that this must be balanced with transparency and the public interest:

> (57) Mr. Gold notes that Bill 21 does not have any provision to maintain confidentiality about the medical background of an individual who is subjected to the investigation and disciplinary process. I consulted to the Law Society of Ontario about a lawyer with a mental health condition and I don't disagree with the assertion that this is an important concern. I think that efforts should be made to reveal as little as possible about personal information, including personal health information, such that it is not disclosed to the public domain. However, this has to be balanced against the public interest in a transparent process and public confidence in the legal profession.[242]

[242] Colleton Report at para. 57, p. 22.

234. Dr. Colleton's observation here may have some materiality when considering whether Bill 21's infringement of s. 7 is in accordance with fundamental justice (or, if it gets that far, whether it is justifiable in a free and democratic society).[243] But it does not answer the fact that the system set up by the government does implicate lawyers' security of the person interest from the unwarranted exposure of their most intimate health information.

Bill 21 engages lawyers' right to life

235. The evidence adduced in this summary trial engages a lawyers' constitutional right to life. It does so because the same delay in seeking help caused by Bill 21's enhancement of stigma that leads to harm to lawyers' wellbeing may lead to lawyers engaging in self-harm or even death. As Mr. Greenberg states, "[g]iven the prevalence of suicidal ideation in the profession, Bill 21 inevitably places my colleagues and members of the profession at significant personal risk."[244] As noted above, to engage a right to life, the provision must merely create a risk of such a deprivation. Such a risk is established on the record.

The government's other arguments on s. 7 are irrelevant

236. The government makes other arguments in its application response and through its expert. The legal significance of these arguments is unclear because they do not detract from the proposition that Bill 21's competence scheme implicates lawyers' life, liberty, and security of the person.

237. First, the government says "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".[245] The government maintains that the current Rules of the Law Society authorize the Practice Standards Committee to impose conditions on a lawyer's practice, including the requirement that a lawyer "obtain a medical

[243] *Bedford* at para. 125; *R. v. Brown*, 2022 SCC 18 at paras. 71-72.

[244] Greenberg Affidavit #3 at para. 209.

[245] Defendants' Application Response (TLABC Action) at para. 7(a).

assessment or assistance, or both".[246] The government says the provisions of Bill 21 parallel the regulator's prior power and thus there can be no unconstitutionality.

238. The argument that Bill 21 simply preserves the status quo is at best an oversimplification. As noted above, and most importantly, the prior definition of competence in the *Code* does not reference the lawyer's mental health.[247] Contrary to the government's submission, the *LPA*'s regulation of health as it relates to competence is an entirely different process than that envisaged by Bill 21. Presently, the Law Society may affect a lawyer's health under the purview of the Practice Standards Committee. If a person makes a complaint to the Law Society, the executive director may refer the complaint to the Committee.[248] The Committee may, among other things, require the lawyer to meet with a lawyer or Bencher[249] or order a practice review.[250] Either path may result in a report issued to the Committee,[251] on which basis the Committee may recommend that the lawyer undertake medical treatment.[252] The Committee may only order treatment—with appropriate procedural protections—if the lawyer fails to comply with the Committee's recommendation.[253]

239. In any event, this argument does nothing for the s. 7 analysis. Even if one accepts the argument that Bill 21 did nothing to change the regulation of lawyers' competence in British Columbia, that is not an answer to an infringement of s. 7. One does not answer an infringement of a constitutional right by simply saying "this is the way we always did it". It is no defence to point to another unconstitutional law. Similarly, the fact that other provinces may have similar schemes does not provide safe harbour for an infringement of s. 7. It simply puts those schemes at risk for similar constitutional challenge. The argument that we are not seeing anything new is a red herring.

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[246] Defendants' Application Response (TLABC Action) at para. 9, citing BC Rule 3-20(e).
[247] *Code of Professional Conduct for British Columbia*, s. 3.1-1.
[248] *Law Society Rules*, Rule 3-17 ("**BC Rule**").
[249] BC Rule 3-17(3)(c).
[250] BC Rule 3-18.
[251] BC Rule 3-18(5).
[252] BC Rule 3-19(b)(iv)–(v).
[253] BC Rule 3-20(1)

240. The second argument advanced by the government is that "[t]he 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."[254]

241. This is also of no moment for the infringement analysis. In any event, the Plaintiffs' case does not rely on any speculation of what the regulator may or may not do. It relies on what the scheme says to lawyers as the subject of the regulation and what effect it may have on them and their fundamental interests as persons.

242. Third, the government's expert, Dr. Colleton, takes the position that the Plaintiffs' case that Bill 21's association between mental health and competence and the potential for involuntary treatment does not " adequately address the issue of client interest in relation to these issues nor do they displace the need for the provisions of Bill 21. The opinion letters of Mr. Gold and Dr. Ganesan hardly consider the public interest at all, focusing almost exclusively on the personal liberty interests of the lawyers."[255] This position, and much of Dr. Colleton's report, in addition to being pure argument, is simply irrelevant to the infringement analysis. At best, Dr. Colleton's evidence is his opinion about the government's alleged public policy goals of Bill 21. That again "plays no part in the s. 7 analysis, which is concerned with the narrower question of whether the impugned law infringes individual rights".[256]

243. In summary, none of these arguments are material to whether a right to life, liberty or security of the person is engaged here. To the extent these arguments are relevant, it is in the question of justification under principles of fundamental justice or s. 1.

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[254] Defendants' Application Response (TLABC Action) at para. 7(b).

[255] Colleton Report at para. 6, p. 5.

[256] *Bedford* at para. 125; *Brown* at paras. 71–72.

The infringement of lawyers' right to life, liberty, and security of the person is not in accordance with fundamental justice

244. Once it is determined that lawyers' right to life, liberty, and security of the person is engaged by Bill 21, the question is whether this is in accordance with principles of fundamental justice. It is not.

The fundamental justice under s. 7 tests the institutional rationality of a law

245. Three doctrines that have become principles of fundamental justice, and that now figure prominently in s. 7 cases, are arbitrariness, overbreadth and gross disproportionality. If a law deprives anyone of life, liberty or security of the person, any of these doctrines can lead to a breach of s. 7.

246. The Supreme Court of Canada in *Bedford* and *Carter* set out the respective tests for arbitrariness, overbreadth and gross disproportionality.

247. Arbitrariness is an attack on a law's most basic rationality. If a challenged law has no connection to its objective, then a s. 7 deprivation is classified as "arbitrary". According to *Bedford*, "[a]rbitrariness asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose. There must be a rational connection between the object of the measure that causes the s. 7 deprivation, and the limits it imposes on life, liberty, or security of the person".[257] As stated in *Chaoulli*, "[t]he question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair."[258] In order to determine whether a statutory provision is arbitrary and therefore contrary to fundamental justice, "the relationship between the provision and the state interest must be considered".[259]

248. The principle of fundamental justice that forbids arbitrariness targets the situation where there is no rational connection between the object of the law and the limit it imposes on

[257] *Bedford* at para. 111.

[258] *Chaoulli v. Quebec (Attorney General),* 2005 SCC 35 at para. 131.

[259] *Rodriguez* at p. 594.

life, liberty or security of the person.[260] An arbitrary law is one that is not capable of fulfilling its objectives. It exacts a constitutional price in terms of rights, without furthering the public good that is said to be the object of the law.[261]

249. Overbreadth is different; it is a law that is in part arbitrary. If a challenged law has some applications that are connected to its objective but some applications that are not connected to its objective, then a s. 7 deprivation is classified as "overbreadth". According to *Bedford*, "[o]verbreadth deals with a law that is so broad in scope that it includes some conduct that bears no relation to its purpose. In this sense, the law is arbitrary in part".[262] *Carter* distilled overbreadth this way:

> [85] The overbreadth inquiry asks whether a law that takes away rights in a way that generally supports the object of the law, goes too far by denying the rights of some individuals in a way that bears no relation to the object: Bedford, at paras. 101 and 112-13. Like the other principles of fundamental justice under s. 7, overbreadth is not concerned with competing social interests or ancillary benefits to the general population. A law that is drawn broadly to target conduct that bears no relation to its purpose "in order to make enforcement more practical" may therefore be overbroad (see Bedford, at para. 113). The question is not whether Parliament has chosen the least restrictive means, but whether the chosen means infringe life, liberty or security of the person in a way that has no connection with the mischief contemplated by the legislature. The focus is not on broad social impacts, but on the impact of the measure on the individuals whose life, liberty or security of the person is trammelled.

250. Finally, if a challenged law has a connection to its objective, but a s. 7 deprivation is so severe as to be out of all proportion to the objective, then the s. 7 deprivation is classified as "grossly disproportionate". According to *Bedford*, gross disproportionality is concerned with whether "the law's effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported. The rule against

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[260] *Bedford* at para. 111.

[261] *Carter* at paras. 83-84.

[262] *Bedford* at paras. 101, 112-113.

gross disproportionality only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure".[263] *Carter* adds this:

> [89] This principle is infringed if the impact of the restriction on the individual's life, liberty or security of the person is grossly disproportionate to the object of the measure. As with overbreadth, the focus is not on the impact of the measure on society or the public, which are matters for s. 1, but on its impact on the rights of the claimant. The inquiry into gross disproportionality compares the law's purpose, "taken at face value", with its negative effects on the rights of the claimant, and asks if this impact is completely out of sync with the object of the law (Bedford, at para. 125). The standard is high: the law's object and its impact may be incommensurate without reaching the standard for gross disproportionality (Bedford, at para. 120; Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 47).[264]

Bill 21's association between mental health and competence is arbitrary because it exacts a constitutional price on lawyers for no real public benefit

251. Bill 21 is arbitrary.

252. The provisions in Bill 21 dealing with an unwarranted association between mental health and competence are arbitrary because they have no connection to the government's alleged objective in ensuring competent lawyers are available to the public and do not harm the public. This is so because the scheme for regulating lawyers' competence, which starts from the association that mental health affects competence and then proceeds to treat that condition through the state's responses of forced medical examination and forced treatment, leads to lawyers not seeking help. In the government's efforts to allegedly protect the public from mentally ill lawyers, it risks making that very problem worse. The assumption built into the law is stigmatizing and induces fear among lawyers, leading to worse health outcomes and more harm to the public.

253. In other words, the government is not entitled to enact a counterproductive law. Had the government engaged seriously in the legislative consultation process and undertaken an

[263] *Bedford* at para. 120.

[264] *Carter* at para. 89.

evidence based approach to truly modernize the regulation of legal professionals, it might have come to that conclusion independently.

254. The government's only answer here is unsatisfactory. It basically asserts that at least some lawyers will experience health conditions that will impact their ability to practise law competently. Legal Professions British Columbia must have some powers to address the underlying problem:

> 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". 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". 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.[265]

255. Dr. Colleton makes a similar submission:

> (44) From a psychiatric perspective, regulatory oversight of a mental health condition is justified when there is concern about inadequate self-regulation on the part of the member with regard to management of their condition and when the poorly managed condition poses a risk of harm to clients. …
>
> (45) Despite awareness, education, and counselling, there is a subset of individual lawyers who cannot (due to lack of insight) or will not (due to other issues) adequately address their mental health condition and its adverse effects on their job performance, and who are thereby unable to practice law competently. The regulator must, by necessity, impose conditions upon these individuals should they choose to continue practicing,

[265] Defendants' Application Response (TLABC Action) at para. 26.

> in order to protect client interests. The provisions of Bill 21 are therefore necessary despite other efforts to address lawyer mental health.[266]

256. At best, these arguments would fill out a small regulatory space where the regulator would need to step in the so-called extreme cases described in Dr. Colleton's report. This would render Bill 21 an overbroad law, not an arbitrary one.

257. But the government and Dr. Colleton's positions fundamentally misunderstand the problem of any association between mental health and competence and powers for forced treatment and forced examination: they are not necessary from a regulatory perspective where the regulator has the power to suspend and impose practice conditions on a person who is incompetent regardless of the reason for that incompetence. A person facing the conditions described by Dr. Colleton could be addressed by a regulator assessing their outward conduct and suspending their ability to practice law. In that context, the government's objective is satisfied; the public is protected. There is also no harmful association between mental health and practising law incompetency and no public powers to force lawyers into treatment. The regulatory focus that causes lawyers to avoid treatment would no longer be advertised.

258. Dr. Colleton and the government's answer to the arbitrariness problem in this way is revealing: they wish to preserve for the government a power to "address lawyer mental health" when the fundamental concern is to prevent incompetent lawyers from offering services to the public.

259. The simple non-constitutionally infringing option is staring the government in the face: just suspend them if there are proven competency issues, for whatever reason.

260. At no point does the government address this in its application response. Dr. Colleton does not explain why exercise of a suspension power would not be a complete answer to the types of lawyers who avoid treatment and would otherwise justify compelled treatment in his opinion.

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[266] Colleton Report at paras. 44–45, pp. 18–19.

261. Bill 21 is also overbroad.

262. Even if Bill 21 has some connection to protecting the public from incompetent lawyers—and is therefore not arbitrary—it still goes beyond what is necessary to achieve that purpose by defining competency through the association of mental health and substance use and competence, investigating a lawyer's mental health and substance use, and ordering lawyers into care. Those steps are not necessary to protect the public. As the Law Society has shown now, an assessment of competency can be done without making any kind of association between mental health and competence. And, as the Law Society's Task Force has also shown, it is not necessary to adopt a regulatory posture that relies on regulating, investigating, and making orders about a lawyer's mental health. This is because a regulator can assess a lawyer's conduct and protect the public without causing the lawyer, and other lawyers, to question whether their mental health will be a professional liability for them in the eyes of their regulator. The Law Society's ADP program is case in point in this regard.

263. But fundamentally, again, the complete answer to the government, and its expert, is that any alleged mental health and substance issue, no matter its seriousness, can be satisfactorily addressed from the public's perspective through the powers to suspend for incompetency (without making assumptions or defining the source of that incompetency). The power to compel treatment is therefore a pointless overreach, an artifact of an antiquated approach to the mental health and autonomy of individuals who happen to practise in a profession. It now mainly serves as counterproductive and harmful mechanism to cause lawyers to look over their shoulder, delay and avoid confronting their health for fear of their regulator, and fall deeper into physical and mental harm.

264. Bill 21 is grossly disproportionate.

265. Even assuming Bill 21 has some degree of connection to the government's goal of protecting the public from incompetent lawyers, the harm caused to lawyers to lawyers' life, liberty and security interests is entirely out of proportion to the purpose of the law.

266. Bill 21's association between mental health and competence and attendant powers to address the causes of such incompetent practise impose harsh consequences on lawyers' in

relation to their mental state. As explained above, beyond the obvious implications for lawyers' liberty in dealing with forced examinations and treatment, Bill 21 stigmatizes and discourages lawyers from seeking the help they need, leading to harmful and even disastrous consequences. Given the presence of a suspension power where, once a finding of incompetent practise is made, the harm to the public may be fully and completely addressed, this harm to lawyers cannot be remotely justified by the government's general objectives.

267. The suspension power is also a full answer to the government's other arguments set out in its application response.

268. The fact that the court should not assume that a regulator will violate the *Human Rights Code* in administering the competency provisions of Bill 21 simply disregards the fact that there is solution that does not engage the *Human Rights Code* at all: a lawyer who has outwardly practised law incompetently may be suspended until they can practise law competently.

269. Finally, the government makes the argument that the Canadian Bar Association and the Plaintiffs only assume mental health redirection programs like the ADP will be lost and replaced with forced treatment when Bill 21 is put into effect. The government says Bill 21 empowers the regulator to enter into consent agreements, which it says empower it to enter into an ADP program. Even assuming it is true that Bill 21 does allow the regulator to continue an ADP-like program and advance other stigma reducing programs, none of this addresses the fundamental problem at the heart of the scheme chosen by the government. The regulator would be stuck between a regulatory scheme associating mental health with incompetence and threatening compelled treatment, which is frozen in legislative amber, and *ad hoc* and temporary programs designed to ameliorate the unconstitutional effects of the legislation it operates under.

An infringement of lawyers' rights cannot be justified in a free and democratic society

270. None of the government's infringements of ss. 2(d), 7 and 8 rights are justified in a free and democratic society under s. 1.

271. The government has the onus of showing that the rights infringement caused by Bill 21 is justified under s. 1 of the *Charter*. It cannot meet that onus. Indeed, it concedes that any violations of ss. 7 and 8 of the *Charter* are unlikely to be justified under s. 1.[267]

The government cannot justify an infringement of lawyers' right to associate

272. Bill 21 is not minimally impairing of lawyers' s. 2(d) rights and thus cannot be justified as a reasonable limit. By eliminating the Law Society, Bill 21 wholly inhibits lawyers' ability to associate for purposes of self-regulation. As described above, voluntary associations, such as TLABC and the Canadian Bar Association, cannot replace the self-regulatory purpose of the Law Society. Owing to Bill 21, lawyers in British Columbia have no opportunity to exercise their s. 2(d) rights to associate. That cannot be a "carefully tailored"[268] means of achieving the government's goal—however construed.

273. If the objective of Bill 21 is the protection of the public, the violation of s. 2(d) diminishes lawyers' ability to meet the government on equal footing and stand against threats to the administration of justice and the public. If the objective of Bill 21 is to achieve lawyer independence, the legislation in no way "falls within a reasonable alternative";[269] it in fact destroys lawyer independence.[270]

The government cannot justify the infringement of s. 8

274. A proportionality analysis is inherent to s. 8: "Everyone has the right to be secure against unreasonable search or seizure". For this reason, a s. 8 violation can only be saved under s. 1 in exceptional circumstances.[271] It is difficult to conclude that an unreasonable search authorized by Bill 21 could survive the minimal impairment analysis of s. 1.[272]

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[267] Defendants' Application Response (TLABC Action) at para. 42.

[268] *Mounted Police* at para. 149.

[269] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para. 160.

[270] See e.g. *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 at para. 153.

[271] *Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*, 2002 SCC 61 at para. 46 [***Lavallee***]; *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20 at para. 89.

[272] *Lavallee* at para. 46. See also *McLeod v. British Columbia (Superintendent of Motor Vehicles)*, 2023 BCSC 325 at para. 166.

The government cannot justify an infringement of lawyers' s. 7 rights.

275. A violation of s. 7 will normally only be justified under s. 1 in the most exceptional of circumstances, if at all.[273] Of course, s. 7 and s. 1 do ask different questions, work in different ways, and are analytically distinct.[274]

276. Beyond Dr. Colleton's report, which is addressed above, the government has adduced no evidence specific to s. 1. It relies on arguments and expert evidence substantially addressed in relation to arguments that the infringements of s. 7 are in accordance with principles of fundamental justice. On this basis, it cannot be said the government's justification arguments would meet the minimum impairment test. The government clearly had other, less drastic means available to it to achieve its purpose of protecting the public from incompetent lawyers. The Law Society has, right now, shown the way, and the government simply decided it had nothing to learn from them. The government could safely rely on merely a suspension power. But for reasons that are unexplained in either evidence or argument, the government seeks more intrusive powers, with apparent harm to the life, liberty, and security of the person interests of lawyers.

The Plaintiffs are entitled to special costs

277. The Defendants should pay the Plaintiffs their special costs.

278. This case justifies departing from the usual rule on costs. It meets all criteria for special costs:[275]

    a. The TLABC Action involves matters of public interest that are truly exceptional and have significant and widespread social impact. Bill 21 dismantles and threatens institutions that are fundamental to Canadian society. Once the balance of Bill 21 is enacted, the constitutional rights of all lawyers in the province will be in peril, in addition to the public's right to a fair trial and independent judge. In essence, there are few cases of greater importance.

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[273] *Motor Vehicle Reference* at p. 518; *Godbout* at para. 91; *Carter* at para. 95.

[274] *Bedford* at paras. 125–128.

[275] *Carter* at para. 140.

b. The Plaintiffs have no personal, proprietary, or pecuniary interest in the litigation that justifies the proceedings on economic grounds. The Plaintiffs challenge the legislation not for their benefit, but in the defence of the constitutional rights of all lawyers and the public interest. In line with this, the Plaintiffs only seek declaratory relief. It would not have been possible to effectively pursue the present action with private funding.

279. In the alternative, scale C costs are appropriate, as the proceeding is of more than ordinary difficulty.[276] The proceeding engages several elements of "unusual circumstances" that justify elevated costs, including the complexity and difficulty of the issues in the litigation, the serious nature of the allegations, and the importance of the matters to the development of the law.[277]

MATERIAL TO BE RELIED UPON

280. In addition to the materials set out in the Plaintiffs' Notice of Application, filed April 7, 2025, the Plaintiffs intend to rely upon:[278]

a. From the examination for discovery of the Defendants' representative, Ms. Armitage, on March 17, 2025, and July 2, 2025, answers to questions 1, 2, 5–9, 50, 97, 102–103, 111–112, 127–133, 138, 140, 142–146, 161–163, 211–214, 218–223, 227–230, 287–294, 305, 306, 321, 336–343, and 361–364;

b. From the Defendants' letter dated April 1, 2025, responding pursuant to Rule 7-2(24) to the requests left on discovery, answers 2–3; and

c. From the Defendants' letter dated July 22, 2025, responding pursuant to Rule 7-2(24) to the requests left on discovery, answers 7–15, and 20.

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[276] *Supreme Court Civil Rules*, B.C. Reg. 168/2009 Appendix B.

[277] *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.*, 2021 BCSC 1574 at paras. 36, 38; see also *Boissonnault v. Marler*, 2021 BCSC 678 at para. 57.

[278] Armitage Examination for Discovery (March 17, 2025); Armitage Examination for Discovery (July 2, 2025); Liang Affidavit #3 at para. 2, Ex. B.

CONCLUSION

281. Bill 21 is a dangerous incursion on British Columbian's constitutional rights.

282. First, Bill 21 threatens the foundational principles of independence, self-regulation, and self-governance. It is a constitutional imperative that lawyers be provided an institution through which to associate and meet the government on its level. That is what protects the independence of the bar, which in turns guards the rule of law and judicial independence. By depriving lawyers of the right to self-regulation, the Defendants attack the most fundamental Canadian institutions.

283. Second, Bill 21 will impair lawyers' ability to challenge government action and imperil individuals' *Charter* rights if there is no guarantee of an independent lawyer regulated by an independent regulator. Bill 21's elimination of the independence of the bar will erode public confidence in the administration of justice and the protection of the fundamental rights of individuals seeking effective legal representation.[279] The knock-on effect of the loss of independence of the bar is that downstream rights of clients suffer because a basic assumption about lawyers undergirding the system—that lawyers are regulated in a manner that preserves their independence—will no longer be intact.

284. Third, Bill 21 will expose lawyers to potential investigation into their physical and mental health conditions, compelled treatment, and criminal sanction. Lawyers in British Columbia will be subject to the power of Legal Professions British Columbia to compel them to seek medical treatment as part of its regulation of their "competence" as lawyers. This is the combined effect of ss. 68 and 88 of Bill 21. The further effect is to expose lawyers to the threat of prosecution and potential imprisonment for refusing to submit to such compelled medical treatment by Legal Professions British Columbia. [280]

285. Bill 21 effects a serious and unprecedented change to a core of British Columbia's legal system. The government has done so without concern to engage with the Law Society, lawyers, or the public. The result is a flawed legislative project that exceeds the Province's

[279] Collins Affidavit at paras. 19-30; Gourlay Affidavit at paras. 32-38.
[280] Bill 21, ss. 68, 88, 198, 202.

legislative competence and violates the constitutional rights of lawyers and the public they serve.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: July 31, 2025

Signed by:
Gavin Cameron
AC3B07833A6B4D9...

GAVIN CAMERON