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 and the ATTORNEY GENERAL OF BRITISH COLUMBIA

DEFENDANTS

AND:

CANADIAN BAR ASSOCIATION, INDIGENOUS BAR ASSOCIATION, SOCIETY OF NOTARIES PUBLIC OF BRITISH COLUMBIA, LAW FOUNDATION OF BRITISH COLUMBIA and LAW SOCIETY OF MANITOBA INTERVENORS

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1. Factual Background

1. British Columbia is a common law jurisdiction within a constitutional order which traces its legal roots to the English constitution and legal system. That legal system has, for a very long time, functioned under the premise of the rule of law.

2. Within the Anglo-Canadian legal order, learned professions have always played an important role in the maintenance of the rule of law. However there has never been a single legal profession within this structure. Barristers, serjeants, solicitors, attorneys, and proctors have all, at one time or another, practiced law within what were essentially limited spheres.

3. The profession of Notary Public has a long history in the Province. Notaries have been providing legal services to British Columbians since before Confederation. They are one of three learned professions who are presently authorized to engage in legal practice.[1] [2]

4. Notaries are learned professionals and subject to significant educational requirements, training, and rigorous professional standards.[3]

5. Within the scope of their authorized practice, Notaries Public perform virtually all of the same services of lawyers undertaking the same work and are held to precisely the same standard of care that lawyers are held to. For many clients, there is no difference between going to a lawyer and a Notary – for instance, in the context of a real estate transaction, in nearly all circumstances a Notary is the only representation from a legal professional that an individual will have.[4]

6. Notaries Public play an essential role in ensuring the smooth operation of our legal order. They provide legal advice and assist clients in navigating all manner of legal issues, within the scope of their authorized practice areas.[5]

7. Notaries Public, while not authorized to engage in litigation and contentious matters, do represent clients in transactions and assist them in resolving difficult legal issues, sometimes concerning government influence and interests.[6]

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[1] That term being used in the functional sense, rather than the term of art employed in the current *Legal Profession Act*
[2] H. El Masri #1, paras. 36 to 37
[3] H. El Masri #1, paras. 6, 7, 11 to 15
[4] H. El Masri #1, paras. 20 to 25, 31; *Normak Investments v. Belciug*, 2015 BCSC 700, at para. 69
[5] H. El Masri #1, paras. 20 to 25
[6] H. El Masri #1, para. 26 to 29

8. Notaries regularly provide legal advice with respect to clients' rights and interests vis-à-vis government, for instance on the taxes applicable on real property transactions. In some instances, their clients have privacy or financial interests that may be at odds with government policy objectives and Notaries must provide clear, easily understandable legal advice to assist them in navigating these situations.[7]

9. Notaries provide critical legal services and advice to a large segment of the population, playing in an important role in ensuring access to justice within the province. The services they provide often involve important and consequential decisions by clients which require informed legal advice and practiced representation to ensure the client's wishes are carried out and interests protected.[8]

10. The scope of a Notary Public's practice is defined by statute and the common law; however, the profession is self-regulating. SNPBC was privately incorporated by its members in 1926 for the purpose of representing, organizing, and regulating the notarial profession in the public interest. Since that time, SNPBC has been the independent regulator of the profession.[9]

11. SNPBC's status as regulator was formally recognized by statute in the 1950s and is currently recognized and enabled by the *Notaries Act*, R.S.B.C. 1996, c. 334.

12. On May 15th, 2024 the Legislature passed Bill 21, the *Legal Professions Act* (the "new LPA"). Bill 21 received Royal Assent the same day.

13. The new LPA represents a significant redesign of the state of regulation of legal professionals in the Province. All legal professions, including Notaries and subject to exceptions reserved by the government, are to be regulated by a single regulator which is governed by a mix of legal professionals, elected and appointed. All legal professionals, including Notaries and again subject to certain exceptions reserved to government, will also be subject to a consistent framework for discipline and certain incidents of practice, such as handling of trust funds.

14. Material provisions of the new LPA to this application provide that:

    a. A new regulator of legal professions is to be created;[10]

[7] H. El Masri #1, paras. 24 and 32
[8] H. El Masri #1, paras. 30 to 34
[9] *Reference re Society of Notaries Public of British Columbia*, (1969) 6 D.L.R. (3d) 447 (B.C.C.A.)
H. El Masri #1, paras. 4, 8, 38 to 39
[10] *Legal Professions Act*, S.B.C. 2004, c. 26 ("Bill") 21, s. 5

b. That regulator is to be governed by a board of directors, made up of a mix of elected and appointed lawyers and notaries, as well as paralegals and members of the public;[11]

c. The majority board of directors is composed of lawyers and notaries;[12]

d. The government is granted the authority to create new legal professions by regulation;[13]

e. The government is granted the authority to create regulations in respect of any new legal professions it creates;[14] and

f. The government's regulations prevail over any rules or regulations of the new regulator.[15]

2. The Law

1. Bill 21 purports to create a single regulator—created by the provincial government—that would oversee lawyers, Notaries, paralegals, and entirely new classes of legal professionals.

2. The plaintiffs submit that by creating a single regulator, Bill 21 nullifies lawyers' association rights guaranteed by s. 2(d) of the Charter. They base this submission on the following propositions:

(a) Lawyers have a constitutional right to associate protected by s. 2(d) of the Charter;

(b) The Law Society is a manifestation of lawyers' s. 2(d) right in that it supports lawyers' collective objective to be free from government influence and the "influence of persons who represent other interests" (eg, notaries), and allows individual lawyers to "join together to meet the power of government"; and,

[11] Bill 21, ss. 8 to 9
[12] Bill 21, ss. 8 to 9
[13] Bill 21, s. 4
[14] Bill 21, ss. 211 to 213
[15] Bill 21, s. 214

(c) Bill 21 nullifies this right of association by eliminating the Law Society and the system of self-regulation, thereby infringing lawyers' s. 2(d) right.

3. To the extent that the Applicants' argument on this point suggests that a purported single regulator would infringe lawyers' s. 2(d) right by compelling association with non-lawyers, the argument must be rejected.

The Right to Freedom of Association under s. 2(d) of the Charter

4. Section 2(d) of the Charter reads as follows:

2. Everyone has the following fundamental freedoms:

(d) freedom of association.

5. Viewed purposively, section 2(d) protects three classes of activities: (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities.[16]

6. To establish a violation of s. 2(d), an applicant must demonstrate first, that their claim relates to activities which fall within the range of activities protected by s. 2(d) of the Charter, and second, that the government action has, either in purpose or effect, interfered with these activities.[17]

7. Section 2(d) has been held to encompass both a positive and negative aspect. The positive aspect protects the freedom to associate, while the negative aspect protects the freedom not to associate and to be free from compelled association.[18]

8. These are not distinct rights, but two sides of a bilateral freedom.[19]

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[16] *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 ("Mounted Police"), at para. 66
[17] Dunmore v. Ontario (Attorney General), 2001 SCC 94, at para. 13
[18] *Bernard v. Canada (Attorney General)*, 2014 SCC 13 at para. 38
citing *Lavigne v. Ontario Public Services Employees Union*, [1991] 2 S.C.R. 211 ("Lavigne") and *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, ("Advance Cutting")
[19] *Lavigne*, at 319

9. Freedom of association embodies not only an individual interest but also a community interest. As the Supreme Court of Canada recognized in *Lavigne* v. *Ontario Public Services Employees Union*, [1991] 2 S.C.R. 211:

> "This [community] interest might be expressed as the interest of society at large in the contributions in political, economic, social and cultural matters which can be made only if people are free to work in concert. In addition, it is axiomatic that there is a community interest in sustaining democracy, an essential element of which is associational activity."[20]

10. On multiple occasions, the Supreme Court of Canada has unanimously held that freedom of association is meant to protect the collective pursuit of common goals.[21]

11. In *R v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, the Court recognized the fundamental societal value of freedom of association which allows people to bind together in various ways for diverse purposes, and in a democratic state, becomes an essential form of action and expression which informs the entire life of the community.[22]

12. Consistent with this understanding, the Supreme Court has also recognized that the negative aspect of s. 2(d) is not a constitutional right to isolation. It does not protect against the kinds of associations that are "necessary and inevitable in modern democratic communities."[23]

13. The Charter assumes the existence of certain forced associations. For instance, as La Forest J. explained in *Lavigne*, association with government and its policies through the payment of taxes, or the assumption of legal obligations that flow from membership in a family or employment in a workplace, are "accepted because they are integral to the very structure of society."[24]

14. According to La Forest J., writing for the majority in *Lavigne*:

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[20] *Lavigne*, at 317
[21] *Lavigne*, at 252, per Wilson J.
Mounted Police, at para. 46, 58
[22] *Advance* Cutting, at para. 170
[23] *Lavigne*, at 320–21;
Advance Cutting, at para. 194
[24] *Lavigne*, at 321

> "…the organization of our society compels us to be associated with others in many activities and interests that justify state regulation of these associations…Given the complexity and expansive mandate of modern government, it seems clear that some degree of involuntary association beyond the very basic foundation of the nation state will be constitutionally acceptable, where such association is generated by the workings of society in pursuit of the common interest."[25]

15. It follows then, as the Supreme Court of Canada has directed, "that the mere fact of compelled association will not, by itself, involve a breach of the Charter. More is needed in order to trigger the negative component of s. 2(d)."[26]

16. To that end, the Supreme Court of Canada has provided a two-stage approach for invoking the negative component of s. 2(d). First, the court must inquire "whether in a particular case it is appropriate for the legislation to require persons with similar interests in a particular area to become part of a single group to foster those interests." Second, even where the threshold inquiry is established, "freedom of association will not be violated unless there is a danger to a specific liberty interest" on the part of the applicant.[27]

3. It is appropriate to compel association of lawyers with notaries in collective regulation

17. In order to satisfy the threshold issue in determining a breach of the negative component of s. 2(d) "one must…be satisfied that the 'compelled combining of efforts towards a common end' is required to 'further the collective social welfare'".[28]

18. The new LPA harmonizes the regulation of legal professions within the province in order to achieve more efficient and balanced oversight of legal professionals. This new single regulator will ensure an efficient and centralized approach to regulating the legal profession in the public interest and promote greater access to justice within a comprehensive regulatory regime.[29]

19. The structure of the board of directors, moreover, will ensure that one group of professionals cannot overwhelm and diminish others within the regulatory pool. This in turn promotes access to legal services for the public.

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[25] *Lavigne*, at 321
[26] *Advance Cutting*, at para. 223
[27] *Advance Cutting*, at para. 196 citing *Lavigne*, at 328–29
[28] *Lavigne*, at 328–29
[29] H. El Masri #1, paras. 45 to 49

20. At present, concurrent regulation gives rise to inefficiencies and redundancies, with two different regulators attempting to address the same problems in the same practices in different ways. The Notary Society is limited in its ability to expand access to legal services in areas of legal need that are not optimally served by either group in an equitable manner. For its part, the Law Society struggles to address gaps and inequities in legal services provision as a result of this system of concurrent regulation.[30]

21. The evidence suggests that the "compelled combining of efforts towards a common end" through lawyers' compelled association with notaries through a single regulator is required to further collective social welfare. The community interest served by association between these two professional groups in a single regulator is efficient and streamlined regulation that will promote more equitable access to legal services.

22. In *Lavigne*, La Forest J. held that some of the concerns which might normally be raised by a compelled association are tempered when that association is established in accordance with democratic principles.[31]

23. Access to justice is an important democratic principle that undergirds the rule of law in a democratic system. As Dickson C.J. observed in *B.C.G.E.U v. British Columbia (Attorney General)*:

> "There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice."[32]

24. The proposed new regulator also protects the independence of legal professionals from government interference, thereby ensuring the rule of law is upheld.[33]

The single regulator presents no danger to lawyers' liberty interests

25. Once the threshold issue is satisfied, and where the government is acting with respect to individuals whose association is already "compelled by the facts of life", freedom of association will not be violated unless there is a danger to a specific liberty interest.[34]

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[30] H. El Masri #1, para. 48
[31] *Lavigne*, at 326
[32] *B.C.G.E.U v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at paras. 24-25
[33] See Application Response in Action No. S-243258, paras. 27-31
[34] *Lavigne*, at 329

26. Affiliation between lawyers and Notaries is already compelled by the "facts of life". Both provide legal services for members of the public in overlapping areas, with Notaries performing virtually all the same services as lawyers undertaking the same work within their authorized scope of practice.[35]

27. In *Lavigne*, Justice La Forest identified "four primary dangers" to individuals' liberty interests that ought to be protected by the freedom of non-association, as follows:

> The first is governmental establishment of, or support for, particular political parties or causes. The second is impairment of the individual's freedom to join or associate with causes of his choice. The third is the imposition of ideological conformity. The fourth is personal identification of an objector with political or ideological causes which the service association supports.[36]

28. If one of these dangers is present, the potential exists for interference with a free and deliberative democratic process or infringement of the individual liberty interest in freedom to develop one's self-potential, and the compelled association should be held to be *prima facie* violative of subsection 2(d).[37]

29. In sum, an individual may be forced to associate so long as he or she is not stripped of the right to disassociate from the ideology of the group, and is not deprived of his or her liberty interests guaranteed by the Charter.[38]

30. At issue here is whether a collective regulator would engage one of the latter two dangers in the list identified by La Forest J. in *Lavigne*: ideological conformity, or personal identification of an objector with political or ideological causes which the service association supports.

31. These dangers are not readily engaged where the proposed association takes the form of a regulator, particularly one constituted almost entirely by similarly-situated professionals undertaking the same or similar work:

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[35] H. El Masri #1, paras. 20 to 25
[36] *Lavigne*, at 328
[37] *Lavigne*, at 328
[38] *Advance Cutting*, at para. 204

a. Within the scope of their authorized practice, Notaries perform virtually all of the same services of lawyers undertaking the same work and are held to precisely the same standard of care[39] that lawyers are held to;

b. Notaries, like lawyers, represent clients in transactions and assist them in resolving difficult legal issues; and

c. Notaries, like lawyers, play an essential role in ensuring the smooth operation of our legal order, providing legal advice and assisting clients in navigating all manner of legal issues within the scope of their authorized practice areas.[40]

32. Much of the s. 2(d) jurisprudence concerns labour organizations and the proper ambit of their activities, particularly where workers are compelled to pay dues to a union engaged in the promotion of political aims beyond the scope of workplace regulation. Such was the case in *Lavigne* where La Forest J. found that "[e]xpenditures relating to items such as the disarmament movement and opposition to the SkyDome" were "not sufficiently related to the concerns of the appellant's bargaining unit", therefore grounding a *prima facie* s. 2(d) breach.[41]

33. There is no evidence to suggest that a new professional regulator would undertake analogous activities that would engage the aforementioned dangers to individuals' liberty interests. Regulators are apolitical organizations that oversee their respective profession through the establishment and enforcement of rules and regulations. It remains to be seen how any of its actions could foster ideological conformity among the membership or force individual members to identify with contrary political or ideological causes that the regulator supports.

34. Courts have dismissed s. 2(d) complaints in the absence of clear evidence of ideological conformity. In *Advance Cutting*, the Supreme Court considered the constitutionality of an obligation on construction workers in Quebec to become members of a union group prior to obtaining competency certificates. There was no evidence tendered as to any practices or activities of the union group that would impose values or opinions on their members or limit free expression.[42]

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[39] *Normak Investments v. Belciug, supra*, at para. 69, *Dorndof v. Hoeter*, (1981) 29 B.C.L.R. 71 (S.C.), at para. 36
[40] H. El Masri #1, paras. 20-34
[41] *Lavigne* at 333
[42] *Advance Cutting*, at para. 223

35. The majority in *Advance Cutting* also found that ideological coercion could not simply be presumed by the existence of certain social, economic or political orientations held by unions in the past, emphasizing that mere participation in public life does not result in a *prima facie* breach of s. 2(d) of the Charter.[43]

36. In the case of a new single regulator for legal professionals, which has not yet been created, there would necessarily be no historical record to refer to that might give rise to any such presumption.

37. In their Notice of Application, the plaintiffs assert that:

> "The Law Society facilitates the rights of individual lawyers to act collectively and pursue other constitutional rights and to join together to meet the power of government on more equal terms, including and in particular where governments threaten the independence of lawyers, the judiciary, and the rule of law."[44]

38. Section 2(d) arguably protects against substantial interference with the rights of lawyers to act collectively to pursue other constitutional rights and to join together to meet the power of government on more equal terms.[45]

39. However, the plaintiffs have not demonstrated how a single regulator whose board of directors is majority-controlled by lawyers and Notaries might exert ideological pressures over lawyers that somehow deter the pursuit of these collective goals.

40. Lawyers and Notaries share the same fundamental goals of ensuring independence from government and preserving the rule of law. In their respective areas of practice, lawyers and Notaries both serve clients whose interests may be at odds with those of government, and each group has a vested interest in warding off government interference with their professional independence. Both perform similar functions as learned professionals authorized to practice law and who are entrusted with upholding the rule of law.[46]

41. As noted above, the structure of the proposed regulator does not erode this independence.[47] Contrary to the plaintiffs' assertions, self-regulation is not the only possible method of preserving independence from government.

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[43] *Advance Cutting*, at paras. 224, 227 and 232
[44] Notice of Application in Action No. S243325, para. 23
[45] *Mounted Police*, at paras. 66, 75-76
[46] H. El Masri #1, paras. 32 and 46
[47] See Application Response in Action No. S-243258, paras. 27-31

42. The plaintiffs may personally disagree with the proposed single regulator or harbour generalized suspicions that this regulation model may threaten the liberty interests of lawyers at some point in the future. However, in the absence of clear evidence, a Charter challenge predicated on a weak, speculative foundation must necessarily fail.

43. In dismissing the s. 2(d) challenge in *Advance Cutting*, a majority of the Supreme Court held that the application of the negative right not to associate may not rest on generalized suspicions.[48]

44. The Court conceded that while the nature of a particular legislative or regulatory system in an important part of the economy may certainly be subject to criticisms or political discussions, it emphasized the critical point that:

> "…personal disagreements with the extent of a strict regulatory system do not suffice to mount a successful Charter challenge."[49]

45. This observation equally applies to the plaintiffs' attack on Bill 21 as being inconsistent with s. 2(d) of the Charter.

46. In the circumstances, the wisdom of implementing a single regulator ought to be left to the political process. Policy considerations militate in favour of the Court deferring to legislators where regulation in a particular area requires a delicate exercise in weighing and reconciling values and interests.[50]

47. While this Court may intervene in regards to certain specific unconstitutional provisions of the proposed legislation,[51] it is respectfully submitted that the general structure of the proposed single regulator does not infringe s. 2(d) of the *Charter* or warrant a declaration that Bill 21 is *ultra vires* on this ground.

If the Board Structure Infringes the Plaintiffs' Section 2(d) Rights, it is a Justified Limitation under Section 1 of the *Charter*

[48] *Advance Cutting*, at paras. 232
[49] *Advance Cutting*, at para. 223
[50] *Advance Cutting*, at para. 239, see also *A.G. Can. v. Law Society of B.C.*, [1982] 2 S.C.R. 307, at 335-336
[51] See Application Response of SNPBC in Action No. S243258, paras. 32-36.

48. If this court finds that Bill 21 infringes the plaintiffs' freedom of association rights as described, it is submitted that this limitation is justified under Section 1 of the *Charter*. The limitation, being a constraint on self-regulation, represents a minimal impairment of the general right, in a limited context, and seeks to achieve the legislation's broader apparent aims of harmonizing the regulation of legal services.

49. It is widely accepted by all that a principal object of Bill 21 is to harmonize regulation of legal services and thereby improve regulation of legal services to British Columbians. There are distinct benefits to doing so[52] and it appears to be accepted by all that this object is an appropriate degree of regulation by the Provincial Legislature.

50. Within the new regulator, the influence of members of each profession over their regulator is diluted (but not eliminated). This is done through limiting the number of elected members on the board.

51. Notwithstanding the benefits, harmonization of regulation also brings with it risks. One such risk is the potential for one profession to dominate representation within the regulator and then use that position of power to advance business interests or reinforce monopolies.

52. For context, within the province, there are approximately 15,000 lawyers and 430 notaries public.

53. This concern is grounded in history. Starting in the 1920s, lawyers engaged in various efforts to limit the numbers and practice of notaries public in the province, likely because of "economic repercussions" of competition.[53]

54. Over the course of the next several decades, lawyers attempted to use their influence to press politicians to limit notarial numbers and practice.[54] At one point they even considered asking the judiciary to assist.[55] At the same time, lawyers also went to court to oppose additional notaries being appointed in the province, primarily on the basis that there was no need for additional legal service providers.[56]

55. In the 1970s, the Law Society and the Notaries Society attempted to resolve this long-running dispute; however these efforts were not well-received by lawyers, which led to calls within

[52] H. El Masri #1, paras. 47-49
[53] H. El-Masri #1, ex. E pp. 219 to 221
[54] H. El-Masri #1, ex. E pp. 221 to 230
[55] H. El-Masri #1, ex. D pp. 200 to 204
[56] [56] H. El-Masri #1, ex. D p. 200 to 204; 207 to 209, 211 to 212

the membership of the Law Society for more aggressive action, including suggestions that the notarial profession be eliminated altogether.[57]

56. Then in the 1980s, when Notaries sought to expand the scope of their practice into other legal services, lawyers through multiple professional associations once again mounted an aggressive campaign to limit the scope of notarial practice, including at one point considering reviving the suggestion to eliminate notarial practice altogether.[58]

57. There has been no evidence in this proceeding led that notaries offer substandard service as compared to lawyers, within their sphere of practice; indeed this accepts as a matter of law that they are to be held to precisely the same standard in all respects.

58. While the current relationship between the Law Society and Notaries Society is stronger today, the relationship between the professions remains tense.[59]

59. Preserving lawyers' (or, for that matter, any other profession's) self-regulation in this context, puts those professions in control of the destiny of their sister legal professions.

60. The history of the relationship between lawyers and other legal professions, in particular notaries public, suggests there is an associated risk to doing so. Giving one profession power over another could lead to that profession, in turn, using its position of regulatory dominance to reduce the presence of or functionally eliminate altogether the other professions for reasons motivated by business interests rather than good regulation. Regulation could be used to functionally limit practices by putting up barriers to entry of the profession or onerous practice conditions which render certain professions uneconomical.

61. Squeezing out notaries would, in turn, likely have negative consequences to public interest. Notaries, for example, are an important component of the legal services ecosystem in the province. Their practice concerns a large volume of work fulfilling common, everyday needs of citizens here,[60] for example, facilitating a significant number of real estate transactions in the province.[61]

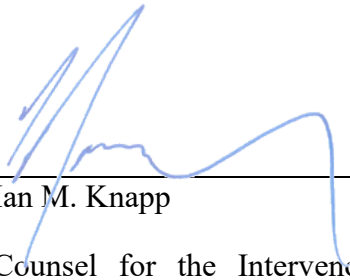
62. It is for this reason the constraint on lawyers' self-regulation is an acceptable limitation to any Section 2(d) right lawyers may have. The new regulator, together with its governance structure, is an effort of regulation of the framework within which legal professionals, as a

[57] H. El-Masri #1, ex. D pp. 213 to 215, 219 to 220
[58] H. El-Masri #1, ex. C pp. 352 to 355
[59] H. El-Masri #1, paras. 42 to 43
[60] H. El-Masri #1, paras. 22 to 24
[61] H. El-Masri #1, para. 30

collective, are to self-govern. The limitations this framework imposes on the ability of individual professions to govern themselves or dominate the regulatory structures, creates an important buffer against those same professions' natural tendencies to regulate in a manner motivated by self-interest which in turn limits the scope of legal services offered to the public.

63. Thus to the extent the legislation does limit the associative rights of the plaintiff, these limitations are an important component of the regulatory objectives underlying the statute in question, aimed at achieving a public good, and thus represent a justified limitation those rights.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of August, 2025.



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