

## What B.C. single-regulator recommendation means to legal independence | Michael D. Lucas

By **Michael D. Lucas**

Law360 Canada (May 14, 2024, 11:03 AM EDT) -- In December 2013, the Law Society of British Columbia made a recommendation that it should regulate not only lawyers but also notaries and other groups of limited-scope legal service providers who had met qualifications standards. The underlying policy rationale for the recommendation was that a single regulator could reconcile qualification processes, ethical standards and disciplinary systems to best assure that different groups of providers providing similar services would be properly qualified and similarly regulated. It was also possible that access to legal services could be improved by regulating new groups of providers under a single regulator, although the recommendations considered this to be speculative.

It was a novel recommendation but relatively simple in concept. The law society governors approved it unanimously.

However, the law society also recognized the fundamental importance of maintaining an independent legal profession. Canadian law requires lawyers and other providers of legal services to operate independently of the government. Courts have specifically commented on the high value that free societies have historically placed on an independent bar free to represent citizens without fear or favour in the protection of individual rights and liberties against incursions from any source, including the state. An independent bar free of influence by public authorities is foundational to the legal framework of Canadian society.

As a result, when the law society approved the idea of a single legal regulator for professional legal services, it did so with the caveat that lawyer independence would be maintained and that the regulatory body, and not the government or anyone else, would set standards for licensing and conduct of all the providers of legal services. The maintenance of self-governance was accordingly a prerequisite consideration for the creation of a single regulator.

Why is this important? The courts have held that "lawyers could not advise citizens as to their responsibilities with respect to particular legislation or governmental action if they cannot maintain their independence as individuals. It is almost impossible to do this if the society that governs them is under the day-to-day control of government." This should be obvious. If the government were able to set or influence ethical, professional and competency standards regarding how lawyers provided their services, it could become very tempting for government to take actions that constrain the ability of lawyers to provide legal services when the lawyer represents an unpopular client or position or challenges the validity of government legislation or policy on behalf of a client. How would a client having a legitimate dispute against a government agency find a lawyer willing to provide legal services if lawyers had to worry whether the services provided might offend the government? How, in such a scenario, would the constitutional validity of government legislation be challenged?

Lawyers in Hong Kong have been regulated by an independent legal regulator. In the last years, however, changes have occurred in that region. Interference by the region's governing authority has been more frequent. Increased pressure on, together with threatened interventions in, the region's regulatory bodies were made by Hong Kong's chief executive not to get "political" — a threat that was inferred to mean that the society would lose its role in the administration of justice in the city if it questioned or challenged government policies. Lawyers who have challenged the region's authority



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regarding the interpretation of legal issues have been intimidated or harassed. In March 2024, the International Bar Association's Human Rights Institute expressed "profound concern" regarding the "Safeguarding National Security Law in Hong Kong," which it said "raised concerns over the mounting pressures on the legal profession's independence" because of provisions that could prevent lawyers from acting for clients on certain matters and which would bar detainees from consulting with legal counsel in certain circumstances. This erosion of an independent bar took place over a rather short period and is instructive of the speed at which things can change.

Insofar as Bill 21 creates a single regulator of legal services, provides for some governance improvements and clarifies some regulatory powers, it could potentially be a useful initiative and is consistent with longstanding law society policy recommendations.

However, Bill 21 goes much further than it should by specifically legislating standards and requirements of regulatory performance. It constrains the authority of the regulator to protect the public interest in the administration of justice. It gives the provincial Cabinet powers to identify what legal services can be provided by which group of legal professionals. And, most worryingly, it gives Cabinet the power to directly pass any regulation or rule that the regulator could pass under the legislation, and rules or regulations passed by Cabinet would take precedence over those passed by the regulator. In other words, if the premier or attorney general were unhappy with standards set by the regulator of legal services, they could prevail on Cabinet to create rules they liked better, perhaps ones that would cause legal professionals to have to weigh whether it was professionally wise to represent a client on a particular matter or how they did so. This power removes self-regulation and curtails both the professional independence of the legal profession and the individual independence of lawyers. By doing so, it significantly curtails the ability of citizens to be guaranteed to receive independent legal advice and representation. It is an affront to the high value that democracies place on an independent bar and is an affront to the fundamental legal framework of Canada.

An independent bar is meant to ensure that there is a robust system of justice that permits citizens to obtain legal advice to challenge government authority where needed. The obvious question is why would the government consciously introduce legislation with a framework that permits the undermining of the fundamental principle of an independent bar that is a right that protects all of us as citizens?

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