

Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations

126-1644 Hillside Avenue, PO Box 35115 Hillside, Victoria BC Canada V8T 5G2
www.lrwc.org; lrwc@lrwc.org

Canada: British Columbia's proposed legislation violates international law and standards on independence of the legal profession

Brief

10 April 2024

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A. Introduction and overview

1. Lawyers' Rights Watch Canada (LRWC) is a committee of lawyers and other human rights defenders who promote international human rights law and the rule of law through advocacy, legal research and education. LRWC is a volunteer-run non-governmental organization (NGO) in Special Consultative Status with the Economic and Social Council (ECOSOC) of the United Nations (UN) since 2005.
2. This brief explains LRWC's serious concerns about legislation proposed by the Government of British Columbia (BC) on regulation of the legal profession. The brief supplements LRWC's submission of November 2022¹ regarding the Attorney General of BC's (AG) September 2022 Intentions Paper² and elaborates LRWC's continuing concerns resulting from examination of

¹ Lawyers' Rights Watch Canada, Statement on the British Columbia Legal Professions Regulatory Modernization General Intentions Paper, September 2022, 18 November 2022, <https://www.lrwc.org/wp-content/uploads/2022/11/LRWC.Statement.BC.LegalProfessions.Intentions.18Nov2022.pdf>.

² British Columbia Ministry of Attorney General, Legal Professions Regulatory Modernization,

the Ministry of Attorney General Public Update 18 March 2024 (Update)³ and subsequent conversations with the BC AG and others. LRWC grounds its submissions in BC’s obligations under international law and standards, including the *International Covenant on Civil and Political Rights* (ICCPR)⁴ and the UN *Basic Principles on the Role of Lawyers* (Basic Principles).⁵

3. Issues discussed in this brief are:

- a. The role of governments in upholding the rule of law, including the independence of the legal profession. See paragraphs 4-8 below.
- b. The right of all persons to remedies for violation of their rights (often referred to as “access to justice”) (ICCPR Article 2), and to legal representation by an independent lawyer of their own choosing in criminal, civil, and administrative law matters (grounded in ICCPR Article 14). See paragraphs 9-13 below.
- c. The right of all members of the legal profession and civil society to freedom of information (ICCPR Article 19), along with the duties of governments to ensure democratic promulgation of laws, including fulfilment of the right to adequate participation at all levels of decision making in all matters that affect rights (ICCPR Article 25). See paragraphs 14-18 below.
- d. The right of lawyers to independence of their governing bodies (grounded in ICCPR Article 14), and the related right of lawyers to freedom of association (ICCPR Article 22). See paragraphs 19-33 below.
- e. Recommendations to the BC government and legal profession. See paragraphs 34 and 35 below.

B. The rule of law, the separation of powers, and the independence of the legal profession: BC’s obligations under international law

4. Lawyers play key roles in the protection of the rule of law worldwide. In accordance with UN principles, LRWC defines the rule of law as:

“a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation

Ministry of Attorney General Intentions Paper [Intentions Paper], September 2022,

<https://engage.gov.bc.ca/app/uploads/sites/121/2022/09/MAG-Intentions-Paper-September-2022-1.pdf>.

³ Legal Professions Regulatory Modernization: Ministry of Attorney General Public Update [Update], 18 March 2024, <https://engage.gov.bc.ca/app/uploads/sites/121/2024/03/LPA-Reform-Public-Update.pdf>.

⁴ *International Covenant on Civil and Political Rights* [ICCPR], 16 December 1966, acceded to by Canada in 1976, Articles 2, 14, 22, and 25, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

⁵ UN *Basic Principles on the Role of Lawyers*, [Basic Principles] 7 September 1990, <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-role-lawyers>.

of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency” (underlines added).⁶

The rule of law and independence of lawyers are under threat around the world

5. The rule of law, including the independence of the legal profession, is under threat in many countries. LRWC has more than two decades of experience advocating for the protection of lawyers and human rights defenders internationally, including letters, statements, reports, amicus briefs to national courts, and interventions at the UN Human Rights Council.
6. LRWC’s experience advocating for lawyers globally demonstrates that authoritarian governments often misuse laws to interfere with the separation of powers, assert control over legal systems, and to impair or destroy the independence of lawyers and their governing bodies. Such laws are often misused to facilitate unwarranted vilification, discipline, disbarments, or judicial harassment of lawyers or the legal profession. Authoritarian governments often look to examples in other countries to justify legal provisions that violate the independence of judges and lawyers. This means that Canadian jurisdictions, including BC, must in all legislation, policies, and practices, set exemplary models of adherence to the rule of law and international human rights law and standards.

The Province of BC’s obligation to uphold international law and standards

7. At international law, all governments⁷ at every relevant level (national, regional or local) or branch (executive, legislative and judicial)⁸ are obligated to ensure the right to equal and effective access to remedies for violations of rights (often termed "access to justice") as well as democratic promulgation of laws. Equality of access to justice entails effective administration of justice, including competent, independent courts and lawyers. Democratic promulgation of laws requires effective implementation of everyone’s right to participate in public affairs, including public consultation on proposed laws that affect rights.⁹
8. International standards stipulate that the appropriate role of government is to engage cooperatively with the legal profession to facilitate the proper functioning and independence

⁶ UN Security Council, Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies (S/2004/616), 2004, <https://www.un.org/ruleoflaw/what-is-the-rule-of-law-archived/>.

⁷ *Vienna Convention on the Law of Treaties*, U.N.T.S. Vol. 1155, Article 26-27, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

⁸ UN Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant*, [GC 31], UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para.3, available at <http://www.refworld.org/docid/478b26ae2.html>. The UN Human Rights Committee is the body of independent experts established by the ICCPR and mandated to oversee States Parties’ implementation of the treaty. The International Court of Justice (ICJ) has confirmed that interpretations of the Committee and other treaty monitoring bodies are to be given great weight. *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of The Congo)*, ICJ, 30 November 2010, para 66-68, <https://www.icj-cij.org/sites/default/files/case-related/103/103-20101130-JUD-01-00-EN.pdf>.

⁹ UN Human Rights Council, Report of the Special Rapporteur on the situation of human rights defenders, A/67/292, 10 August 2012, paras 65-67, <https://undocs.org/Home/Mobile?FinalSymbol=A%2F67%2F292&Language=E&DeviceType=Desktop&LangRequested=False>.

of lawyers and their governance bodies.¹⁰ The role of the legal profession is to cooperate with governments to ensure that all legislation, policies, and practices regarding access to justice, the administration of justice, and the governance of the legal profession adhere to international human rights law and standards and ensure the rights of all members of the public to timely and confidential access to independent legal counsel of choice without interference by State or non-state actors.

C. International law and standards related to the role of lawyers

Access to justice: Rights to remedies and legal representation of choice

9. The BC government's stated rationale for the proposed legislation is to "modernize" the regulatory framework for access to legal services. The primary means proposed by the BC government is to facilitate "better access to legal services for the public"¹¹ by broadening the range of practitioners authorized to provide legal representation.
10. However, the BC government's proposals do not contemplate updating relevant legislation in accordance with contemporary international human rights law and standards related to access to justice and independence of the legal profession. In particular, the BC government has not ensured the right of access to justice through the provision of adequate legal aid in all criminal, civil, and administrative law matters where free, competent, independent legal assistance is required for effective access to the courts and fair hearings, as required by international standards.¹² LRWC has advocated for adequate provision of legal aid since 2010.¹³ LRWC provided an outline of international law and standards in its 2013 *Guide to International Law Rights to Legal Aid*,¹⁴ which provides a comprehensive analysis of the relevant international standards.
11. The BC government has chosen to focus its legislative efforts on the reorganization of the governance and regulatory body of the legal profession and a redefinition of the practice of law to include additional groups of legal services providers authorized to practice law, such as paralegals and notaries public. For example, the information BC has provided to the public about its proposed legislation is that it would "authorize the delivery of legal services by licensed paralegals by setting a minimum scope or scopes of practice, or requiring the regulator to do so within a prescribed period of time."¹⁵ This statement is vague and does not make clear what the scope of practice of paralegals would be or who would decide on its scope or the qualifications required.

¹⁰ Basic Principles, Article 25 *supra* note 5,

¹¹ *Intentions Paper*, *supra* note 2, at p 5.

¹² LRWC summarized the international law and standards in its 2013 publication, *The Right to Legal Aid: A Guide to International Law Rights to Legal Aid*, <https://www.lrwc.org/the-right-to-legal-aid-a-guide-to-international-law-rights-to-legal-aid/>.

¹³ LRWC, International Law Obligations to Provide Legal Aid: Submission to the Public Commission on Legal Aid, March 2013, <http://www.lrwc.org/wp-content/uploads/2012/03/Legal-Aid-LRWC-Oct-25-2010.pdf>.

¹⁴ LRWC, *The Right to Legal Aid*, *supra* note 12.

¹⁵ Update, March 2024, *supra* note 3.

12. The BC government has also indicated that in the proposed legislation, “[t]he definition of the practice of law will be clarified in accordance with definitions developed in other jurisdictions, and in doing so will remain consistent in terms of what types of services constitute the practice of law in B.C.” However, the language of the proposed definition has not been supplied, which means the government’s intentions remain unclear. Any unilateral government redefinition of “the practice of law” that restricts the ability of lawyers to provide or people to receive timely, confidential, and competent legal advice and representation is contrary to the public interest, the rule of law, and Canada’s international law obligations.
13. While international standards recognize the value of a range of legal practitioners including paralegals, choice of legal representation is a fundamental principle of international law. LRWC is concerned that extending the definition of the practice of law and the range of groups entitled to practice law to paralegals, notaries public, and others, particularly without meaningful consultation, could potentially result in depriving people of the right to be represented by a lawyer. This could happen, for example, if government provided funding of legal aid schemes to allow for paralegal services but not representation by a lawyer.
14. To substantially increase access to adequate and competent legal representation by qualified lawyers and other recognized legal practitioners, LRWC recommends that the BC government dedicate the full amount of collected taxes on the legal services of lawyers to fully fund Legal Aid BC so as to ensure the right of all persons to representation by a lawyer in all cases where they require legal representation by a lawyer to secure their rights.

Duty to consult on legislation: Right to participate in public affairs

15. The BC government has declined to provide the draft legislation to the membership of the legal profession, civil society organizations, or the public. LRWC is not privy to information about the scope, type, or levels of consultation that may have taken place with Indigenous Peoples about this proposed legislation. LRWC understand that a small group of individuals, whose identities are unknown to LRWC, have viewed the draft law, and that each person to whom the draft legislation has been provided was required to sign a non-disclosure agreement. LRWC understands this to be the BC government’s standard practice concerning consultation on draft legislation.
16. The BC government’s practice of declining broad and full consultation with stakeholders on draft legislation creates severe constraints on the right of public participation guaranteed by Article 25 of the ICCPR, and is against the public interest.
17. The UN Special Rapporteur on the situation of human rights defenders has emphasised the requirement of public consultation on proposed laws, saying that before a piece of legislation is adopted, “it must be promulgated democratically, meaning that it should be subject to broad consultations with individuals and associations concerned, including civil society” (underline added).¹⁶ Full public consultation must occur before legislation is tabled in the legislature.

¹⁶ UN Special Rapporteur on the situation of human rights defenders, A/67/292, 2012, paras 65-67, *supra* note 9.

18. The process of consultation on legislation in BC does not measure up to international standards, best practices, or emerging norms regarding public consultation.¹⁷ Democratic promulgation of legislation requires fully informed, open, and consensus-seeking processes with time for the legal profession, relevant civil society groups, Indigenous peoples, and the public to discuss and offer appropriate revisions. In the case of the currently proposed legislation on the legal profession, the process of consultation has lacked sufficient transparency and specificity to satisfy BC's obligations under international law and standards, denying sufficient opportunities for participation by those whose rights may be affected, including lawyers, paralegals, notaries public, relevant sectors of civil society in Canada, Indigenous Peoples, and all members of the public.

Concern about the independence of the legal profession

19. The BC government has drafted a law that would:
- a. Unilaterally reconstitute the membership of the Law Society of BC (LSBC) – changing its composition from members of the legal profession (composed of lawyers) to members of “legal professions” (plural, including lawyers, paralegals, notaries public, and potentially others).
 - b. Unilaterally reduce the size of the LSBC's governing body. There are currently 25 lawyer Benchers elected by the lawyer members of the LSBC (plus the AG and five non-lawyers appointed by government). The proposed legislation would reduce the governing body to 17 “Board” members, three of whom would be appointed by government, nine of whom would be lawyers, and the rest who would comprise paralegals, notaries, and members of the public. While lawyers are proposed to be a majority of nine of 17 board members, it is a bare majority, and the March 2024 Update does not indicate whether all of these lawyers would be elected by the members of the legal profession or whether some of the lawyers might be government-appointed.
20. This proposed change represents a considerable reduction in the proportion of lawyers in the LSBC's governance structure, resulting in serious impairment of democratic governance by representatives elected by lawyers. At best, the result would be a dramatic reduction in control of the legal profession by lawyers elected by lawyer members of the legal profession. Thus, the governance structure is proposed to be radically, unilaterally, and without justification, restructured to inappropriately reduce and impair the role of lawyers in the governance of the LSBC.

¹⁷ See, e.g. Guidelines on the right to participate in public affairs, UN High Commissioner for Human Rights, A/HRC/39/28, 20 July 2018, <https://www.ohchr.org/en/calls-for-input/report-guidelines-right-participate-public-affairs>; Promotion, protection and implementation of the right to participate in public affairs in the context of the existing human rights law: best practices, experiences, challenges and ways to overcome them. Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/30/26, 23 July 2015, <https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F30%2F26&Language=E&DeviceType=Desktop&LangRequested=False>.

21. Further, the proposed criteria for government appointees indicates that their selection would be “merit-based,” but there is no indication of any planned stipulation in the legislation that the government appointees would exercise their duties independently.
22. LRWC respectfully points out that these proposed changes contravene the UN *Basic Principles on the Role of Lawyers*,¹⁸ which require that the governing body be elected by the members of the legal profession, all of whom are lawyers (Principle 24). While the current *BC Legal Profession Act*¹⁹ provides for the AG’s ex officio status as a Bencher plus an additional five government appointees, this, too, runs counter to the Basic Principles. While the presence of the AG and government appointees as Benchers has been tolerated by the BC legal profession for many years, LRWC recommends that all members of the LSBC governing body be lawyers elected by the members of the legal profession (lawyers). LRWC takes no position on governance roles of non-lawyers, as long as their qualifications and identity are decided by lawyer members of the LSBC.
23. The AG’s March 2024 Update further suggests that:

licensees should not have the authority to bring forward resolutions that purport to direct the actions of the regulator’s board. It is not consistent with best practice in governance to enable licensees to direct, or even bind, their regulator to take certain actions. The regulator is not accountable to licensees, it is accountable to the public.

The Update further proposes that: “Licensees would not have the authority to approve or reject the regulator’s rules as determined by the board mandate to address the public interest.” These statements, too, run counter to the Basic Principles and are measures clearly intended to control the legal profession by arbitrarily curtailing the right and duty of lawyers to participate in governance and by restricting the members’ role to the annual election of nine “board” members. A lawyer’s duty to protect the paramount right of all persons to representation by an independent lawyer cannot be meaningfully carried out without rights to participate in decision making by the regulator. Members of the LSBC must remain free, for example, to reject measures proposed or imposed by the governing body that endanger or restrict rights to representation by an independent lawyer of choice.

24. In summary, the BC government’s proposal goes to the heart of the structure of the governance body of the legal profession, dramatically reducing the number of Benchers, changing the title of the Benches to a “board,” and removing key rights of members of the legal profession in the governance of the profession. Instead, the BC government proposes that the governing body of the legal profession be transformed to become a licencing authority, with members becoming “licensees.” This represents a dramatic shift from the current structure of the LSBC as an organization of lawyers who elect its governing Benchers and who can participate in governance by bringing resolutions to general meetings. LRWC emphasizes that, at the present time, members are not entitled to make resolutions that are outside the mandate of the LSBC.

¹⁸ Basic Principles, *supra* note 5.

¹⁹ *Legal Profession Act*, [SBC 1998] Chapter 9,
https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/98009_01.

25. The Special Rapporteur on independence of judges and lawyers has affirmed that the “executive body of the professional association shall be elected by its members and shall exercise its functions without external interference,” citing the Basic Principles, Article 24.²⁰ The Special Rapporteur has also emphasised “that the central role in the establishment, work and appointment of executive bodies of the legal profession needs to remain with the lawyers...” and that “Bar associations should not act as a part of a bureaucratic apparatus allowing for government control of the legal profession; they should operate as professional associations, working to protect the rights of its members.” The Special Rapporteur specifically included reference to situations where “membership in the organization is compulsory.”²¹ The Special Rapporteur’s reference to “bar associations” refers not only to voluntary organizations like the Canadian Bar Association or local bar associations, but also to professional regulatory associations and law societies such as the LSBC.
26. The BC government has proposed unilaterally to fundamentally restructure the LSBC so that its governance body (to be renamed as a “Board”) would become a regulatory authority that grants licences to practice law. The LSBC would no longer have members; it would be comprised of “licensees.” The BC government’s clearly-stated intention is that the “licensees” (lawyers, paralegals, and notaries public) would not have membership rights and would have no right to participate as members in the adoption or amendment of policies or rules adopted by the proposed Board (Update, paras 6.0-6.4).²²
27. The BC government proposes to abolish the LSBC as a democratically-run membership organization and replace it with a collection of licensees with no authority to adopt members’ resolutions to direct the governing Board or otherwise meaningfully participate in governance of the legal profession in a manner that serves the public interest. These measures would strip lawyers of the right to protect the independence of lawyers through participation in governance of the legal profession. Such measures would be tantamount to inappropriate constraint of lawyers’ independence and denial of lawyers’ right to freedom of association and self-governance as members of the LSBC.
28. The BC government suggests that its motivation for proposing these radical changes in the law is prophylactic – to prevent members of the BC legal profession from seeking to protect their self-interest at the expense of the public interest. These alarming changes are being proposed without the provision of evidence that the LSBC or its members have sought to advance the self-interest of lawyers over the public interest. There are no valid grounds for

²⁰ Report of the Special Rapporteur on the independence of judges and lawyers, Diego Garcia-Sayan, Report to the UN General Assembly, A/73/365, 5 September 2018, para. 38, <https://www.ohchr.org/en/calls-for-input/bar-associations-report>.

²¹ A/HRC/50/36, 22 April 2022, *ibid*. See also the Report of the Special Rapporteur on the independence of judges and lawyers, Monica Pinto, Report to the UN General Assembly, A/71/348, 22 August 2016, Section D, <https://undocs.org/A/71/348>.

²² Legal Professions Regulatory Modernization: Ministry of Attorney General Public Update [Update], 18 March 2024, <https://engage.gov.bc.ca/app/uploads/sites/121/2024/03/LPA-Reform-Public-Update.pdf>.

the BC government to arbitrarily and unilaterally change the fundamental structure and governance of the legal profession. The proposed changes imperil the rights of all to independent legal representation of choice. LRWC submits that the “public interest” can only be served by a legal profession that is independent of government and capable of protecting fundamental procedural and substantive rights within and outside of the formal legal system. A principal function of lawyers is to protect clients from rights violations imposed, promoted, or allowed by State authorities.

29. The preamble of the Basic Principles confirms that:

“...professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and cooperating with governmental and other institutions in furthering the ends of justice and public interest.”

30. Basic Principle 24 further stipulates that:

Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference” (underline added).

31. The interests referred to as “their interests” in Basic Principles 24 refer to the professional interests of lawyers to ensure the fundamental purpose of the legal profession to uphold “... adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession...” The BC government’s Update has wrongly implied, without evidence, that BC lawyers might inappropriately attempt to abuse their authority as members of the LSBC to promote their personal self-interests.²³

32. LRWC respectfully submits that all the Basic Principles apply not only to voluntary bar organizations such as the Canadian Bar Association and local bar associations, but also to the LSBC. It is not properly within the jurisdiction of the BC government to change unilaterally the structure and function of the LSBC as a fully independent membership organization with the right to determine its own governance structures. Nor is it proper for the BC government to use coercive means to cause the legal profession to adopt its visions and goals for access to justice and governance of the legal profession and other legal practitioners.

33. LRWC takes no position concerning a proposal for a single regulator for the licencing of lawyers, paralegals, notaries, and others, nor on the particular composition of the governing body of the LSBC, other than what has been stated above. However, any such changes must

²³ Update, section 6.0, *supra* note 3.

be decided by the legal profession in cooperation with the BC government, and not unilaterally by the BC government.

D. Recommendations to the BC government and the legal profession

34. LRWC recommends that the BC government:

- a. Withdraw its plans for legislation regarding the government-proposed changes to the BC legal profession in the 2022 Intentions Paper and March 2024 Update.
- b. Fully consult and cooperate with the legal profession, relevant civil society organizations, the general public, and Indigenous Peoples on all draft intentions and provisions of any proposed law related to the governance of the legal profession or governance of other practitioners engaged in the provision of legal services, such as paralegals, notaries public, or others.
- c. Create, in cooperation with the legal profession, a comprehensive plan on access to justice, including utilization of the Provincial Sales Tax (PST) on legal services to fully fund Legal Aid BC so as to ensure the right of all persons to representation by a lawyer in all cases where they require legal representation by a lawyer to secure their rights.

35. LRWC recommends that the Law Society of BC, bar organizations, and lawyers urgently take all necessary measures, in cooperation with the BC government, to:

- a. Promote or ensure laws, policies, and practices that uphold and guarantee the independence of lawyers in BC in accordance with international law and standards.
- b. Promote or ensure laws, policies, and practices to ensure access to justice for all persons in BC, including adequate provision of legal aid in accordance with international human rights law and standards.
- c. Ensure adequate education and training of all lawyers and other legal practitioners on international human rights law, standards, and best practices.