

# The Law Society of British Columbia



November 8, 2016

## Sent via mail

David W. Rivkin, President  
International Bar Association  
4<sup>th</sup> Floor, 10 St. Bride Street  
London EC4A 4AD  
United Kingdom

Dear Sir:

## Re: IBA Presidential Task Force on the Independence of the Legal Profession

The Law Society of British Columbia is the independent regulator of lawyers in the Province of British Columbia, Canada. Our origins date back to 1869, prior to any legislation creating our existence. The Law Society is now continued by the *Legal Profession Act* of British Columbia. Our object and duty is to protect the public interest in the administration of justice by, amongst other things,

- preserving and protecting the rights and freedom of all persons,
- ensuring the independence, integrity, honour and competence of lawyers,
- establishing standards and programs for the education of and competence of lawyers, and of applicants and admission, and
- regulating the practice of law.

In this context, we read with much interest the report of the IBA Presidential Task Force on the Independence of the Legal Profession. We applaud the Task Force's efforts to set out the importance of the independence of the legal profession, particularly from the operation of the state and government. These are matters that this Law Society, as well as other Canadian law societies, have taken very seriously since the late 1990s and early 2000s when we noticed what seemed to be a derogation of the principles of lawyer independence in advanced nations such as Australia and England. We were particularly concerned with the creation, through the *Legal*

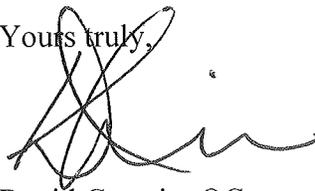
*Services Act* 2007, of the state-appointed Legal Services Board in England to oversee the regulators of the legal profession in that jurisdiction.

The IBA Task Force has noted in its materials the case of *Canada (Attorney General) v. Federation of Law Societies of Canada* [2015] 1 S.C.R. 401. This decision was the culmination of efforts by Canadian law societies, initiated in British Columbia by the Law Society of British Columbia, to assert the independence of the profession and protect and uphold key underlying principles such as solicitor-client privilege, a right and freedom of all persons to ensure that they can freely obtain legal advice from lawyers whose duty of commitment is owed solely to the client and not to a governmental authority is to provide advice to the client with no other overriding interests or concerns. As a result of that case, as I am sure you are aware, the law societies in Canada were able to establish that it is a principle of fundamental justice in this country that the state not interfere in the relationship between lawyers and clients.

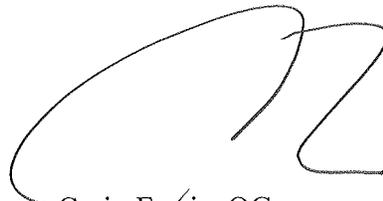
There are many other cases in Canada as well that speak to the importance of an independent Bar. The Law Society of British Columbia's Rule of Law and Lawyer Independence Committee authored an article that discusses the connection between the rule of law and an independent legal profession, and references several of the Canadian cases that underlie these principles. A copy of that article (published in *The Advocate*, Vol. 66, Part 6 p. 897 (November 2008)) is included with this letter.

We would be pleased to discuss our experiences in defending and advocating for lawyer independence with you or any of the members of your Committee. Noting that you had no participation from Canada on the Task Force, we would also be pleased to participate in any future endeavours undertaken by the International Bar Association in connection with this important work and would be pleased to offer any advice or assistance we are able to in this regard.

Yours truly,



David Crossin, QC  
President



Craig Ferris, QC  
Chair, Rule of Law and Lawyer  
Independence Advisory Committee

Encl.

# INDEPENDENCE AND SELF-GOVERNANCE OF THE LEGAL PROFESSION

By the Independence and Self-Governance Committee of the  
Law Society of British Columbia

This article is a revised version of Part I of the recent report of the Law Society's Independence and Self-Governance Committee. The report itself, the full version of which is available on the Law Society's website, was the result of the committee's analysis of lawyer independence and its importance to the protection and maintenance of the rule of law, and thereby to the maintenance of an underlying cornerstone of Canada's democratic Constitution.

This article addresses the meaning of, and reasons for, lawyer independence. It examines why, in the committee's view, lawyer independence is best preserved for the benefit of the public interest through self-governance. While the Supreme Court of Canada has recognized this principle, the committee understands that effective self-regulation and self-governance also require public confidence. A lack of public confidence that the self-regulating body discharges its mandate effectively and in the public interest is inimical to the preservation of and support for self-regulation, and this would be a significant threat to lawyer independence and, thus, to civil rights.

## WHAT IS "LAWYER INDEPENDENCE"?

"Lawyer independence" is not a well-understood concept. It is not, as is often assumed, a right conferred upon lawyers. It is a public right that is necessary to protect the rule of law. The public has a right to be able to obtain legal advice from a lawyer whose primary duty is to his or her client, not to any other person and certainly not to the state. The public's right to lawyer independence is therefore closely associated with the obligation on the profession to govern itself, in a responsible and effective manner, in order to ensure that lawyers continue to be free from interference or control by the state.

The committee recognized that, to be useful, the definition needed to be straightforward and free from obscure legal language. It settled on the following:

Lawyer independence is the fundamental right guaranteeing that lawyers may provide legal assistance for or on behalf of a client without fear of interference or sanction by the government, subject only to the lawyer's professional responsibilities as prescribed by the Law Society, and the lawyer's general duty as a citizen to obey the law.

The definition was drafted to incorporate the essential ideas of the concept of lawyer independence:

- the importance of lawyer independence to Canadian society;
- the separation of lawyers from government;
- self-governance; and
- the right to protect members of the public from government interference when they obtain legal advice.

The literature on the subject has identified several other types of lawyer independence, including independence from one's client (on the basis that a lawyer must not be made to do something by a client that goes against the lawyer's own sense of professional or ethical propriety), independence from government and independence of the profession to regulate its own practices.<sup>1</sup> The committee settled on the definition set out above, which emphasizes independence from government as the underpinning of the rule of law.

## THE RULE OF LAW

The rule of law is a fundamental principle underlying Canadian democracy. The preamble of the *Canadian Charter of Rights and Freedoms* states that the rule of law is one of the founding principles of Canada. In *Roncarelli v. Duplessis*, Mr. Justice Rand noted that the rule of law is a "fundamental postulate of our constitutional structure".<sup>2</sup>

Briefly stated, the rule of law means that everyone is subject to the law and no one is above the law. Rich or poor, individuals, corporations and governments alike are all subject to, and governed by, the law. The rule of law means that the law is supreme over officials of the government as well as over private individuals, no matter how wealthy or powerful. It thereby precludes bullying by individuals and arbitrary power by governments.<sup>3</sup>

Because the rule of law functions to control the powers of the state, there must be a division among those who make the law, those who interpret and apply it, and those who enforce it. This requires

an independent judiciary, which in turn requires an efficient, functioning court system and a strong, independent, properly qualified legal profession to support it. An independent legal profession is also fundamental to the maintenance of citizens' rights and freedoms under the rule of law, so that they are guaranteed access

to independent, skilled, confidential and objective legal advice... [If the highest standards of skill, professionalism and integrity among the legal profession are not maintained] confidence in the legal process will be undermined, so will the necessary respect for the rule of law, and the executive and legislative branches will be both tempted and enabled to interfere in the processes which protect their independence.<sup>4</sup>

Interference by the executive with the independence of the judiciary or lawyers can have a severe impact on the rule of law and the protections it affords, as was demonstrated in 2007 in both Venezuela<sup>5</sup> and Pakistan.<sup>6</sup>

In an article entitled "The Independence of the Bar",<sup>7</sup> Jack Giles, Q.C., drew the connection between lawyer independence and the rule of law as follows:

It is simply inconceivable that a constitution which guarantees fundamental human rights and freedoms should not first protect that which makes it possible to benefit from such guarantees, namely every citizen's constitutional right to effective, meaningful and unimpeded access to a court of law through the aegis of an independent bar... While a court of law worthy of its name is impossible without an independent judiciary, meaningful access and the effective use of such a court is impossible without an independent bar. In the result, both an independent bar and an independent judiciary are necessary to maintain and preserve the supremacy of law.

For these reasons, the committee concluded that the independence of lawyers is necessarily linked to preservation of the rule of law.

### THE LAW SOCIETY AND SELF-GOVERNANCE OF LAWYERS

If lawyer independence is necessary to preserve the rule of law, the next question is, how can that independence be assured? The committee believes that self-governance is a necessary condition of this independence.

The motto of the Law Society is *lex liberorum rex*, which means "The law is king of free men." A less literal and more contemporary translation is "The law is ruler of free people." This motto has been in place for well over a century and reflects the importance both of the rule of law and of the Law Society's role in protecting it.

The object and duty of the Law Society, as set out in s. 3 of the *Legal Profession Act*, S.B.C. 1998, c. 9, is to uphold and protect the public interest in the administration of justice by, among other things,

- preserving and protecting the rights and freedoms of all persons, and
- ensuring the independence of lawyers.

The importance of the independence of lawyers is not, however, well understood by the public. Few citizens regard it as a fundamental protection of their rights and freedoms. In a recent article, W. Wesley Pue noted that to

the general public, "[t]he idea of independence [of lawyers] from state regulation strikes many as undemocratic, if not a prescription for lawlessness".<sup>8</sup>

The meaning and importance of lawyer independence is, however, well understood by the Supreme Court of Canada. In *Andrews v. Law Society of B.C.*, for example, McIntyre J. said:

In the absence of an independent legal profession, skilled and qualified to play its part in the administration of justice and the judicial process, the whole legal system would be in a parlous state.<sup>9</sup>

And in *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, LeBel J. said:

[A]n independent and competent Bar has long been an essential part of our legal system.<sup>10</sup>

The Supreme Court of Canada has also recognized the connection between lawyer independence and self-regulation:

There are many reasons why a province might well turn its legislative action towards the regulation of members of the law profession. These members are officers of the provincially-organized courts; they are the object of public trust daily; the nature of the services they bring to the public makes the valuation of those services by the unskilled public difficult; the quality of service is the most sensitive area of service regulation and the quality of legal services is a matter difficult of judgment. The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality, and availability to the general public of members of the Bar and through those members, legal advice and services generally...<sup>11</sup>

and

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...<sup>12</sup>

In *LaBelle v. Law Society of Upper Canada*,<sup>13</sup> the Ontario Superior Court discussed the rationale for self-governance by referring to an article by G.D. Finlayson, Q.C. (later Finlayson, J.A. of the Ontario Court of Appeal), entitled "Self-Government of the Legal Profession: Can It Continue?"<sup>14</sup>

The legal profession has a unique position in the community. Its distinguishing feature is that it alone among the professions is concerned with protecting the person and property of citizens from whatever quarter they may be threatened and pre-eminently against the threat of encroachment from the state. The protection

of rights has been a historic function of the law, and it is the responsibility of lawyers to carry out that function. In order that they may continue to do so *there can be no compromise in the freedom of the profession from interference*, let alone control, by the government. [emphasis added]

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

Lawyers could not advise citizens as to their responsibilities with respect to particular legislation or governmental action if they cannot maintain their independence as individuals. It is almost impossible to do this if the society that governs them is under the day to day control of the government. *It is imperative* that the public have a perception of the legal profession as entirely separate from and independent of the government, otherwise it will not have confidence that lawyers can truly represent its members in their dealings with government.<sup>15</sup>

The committee has accepted these views and therefore believes that self-regulation and self-governance are essential to lawyer independence.<sup>16</sup> Self-governance most clearly distances the profession from the state, thereby assuring the public of lawyers' independence and freedom from conflicts with the state. Lawyers, who are often retained to act on behalf of clients who are in conflict with the state, would find themselves in an untenable conflict of interest with their client should the lawyer be regulated by the state. If lawyers were not governed and regulated in a manner independent of the state, clients could not be assured that their lawyer would be providing them with independent representation, particularly if the client's case required a direct challenge to the state's authority. In such cases, it is necessary that individuals can obtain legal advice and representation that is independent of state control.<sup>17</sup>

### CHALLENGES TO INDEPENDENCE AND SELF-GOVERNANCE

Lawyer independence has been challenged, or attacked outright, in a number of areas in the world. In some of these countries, such as Zimbabwe, challenges to lawyer independence are to be expected because a strong, independent bar impedes the abilities of tyrants to suppress the rule of law. However, challenges to lawyer independence and self-regulation have also surfaced in developed common law jurisdictions, notably Australia and the United Kingdom, where the rule of law is otherwise well entrenched. Governments in each of those countries have introduced legislation that reduces or eliminates self-governance in the legal profession.

Challenges to self-governance in Australia and the United Kingdom appear to have arisen in response to public criticism concerning the local

law society's ability to handle complaints made against lawyers. A theme underlying the criticism is that a regulatory body comprising lawyers cannot be expected to properly discipline other lawyers. A public perception appeared to develop that the law societies were not acting first and foremost in the public interest, but were rather acting more in the interest of their members. Therefore, critics argued, a body independent of lawyers was needed.

In Australia and the United Kingdom, the fact that the local law societies were (unlike the B.C. Law Society) responsible for *representing* lawyers' interests as well as being responsible for the regulation of lawyers meant that the law societies had dual and conflicting roles, and this fact complicated efforts to respond to criticisms in those jurisdictions.

In the result, changes were, or are, being made in Australia and England (including Wales) that place ultimate regulatory responsibilities with boards appointed by government. Governments, particularly in the United Kingdom, maintain that lawyer independence is preserved through the measures taken. Indeed, maintaining the independence of the legal profession is one of the eight regulatory objectives of the Legal Services Board created under the *Legal Services Act 2007* (U.K.). It is noteworthy, however, that changes to the legislation agreed to in the House of Lords designed (in the words of that House) to ensure the protection of lawyer independence were initially opposed by the government.<sup>18</sup> Ultimately, while there is to be consultation with the Lord Chief Justice prior to any appointments being made to the board, the appointments (the majority of whom must be laypersons) are still made by the Lord Chancellor.<sup>19</sup> This is said to safeguard the board's independence from government.<sup>20</sup> It is, however, a significant incursion on self-governance, and the committee is of the view that a similar model, if introduced in B.C., would put at risk lawyer independence.

Some commentators challenge the notion that self-regulation is necessary to ensure the independent advocacy and advice of lawyers. That view is expressed in a recent article published in New Zealand by Professor Duncan Webb,<sup>21</sup> who notes that:

- the legal profession is subject already to many statutes and common law rules that affect the practice of law;
- while lawyers undeniably play an important part in the judicial process, they are "simply assistants to the court"; and
- advocacy, in any event, is only a part of the lawyer's role, and most of the profession works, in fact, in non-litigious matters such as conveyancing, wills, business transactions, and the like.

The committee believes these arguments have relatively straightforward responses:

- Statutes and common law govern all individuals, and lawyers are no different. Lawyer independence (as the committee's definition sets out) does not exempt lawyers from the application of the law. Rather, it ensures that the state cannot interfere in the determination as to who can and cannot be a lawyer. It prevents the state from investigating and sanctioning lawyers for what they do as lawyers.
- Lawyers are more than "assistants to the courts". Lawyers are officers of the court, and with that title comes important responsibilities in the representation of a client, which the court is entitled to rely upon and which better ensure the fairness and efficacy of proceedings. As the Supreme Court of Canada has said, "Clients depend on the integrity of lawyers, as do colleagues. Judges rely upon commitments and undertakings given to them by counsel. Our whole system of administration of justice depends upon counsel's reputation for integrity."<sup>22</sup>
- Independent advice to clients on what may loosely be referred to as "transactional" matters is no less important than on litigious matters. Many individuals and corporations must negotiate with governments. Those clients also need to be assured of their lawyer's independence from the state.

The committee's view is supported by the Supreme Court of Canada in *Pearlman v. The Manitoba Law Society Judicial Committee*:<sup>23</sup>

I note that courts have recognized that Benchers are in the best position to determine issues and misconduct and incompetence. For example, in *Re Law Society of Manitoba and Savino* (1983), 1 DLR (4th) 285 (Man. C.A.) the Court of Appeal said (at pp. 292-93): No one is better qualified to say what constitutes professional misconduct than a group of practising barristers who are themselves subject to the rules established by their governing body.

However, while criticism of self-regulation and self-governance of lawyers is answerable, the committee believes that it is of critical importance to convince the public that the Law Society is discharging its mandate in the public interest. Lay bencher involvement in policy making and discipline assists in this regard.

## CONCLUSION

Lawyer independence is an important public right, necessary to maintain and preserve the rule of law, that must not be lightly interfered with. The Law Society, whose duty it is to uphold and protect the public interest in

the administration of justice,<sup>24</sup> owes a duty to the public to act in such a way as to ensure the continuation of lawyer independence.

The public must, however, be confident that the Law Society's regulatory function is being discharged in the public interest and not in the self-interest of those it regulates. Otherwise, as has been seen in other jurisdictions, there is a significant risk of erosion of self-regulation of the legal profession and, with it, lawyer independence and the full protection of the rule of law.

#### ENDNOTES

1. See, in particular, Robert Gordon, "The Independence of Lawyers" (1988) 68 Boston U. L.R. 1.
2. [1959] S.C.R. 121 at 142. See also *Reference re Secession of Quebec*, [1998] 2 S.C.R. 21 at para. 51, and *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721.
3. *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 748.
4. Francis Neate, "The Rule of Law", Discussion Paper, February 2008. Mr. Neate is the immediate past president of the International Bar Association. The discussion paper was prepared for members of the IBA to remind them of and to develop further the concern for the rule of law reflected in the IBA Council's Resolution of September 2005.
5. "Justice Under Threat in Venezuela", *Law Talk* (N.Z.), Issue 693, August 20, 2007, p. 25.
6. "Musharraf Sweeps Democracy Aside", *The Globe and Mail* (B.C. ed.) November 5, 2007; "CBA Condemns Arrests of Lawyers in Pakistan and Calls for Return to Rule of Law", News Release, November 5, 2007.
7. (2001) 59 Advocate 549.
8. "Death Squads and 'Directions over Lunch': A Comparative Review of the Independence of the Bar" in *In the Public Interest* (Toronto: Law Society of Upper Canada/Irwin Law, 2007) 10-11.
9. [1989] 1 S.C.R. 143 at 187.
10. [2002] 3 S.C.R. 209 at para. 68, per LeBel J. dissenting in part.
11. *Canada (Attorney General) v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 at 335-336 ("Jabour") per Estey J.
12. *Finney v. Barreau du Québec*, [2004] 2 S.C.R. 17 at para. 1.
13. (2001), 52 O.R. (3d) 398.
14. (1985) 4 Advocates' Soc. J. 11.
15. *Ibid.* at 11-16 [emphasis added].
16. The committee notes that this position is shared by the Council of Bars and Law Societies of Europe ("CCBE"). A June 30, 2005, CCBE position paper on regulatory and representative functions of bars states that "an independent legal profession is the cornerstone of a free and democratic society. Self-regulation, conceptually, must be seen as a corollary to the core value of independence."
17. See William H. Hurlburt, *The Self-Regulation of the Legal Profession in Canada and England and Wales* (Edmonton: Law Society of Alberta and Alberta Law Reform Institute, 2000) at 170.
18. "Bill Changes Face Reversal", *Law Gazette*, June 7, 2007.
19. The justice minister "stood firm against the call to oblige the Lord Chancellor to have the concurrence of the Lord Chief Justice when appointing members to the Board."

- See "Bill Given the Green Light", *Law Gazette*, November 1, 2007.
20. The Law Society (of England and Wales), "The Legal Services Act 2007—Briefing", November 29, 2007.
  21. Duncan Webb, "Are Lawyers Regulatable?" 2007.
  22. *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 177.
  23. [1991] 2 S.C.R. 869 at 880, per Iacobucci J.
  24. *Legal Profession Act*, S.B.C. 1998, c. 9, s. 3.





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