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## **You Shall Not Pass Go: The End of Monopoly (and Self-Governance) for BC Lawyers**

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**Matter Commented On:** [Bill 21– 2024, \*Legal Professions Act\*](#), 5th Session, 42nd Parliament (2024)

What is the difference between a dairy farmer and a lawyer? The most obvious answer might be that one produces a good that has social value, while the other one is a lawyer. A more nuanced answer might be that while Canadian dairy farmers have been extraordinarily successful (or rather [notorious](#)) in maintaining their regulation protected monopoly, lawyers, at least in British Columbia, are on the precipice of losing theirs. The object of this short post is to offer some preliminary observations on the BC government's Bill 21, the proposed new *Legal Professions Act*, which will do away with the Law Society of BC.

### **Three Legal Guilds**

The Law Society of British Columbia, which has been in existence since 1869, is set to be abolished by the BC government. The Law Society is to be replaced with a single regulator for the legal profession, which will cover the practices of lawyers, paralegals, and notary publics. Under the new scheme notary publics and paralegals will be permitted to provide some legal services that were previously restricted to lawyers, and both groups will have a place on the board of the new regulator, alongside of lawyers and government appointees.

There are three guilds, or professional associations, in competition here – lawyers, notary publics, and paralegals. The membership of all three guilds are no doubt devoted to the public interest, but these groups arguably pursue their own economic interests as well. When notary publics lobby the government to be able to offer conveyancing services it is probably not entirely due to altruism, and when lawyers resist the extension of conveyancing to other legal professionals, they are not likely acting to protect the rule of law.

Because lawyers occupy the higher economic position in the legal profession hierarchy (for now), in that they more often possess a monopoly on more lucrative legal services, the liberalization of the trade in legal services will tend to benefit notaries and paralegals. Notary publics are not likely lobbying to do the conveyances for free, in most circumstances. It should be acknowledged that liberalization can assist with the delivery of pro bono legal work. The basic premise offered here is that access to justice will tend to reward notaries and paralegals because they are likely to benefit from offering new and more lucrative services that were previously the exclusive preserve of lawyers.

The economics of trade liberalization is important because under the new regulator, all three guilds are thrust together with shared governance over the legal profession. I suggest that the lawyers' guild contains two monopolies: one over legal services, and the second over governance. The government's proposed reforms will weaken lawyers' monopoly over some services, but only to a minor extent thus far. The monopoly over governance, on the other hand, is another matter entirely.

It should also be noted that there are serious objections to the lack of transparency and consultation on the reforms (see, e.g., [here](#), [here](#) and [here](#)). That a democratic government would unilaterally overhaul the legal profession with little to no consultation is frankly alarming, but the focus of this brief post will be on the governance issue. Rule of law concerns clearly abound in this story.

### **Breaking the Monopoly over Governance**

The Law Society of British Columbia has statutory authority for the licensing and regulation of lawyers in BC, as is common across Canada. The law society is governed by 'benchers.' Twenty-five benchers are lawyers elected by their fellow lawyers across the province of BC. Up to 6 lay benchers are appointed by the BC government. This gives lawyers control of approximately 80 percent of the positions on the controlling board of the law society. This easily qualifies as a supermajority of control. Put differently, lawyers have a monopoly of control over their own profession under the status quo system.

BC's Attorney General, Nicki Sharma, tabled Bill 21, the *Legal Professions Act*, which will replace the Law Society with a new regulator, a public corporation named the "Legal Professions of British Columbia". The new regulator will have authority over the amalgam of legal professionals indicated above. The Attorney General has indicated that the reforms are intended to modernize lawyer regulation so that it operates in the [public interest](#), [while](#) "advancing really important things, which is access to justice, the public interest, reconciliation, making sure that underrepresented groups are better represented in our legal profession."

Increasing access to justice is a pressing and worthy objective, but if the government of BC were fully committed to this objective it might have also provided some funding and resources to support this commitment. A pointed criticism of the government's legal reform platform is that it did not include any additional funding or resources for access to justice (see [here](#)). Indeed, critics have further observed that BC remains the only province to collect provincial sales tax from legal transactions, and that this revenue stream goes into the general provincial treasury and is not devoted to legal aid or access to justice (see [here](#)). It would seem that the thrust of the government's access to justice agenda is directed not at resources, nor even legal services, but governance redesign.

The new legal profession regulator, or public corporation, is to be governed by a [board of directors](#), which will consist of 17 directors, including:

- 5 directors elected by lawyers;
- 2 directors elected by notaries public;

- 2 directors who are paralegals (who are either elected by paralegals or appointed according to some government style formula on the number of paralegals in the Province);
- 3 directors appointed by the Lieutenant Governor in Council (including one director who must be “of a First Nation”);
- 5 directors appointed, after a merit based process, by a majority of the other directors holding office, of whom:
  - 4 must be lawyers;
  - 1 must be a notary public;
  - And 1 of these 5 must be of a First Nation.

What the ‘merit based process’ would entail is not indicated. I think the seat entitlements can be summarized as: 5 elected lawyers, 9 lawyers in total; 3 government seats; 2 elected notary publics, 3 in total; 2 paralegal seats.

Lawyers will comprise 9 of 17 directors on the board for a slim majority of approximately 53 percent of the seats on the board. Not a super-majority as under the Law Society, but a majority still, barely. By comparison, notaries and paralegals will have 4 elected and 5 total seats, for approximately 30 percent of the board. As Jordan Furlong, a lawyer and legal commentator, has [noted](#), notaries and parallels make up only around ten percent of the province’s legal population but will have 4 of the 9 elected seats reserved for legal professionals.

### **The Numbers Debate**

A number of organizations have strenuously objected to Bill 21. For example, the Law Society of BC has [opposed](#) the Bill on the grounds that it fails to protect the public’s interest in “access to independent legal professions governed by an independent regulator that are not constrained by unnecessary government direction and intrusion.” The President of the Canadian Bar Association BC, Scott Morishita, [wrote](#): “To be independent, lawyers must be self-regulated with more than a slim majority of lawyers represented on the regulator's board. And those lawyers must be elected, not appointed.” The Trial Lawyers Association of BC [called Bill 21](#) “an egregious assault on the principle of lawyer independence” and “an enormous departure from the norms governing legal regulation in liberal, democratic societies.”

Many objections to Bill 21 emphasized the necessity of independence for legal advocates in a liberal democracy. If advocates are not free from government interference, then governments will not be held accountable under the law. As Michael Elliot, president of the Trial Lawyers Association of BC, [stated](#): “An independent bar is a foundational cornerstone in any functional democracy.”

The Attorney General has [claimed](#) that the independence of lawyers has been balanced and maintained under the proposed new regulator. The Attorney General has also made two more specific arguments. First, that the government’s role is reduced in the new scheme, or [that](#): “Government is actually stepping back from its role.” Second, that lawyers will be in the majority on the board, and that elected lawyers form a majority of those who appoint. When asked in the legislature whether the forthcoming bill would ensure that a majority of directors were elected

lawyers, the Attorney General seemingly avoided the [question](#). After the Bill's release, the Attorney General [told the media](#) that: "there is a majority of lawyers who are elected members and it is those nine members (five elected lawyers) who then appoint four additional lawyers (from an unspecified merit-based process)."

### **Lawyer Math Bad?**

The argument for a reduced role for government must refer to the government's power of appointment to the law society in comparison with the new regulator. The gist of the Attorney General's argument was echoed by Jordan Furlong, who [told Canadian Lawyer Magazine](#) that: "Bill 21 reduces the number of government-appointed board directors from six to three, making it difficult to argue that the proposed arrangement threatens the independence of the legal profession."

With respect, I do not see how the Attorney General's argument, or Furlong's math, makes sense. Yes, 6 is a larger number than 3, and so it looks like the government's position has declined, but this mistakes the inquiry. In the assessment of voting power or representation on a board you cannot treat the number of board members as an independent value. In a comparison of board compositions, board seats are fractional amounts, not cardinal numbers. The operative assessment is  $X \text{ of } Y$ , not  $X2 > X1$ . Suppose I have control of 2 out of 3 board seats in state A. Later, in state B I have 4 seats out of 10. Has my influence or power on the board doubled in the move from state A to B? No. I have gained votes but lost heavily in terms of proportion. I have gone from a super-majority in state A to a minority position in state B.

Under the Law Society of BC, the government appointed 6 of 31 benchers, for approximately 20 percent of the total number. Under the new system, the government will appoint 3 of 17 directors, or approximately 18 percent of the total. This could hardly be called 'stepping back' for the government. What is more, based on the essential decision as to ultimate board composition – the appointment of the remaining five directors – government appointees will constitute 3 of 12 votes, meaning that the government's proportion has increased to 25 percent. Not only has the government's role not been decreased in any meaningful way, it has arguably increased.

The Attorney General's claim that lawyers will occupy a majority position on the new board appears accurate – 9 of 17. Even the critics refer to the number of lawyers as a 'slim majority' – but it is a majority nonetheless. But then there is the Attorney General's claim on the second majority – that elected lawyers will form the majority of elected members (5 of 9) who then select the remaining 4 lawyers. This does not reflect the statute, as I read it (and I am not the first to note the problematic proportion of elected lawyers – see [here](#)). The additional 5 directors (4 lawyers plus one notary) are to be appointed by the "other directors holding office" – meaning the 2 notary directors, the 2 paralegals, and the 3 government appointees. This would mean that 5 elected lawyers and 7 non-lawyers decide on the remaining 5 appointed seats, which includes the 4 appointed lawyer seats. This means that elected lawyers are in the minority on the decision as to remaining, appointed board members. Once again, I am confused – I do not think that the Attorney General's math, or description of lawyer majorities, makes sense. It seems clear that elected lawyers will not constitute a majority of the panel of 13 that will appoint the remaining board members.

Had the government wanted lawyers to have a majority position then elected lawyers would simply have received 9 or more seats. Instead, the 4 additional lawyers will be selected by the initial directors, of which a majority is made up of non-lawyers – the government appointees and the representatives of rival guilds. The scheme seems designed to superficially appear like lawyers have majority control when they do not.

### **Twilight of the Lawyers' Guild**

From a certain vantage it appears that the proposed regulator is designed in a way to ensure a continual set of policy preferences is held by the majority on the legal regulator's board. To elaborate, let's imagine a hypothetical from medicine. Suppose there is a proposal for liberalizing the provision of drug prescriptions, so that instead of only physicians that pharmacists are also able to write some drug prescriptions. The proposal is intended to increase accessibility to medicines and lower costs. Assume that physicians, as a diverse guild, are divided over the extent of prescription liberalization. Some physicians might welcome the alleviation of overwhelming patient demand, while others might have a practice based or clinical foundation for concern. Assume the pharmacists, again in good faith, as a group are much more confident and are overwhelmingly in favour of prescription liberalization.

Now, if we as the government wanted to ensure that the tendencies of a prescription regulator remained consistently pro-liberalization, but also need to placate the physicians, then the BC model provides us with a perfect stratagem. We would let physicians elect a minority to the board, alongside a minority of pharmacists. Being a government, we would of course like to make some appointments ourselves, but let us concentrate on physicians and pharmacists for now. Next, we orchestrate the rules so that another set of minority doctor appointments are made by the pharmacists, who then predictably select only physicians with a pro-liberalization mandate. *Voila*. There we have it. There is a majority of physicians on the panel so as to appease the physicians and fob off the media; our policy preferences are embedded in the regulator; and, best of all, we the government get to claim that we are independent, that we are stepping back from the regulation of medicine. How deliciously Machiavellian. Time to cackle maniacally into the moonlight.

### **Conclusion**

That there is a diversity of opinion amongst lawyers on the priorities for the profession seems like a good thing; a legitimate source of reasoned debate. But this diversity in philosophy should not be manipulated by governments to achieve a level of interference indirectly, by institutional design, that the rule of law precludes them from taking directly. An orchestrated policy interference does not need to happen on a day-to-day basis for the autonomy of lawyers to have been compromised. Manipulating the market in legal services is not like manipulating the market in milk. The market for legal services in a liberal democracy includes the provision of independent advocacy that is a bedrock precondition of the rule of law. As delectable as I find all sorts of dairy products, dairy products have never defended me from the state.

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