A seismic shift in regulation of BC lawyers: A case study in the failure of democratic law-making

Catherine Morris*

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British Columbia's government is currently fighting the Law Society of British Columbia (LSBC) and the Trial Lawyers Association of British Columbia (TLABC) over BC's new *Legal Professions Act* (Bill 21). They and others see Bill 21 as unlawfully terminating the independence of the profession of lawyers. Bill 21 also serves as a case study in the failure of democratic law-making.

As I write, faces of lawyers from other countries flash through my mind – lawyers who have suffered exile, criminalization, imprisonment, threats, attacks, murder, or enforced disappearance to silence their legitimate advocacy. In countries without a strong, independent legal profession, lawyers often suffer dangerous retaliation for reporting human rights violations by government officials or business owners with friends in high places. Bar associations in too many places either lack the legal mandate or the will to protect their members from improper interference or punishment for representing unpopular clients or for criticizing State policies or actions.

Attacks on democracy often have "justice systems and actors as their target," according to the UN Special Rapporteur on the independence of judges and lawyers. Authoritarian governments' capture of courts and the legal profession often features subversion of the language of "the rule of law" to justify the creation or abuse of laws that violate human rights.

This is the context for my profound worries about Bill 21. Some of these concerns are reflected in statements of Lawyers' Rights Watch Canada (LRWC) in which I have been engaged. This column is written in my personal capacity to red-flag serious concerns about the processes used to pass Bill 21.

BC's deviation from democratic law-making

The BC government's public engagement strategy for Bill 21 deviates markedly from international human rights law and standards for democratic law-making. From 2022 to 2024, the government failed to respect and fulfil people's right to participate in public affairs at all levels of public decision making in all matters that affect rights.

The truncated parliamentary process used by the BC government to rush Bill 21 through the legislature from 10 April to 16 May 2024 denied democratically elected parliamentarians sufficient time to consult with their constituents and fully debate the Bill. Democratic consensus was thwarted, and public conflict escalated.

Litigation now in progress

The government forced Bill 21 through to Royal Assent on 16 May 2024, bringing its transitional provisions into force and ending opportunities for negotiation and persuasion. Facing

a choice between capitulation or litigation, the LSBC and TLABC launched constitutional challenges on 17 May and 21 May respectively.

In their first salvos they sought an interlocutory injunction to halt implementation of the Act. The Supreme Court of BC denied their applications on 17 July, ruling that while there are serious constitutional issues to be tried, the plaintiffs had not "established that irreparable harm will result" from the transitional processes, which the government argued are only for planning purposes over 18 to 24 months. The court ruled that the plaintiffs may reapply if implementation of the Act's substantive provisions becomes imminent. It is beyond the scope of this column to evaluate concerns about the Court's decision. The LSBC and TLABC are preparing for the next stages of litigation.

Historical backdrop

Bill 21 represents a sharp rupture in over a century of BC government cooperation with the LSBC regarding the regulation of lawyers. At the same time, we must not forget that the LSBC was formed in conjunction with colonial practices that included extra-legal assumptions of sovereignty over Indigenous Peoples and territories, along with denial of their access to lawyers. The LSBC excluded Indigenous persons from becoming lawyers. In effect, the LSBC was complicit with Canadian governments in genocidal policies with consequences that continue to disadvantage Indigenous Peoples and individuals to this day.

After the report of Canada's Truth and Reconciliation Commission in 2015, the LSBC acknowledged "the oppressive role that the colonial legal system has played, and continues to play, in the lives of Indigenous Peoples, and the role the Law Society plays within that legal system." The LSBC committed itself to eliminating systemic discrimination, and marginalization. There is no question about the need for reform of the legal profession in BC (and Canada).

Among the disastrous consequences of Canada's colonial legal system is that a disproportionate number of people needing legal aid have Indigenous ancestry. To address inequality of access to lawyers, the LSBC has over the years encouraged lawyers to volunteer pro bono services. It was also engaged in setting up the Legal Aid Society in the 1970s and now has statutory authority to appoint several board members to the government-funded Legal Services Society (Legal Aid BC).

Legal aid in BC fails to measure up to international standards, especially since the BC government's severe funding cuts in 2002. Subsequent government funding increases have not resolved disproportionate gaps faced by Indigenous people seeking needed access to lawyers for family law, child protection, criminal law, or poverty law. The LSBC has been among the legal organizations advocating for adequate public funding of legal aid.

In 1992, the BC government imposed a special sales tax on lawyers' fees which the government promised would foster "a comprehensive legal aid system" for people in BC. Successive BC governments have ignored calls to dedicate to legal aid all the funds raised by this tax. The TLABC says the BC government "underfunds legal aid by approximately $100 million annually, and Bill 21 does nothing to improve funding for legal aid."

Proponents of Bill 21 note that for over a decade before the introduction of Bill 21, discussions about licensing of paralegals and the possible merger of LSBC with BC's notaries failed to develop mutually satisfactory plans. The LSBC points out that in May 2023, the BC government rejected its request to bring into force 2018 amendments to the 1998 *Legal Profession Act* to allow licensing of paralegals.

In early 2022, the Attorney General of BC (AGBC) had announced a plan to circumvent these difficult issues by creating a single regulator for lawyers, notaries, and paralegals. The government's public engagement strategy included an invitation to respond to a September 2022 "Intentions Paper." A "What We Heard" summary appeared in May 2023. The AGBC's "update" in March 2024 showed no substantial change from the 2022 Intentions Paper.

Despite requests from many legal organizations, the contents of Bill 21 were kept from the public until first reading of the Bill in the legislature on 10 April 2024. Some of my views on its contents are reflected in LRWC's 17 April 2024 briefing paper.

The right to direct participation in public affairs

Serious questions have arisen about the BC government's intentions regarding public engagement and legislative debate. According to LSBC President, Jeevyn Dhaliwal:

> "Not only did government fail to permit full and transparent consultation, they also closed debate on Bill 21 in a manner that suggests they never intended to permit a full and open discussion on the implications of seismic changes that we view as contrary to the public interest."

The BC government's public engagement strategy on Bill 21 represents a failure to respect BC's obligations to uphold international law and standards for democratic law-making. The *International Covenant on Civil and Political Rights* (ICCPR), Article 25 guarantees that "every citizen shall have the right and the opportunity … and without unreasonable restrictions…[t]o take part in the conduct of public affairs, directly or through freely chosen representatives."

The UN Human Rights Committee (HRCttee), in its authoritative 1996 General Comment No. 25, stipulates that ICCPR Article 25 applies not just to voting rights but to the right of direct participation, including "exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves." This right to participation is undergirded by the right to freedom of expression (which includes the right to information), as well as the right to freedoms of association and assembly.

The HRCttee specified that, "[w]here a mode of direct participation by citizens is established, no distinction should be made between citizens as regards their participation on the grounds... [of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status], and no unreasonable restrictions should be imposed."

No group can legitimately be afforded more participation opportunities than others without good reason. The participation rights of one sector of society cannot be abrogated for the sake of ensuring the rights of another sector.

In 2012, the UN Special Rapporteur on the situation of human rights defenders made it clear that before a law is adopted, "it must be promulgated democratically, meaning that it should be subject to broad consultations with individuals and associations concerned, including civil society." This entails full, transparent, non-discriminatory public engagement on the full content of a draft law before it is tabled in the legislature.

In 2018 the UN High Commissioner for Human Rights issued Guidelines on the Right to Participate in Public Affairs, stipulating that this right applies to participation in "the decision-making process from an early stage, when all options are still open…" and that "revised, new or updated draft versions of documents relating to the decision(s) should be made public as soon as they are available…" with "[s]ufficient time for rights holders to prepare and make their contributions during decision-making processes…"

In 2020, the High Commissioner pointed out that "[p]rotecting and respecting the right to participation is a legal obligation for every [UN] Member State. But it is also a major asset to governments, even if not always recognized as such." She emphasized that:

> "To be 'meaningful and effective' participation must not be merely formal or tokenistic; it must have an actual impact on decisions; and be timely and sustained. And, crucially, participation must be inclusive, extending participation most especially to marginalized and vulnerable groups."

The 2007 UN *Declaration on the Rights of Indigenous Peoples* (UNDRIP), Article 19, requires that,

> "States shall consult and cooperate in good faith with the [I]ndigenous [P]eoples concerned through their own representative institutions in order to obtain their free, prior and informed consent [FPIC] before adopting and implementing legislative or administrative measures that may affect them."

BC endorsed this international standard in its 2019 enactment of the *Declaration on the Rights of Indigenous Peoples Act* (DRIPA).

Lopsided, siloed, and opaque consultation and engagement

This international human rights framework for genuine public participation was conspicuously absent in the BC government's public engagement strategy on Bill 21.

Some, but not all, LSBC Benchers were afforded the opportunity to see the draft legislation – subject to non-disclosure agreements (NDAs). The NDAs precluded those reviewing the draft legislation from discussing it even with other Benchers or with BC lawyers.

The UNDRIP duty of FPIC may have been implemented (at least in part) through consultation with individuals from some groups representing First Nations and Indigenous lawyers. There is no publicly available information on the range or identities of Indigenous groups or individuals consulted. Those consulted were reportedly subjected to NDAs.

A list of testimonials appended to a government press statement of 10 April 2024, the date of first reading, suggests that other experts were also consulted by the government, but no list of persons consulted is available. It not known how these persons were selected.

By early 2024, numerous legal organizations, including the Federation of Law Societies of Canada, were urgently asking the AGBC to make public the contents of the draft legislation. The AGBC repeatedly cited "cabinet privilege" as the reason for refusing to release the draft prior to first reading in the legislature.

NDAs meant that all persons consulted were prohibited from communicating with constituents or one another about the contents of the draft law. Selective and non-transparent consultation with undisclosed groups under NDAs violates the State duty to fulfil the right to public participation of Indigenous Peoples and British Columbians in general.

BC's public participation practices have been a concern for decades. In 2008, the BC Auditor-General made recommendations to the BC government for a province-wide framework for "strong citizen-centred public engagement." He urged public participation "based on principles of transparency and openness" with the goal of developing government policy directions that are sound, reflect the public interest, and build trust among government and the public. His recommendations were never implemented.

With some legislated exceptions, including DRIPA, the BC government considers public consultation and engagement on legislation as optional, and public engagement practices vary across ministries. The AGBC says they to work "with a variety of stakeholders to develop ways to improve public access to justice services" and encourage British Columbians "to participate in developing law, policy and programs…"

The AGBC's refusal to provide the full details of Bill 21 meant there were no reasonable opportunities for public participation in developing the law by those most directly affected, including lawyers. The UNDRIP and DRIPA duty to cooperate and consult with Indigenous Peoples does not abrogate the government's responsibility to provide all people with the information, opportunity, and time needed to participate effectively in developing legislation that affects them.

Bill 21 contemplates a fundamental shift from historic norms as well as international standards set out in the UN *Basic Principles on the Role of Lawyers*. All lawyers; notaries; paralegals; judges; justice system actors; civil society organizations, those potentially engaged in criminal, civil, or administrative matters, legal aid providers and recipients and, of course, all citizens whether or not they belong to one of the First Nations or other Indigenous Peoples, had the right to receive clear notice and give feedback on Bill 21's fundamental changes before they were tabled in the legislature.

It is not surprising that Indigenous groups selected to engage in development of Bill 21 support the result. Results of their participation are seen in Bill 21's guarantees of Indigenous representation on the regulatory board and its framework for required consultation with an Indigenous Advisory Council and restoration of Indigenous and First Nations justice systems.

Equally, it is no surprise that lawyers, who had no opportunity of meaningful engagement, are resisting the implementation of legislation that terminates their right to membership in the LSBC and their right to self-governance of their profession.

In summary, the BC government's approach was outdated, lopsided, siloed, non-transparent, and (after first reading on 10 April 2024) rushed and truncated. Public consultation and engagement strategies failed to measure up to international law, standards, or best practices. The process of consultation and engagement on Bill 21 was dramatically lacking in transparency, information about its contents, and opportunity for prior, informed public dialogue, contrary to BC's international obligations to ensure democratic law-making.

Truncated debate in the legislature

The violation of democratic principles persisted in the legislature itself. On 10 April 2024, the details of Bill 21 became public for the first time. The government's intention became clear. With support from its selected group of consultants (under NDAs) it had unilaterally decided to impose its own institutional design for governance of lawyers.

The LSBC would no longer exist. The identity of BC's 14,000 lawyers would be changed from "members" of the LSBC to "licensees" of a new 17-member regulatory body. Their only say in governance would be to elect five of its 17 members.

During the five-week legislative process, the government used its majority power to rush Bill 21 through the legislature with minimal time for debate. Elected members of the legislative assembly, Benchers, lawyers, civil society organizations, the full range of Indigenous Peoples, and the public had only days to analyse and discuss Bill 21's 317 sections – 147 pages – of complex legislation which is entirely different from its predecessor law of 30 sections. Those under NDAs remained under NDAs.

The government has been accused of a pattern of using "closure" or "time allocation" procedures. These measures were designed for use in limited circumstances. The current BC government has used these measures routinely. When Bill 21 finally went to the Committee of the Whole, it debated only 30 sections – less than 10 percent – before time allocation was called. Third reading took place in under five minutes on 15 May. Bill 21 received Royal Assent on 16 May. Its transitional sections came into force immediately.

Conclusion

The BC government's process for passing Bill 21 violated democratic principles. The government's use of dramatically different forms of engagement with Indigenous and non-Indigenous peoples thwarted the development of broader public consensus on the regulation of legal services providers.

The differential treatment of those affected by Bill 21 has exacerbated or created rifts among Indigenous and non-Indigenous lawyers. Persons from Indigenous groups reportedly engaged in co-drafting Bill 21 understandably support it. Those excluded from consultation are now engaged in litigious opposition to it. The BC government's approach has resulted in time-consuming and

costly litigation, squandering resources that could have been directed towards full, consensus-seeking participation by all those affected.

There is now a dangerous prospect that BC's example will embolden authoritarian governments to use similar anti-democratic procedures to silence members of self-governing bar associations. Canadian governments need to set an example of fulfilment of international human rights law, standards, and best practices. Canadian lawyers owe a duty to not only to BC lawyers but also to colleagues around the world.

What can we do about Bill 21? Litigation is ongoing. The transitional provisions are now in force.

Even so, the BC government retains the power to undertake to postpone implementation of the transitional provisions and revisit the legislation after the election with sincere intention to reach public consensus on a regulatory body that fully satisfies international standards for independence and self-governance of lawyers. It remains possible to restore cooperation between government and lawyers, as contemplated by the UN *Basic Principles on the Role of Lawyers,* without compromising commitments under UNDRIP and DRIPA.

Lawyers can engage their right to public participation through direct and collective action – and the ballot box – to persuade politicians to ensure full and equal implementation of international standards for protection of the rights of all, Indigenous and non-Indigenous alike.

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[*] Catherine Morris, BA, JD, LLM, has more than three decades of engagement in the field of conflict studies and practice. She is the founding director of Peacemakers Trust, a Canadian non-profit organization for education and research in conflict resolution and peacebuilding. For more than two decades she has conducted research, education, and advocacy in the field of international human rights. She served as the UN representative in Geneva for Lawyers' Rights Watch Canada (LRWC) from 2011 to October 2022 and as LRWC's transitional executive director from June 2020 to January 2022. She has conducted research and education for civil society organizations and post-secondary institutions on several continents, including the University of Victoria, Canada, and Chulalongkorn University in Thailand. Her research and writing have resulted in a number of publications on dispute resolution and international human rights.