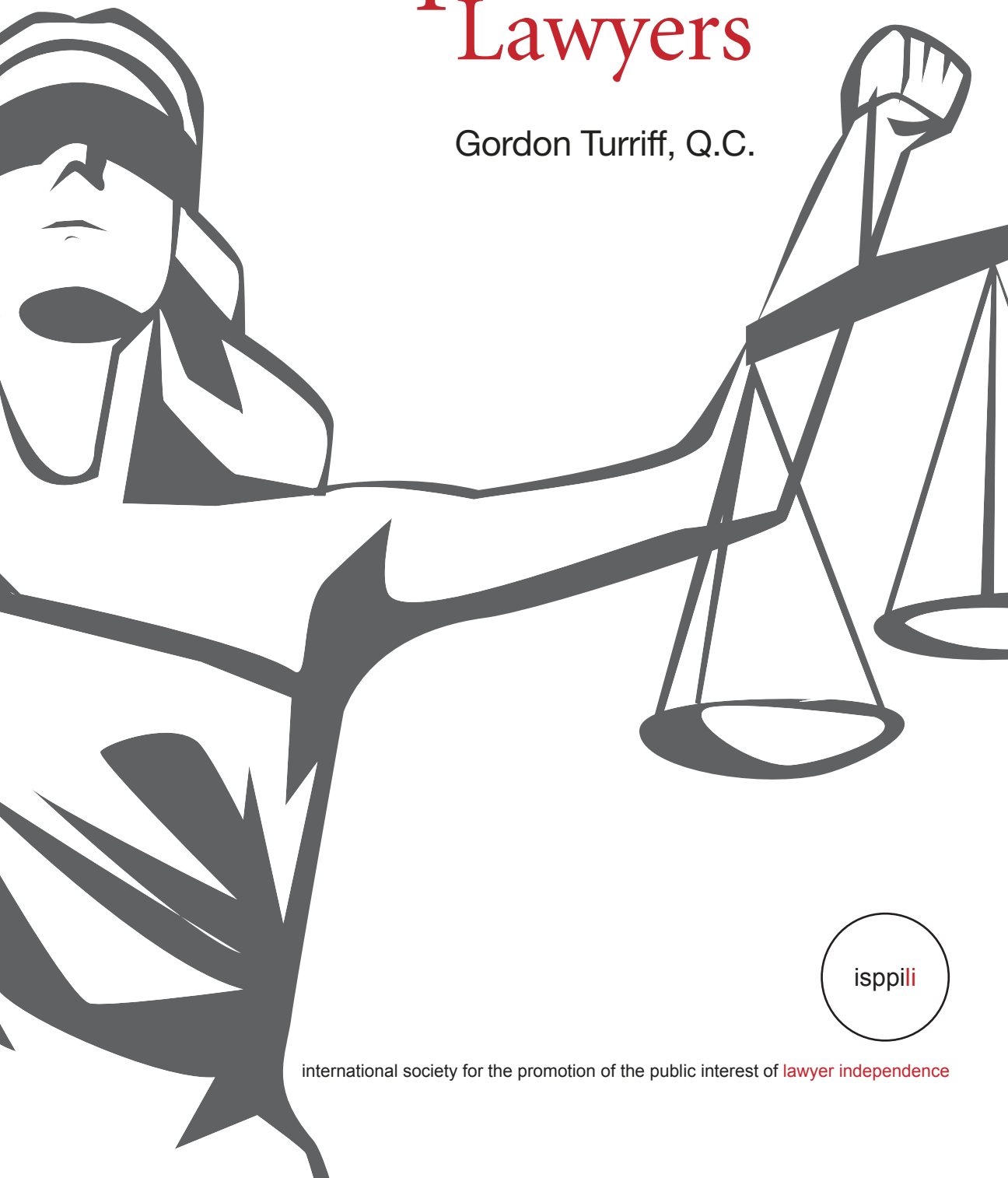
Why We Need Independent Lawyers

Gordon Turriff, Q.C.



isppili

international society for the promotion of the public interest of lawyer independence

Author's Note

I wrote this pamphlet after reading that the head of the English bar, the interest group of England's specialist courtroom lawyers, had said in 2013 that her profession could not go back to self-regulation because self-regulation was "not attractive to the public." I was surprised she'd said that because her statement implied that the English public had made an informed judgement about matters pertaining to lawyer independence and regulation of lawyers by lawyers. I was surprised because I had learned, from my experience as an independent regulator of independent lawyers in British Columbia, that most people in my province know very little about these subjects. My wife, Ellen Gerber, a lawyer, encouraged me to write the pamphlet because she's sure most people haven't thought about how lawyer independence affects their lives or what life might be like without it. She's convinced the light will go on quickly when they understand the issues. It was her idea that I write for non-lawyers.

I suspect that government in England has conditioned its public to accept that consumer protection justifies government regulation of lawyers without that public having had an opportunity to consider all the important questions or to decide what is needed or what is needed most. I wrote this pamphlet because I think we have to be sure people know what lawyer independence is and why it can't be given up. We have to be sure people understand what's at stake when a state regulates lawyers, even indirectly.

This pamphlet aims to teach and persuade. My expectation is that informed citizens will accept that matters are not as simple as the government in England might suggest; that they will decide England's bar leader was wrong to have concluded the English clock could not be turned back; and that they will conclude that interference with self-governed independent lawyers anywhere can't be tolerated.

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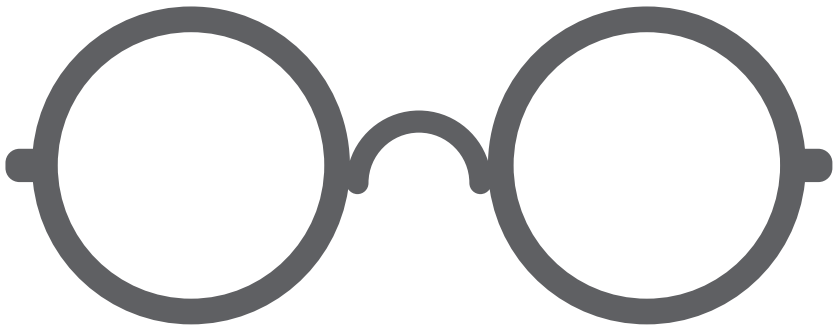

Harry Potter and the Rule of Law

Consider what happened when one of J.K. Rowling's lawyers told a secret he was bound to keep. Of course J.K. Rowling is the fabulously successful author of the amazingly popular Harry Potter series. After she led Harry through dozens of thrilling adventures [spoiler alert], he vanquished the Dark Lord, married Ginny Weasley and appeared to settle into a relatively ordinary life only Rowling could interrupt. But she went a different way, writing instead, under the name Robert Galbraith, a very good detective novel. She didn't want anyone to know she was Galbraith. She wanted to write a book to be read without her, or Harry, or the success of Harry in mind. But it wasn't to be. A lawyer in the firm of entertainment solicitors she employed in London told his wife's best friend that Galbraith was Rowling, and the news went viral. It wasn't a stunt. Rowling was very angry about the disclosure. She sued. The firm apologised, paid her legal expenses and made a substantial donation to a soldiers' charity.

You may ask: "What does Rowling aka Galbraith have to do with why we need independent lawyers?" Let me explain. It begins with the rule of law.

The Rule of Law, Harry Potter Aside

Have you ever wondered why you don't see soldiers with machine guns on our street corners? Or why you're able to help decide who decides whether we need bike lanes? Have you ever wondered why most people keep their business promises or why what happens happens when they don't? Have you ever wondered why prime ministers wouldn't be excused for over-parking or why they don't always get their own way?

The fact is you don't think about these things because you don't have to. Most Canadians are like you. Understandably, we all just get on with our lives. Those lives are good for most of us, certainly a lot better than the lives of millions of people in many countries around the world.

Why are you better off? How sure can you be about your better-offedness?

It's actually very simple. You're better off because in Canada we live under the rule of law. And you'll be better off as long as we do, unless people in other countries catch up by claiming the advantages the rule of law helps to produce. And then you'd still be at least as well off as them.

Think of the rule of law as a common understanding, on which everything else depends, about how we can best get along in all our personal, family, neighbourhood, business, community and political relationships. Think of it as the fundamental organising and civilising principle of our society.

So what *is* the rule of law? Surprisingly, even though scholars, judges, lawyers and politicians frequently refer to the rule of law, they haven't defined it very helpfully, except perhaps among themselves. But saying plainly what the rule of law means isn't as difficult as their efforts might suggest. Think of the rule of law as a common understanding, on which everything else depends, about how we can best get along in all our personal, family, neighbourhood, business, community and political relationships. Think of it as the fundamental organising and civilising principle of our society. Think of it as an acknowledgement by everyone in all our communities that our interconnected lives are too complex to be lived without order, backed by rules, but think also of the rule of law as a rejection of too much order or order of the wrong kind.

Laws are a security blanket. They help make our lives comfortable and predictable. Predictability helps us measure risk. Measured risk-taking promotes social and business activity that benefits all of us.

Laws We Like (or are willing to live with)

Still, we don't agree to be ruled by every conceivable law. Some laws are obviously bad. Many people believe there's a moral case for resisting obviously bad laws, at least non-violently. How could we accept the laws of Nazi Germany targeting Jews? How could we accept our own World War II laws victimising Japanese Canadians? These are easy cases. But for most laws, whether they're bad or good is a matter of opinion. Some people want to limit gun possession; others don't. Some people want to "occupy" public spaces; others don't want them to.

Incidentally, all the good laws count, even if we're pretty sure we could do without some of them.

> **Look what happened to Jerry Rubin.** In the 1960's, he was an outrageous thorn in the side of the U.S. government. He rallied youth against the war in Vietnam. His small group of fellow radicals included Tom Hayden, who later married the actress Jane Fonda and served for many years as a California state assemblyman and senator. Famously, they disrupted the 1968 Democratic national political convention in Chicago. Rubin definitely knew how to push government's buttons. You wouldn't say he was a respecter of laws. In time, and a little curiously, he re-invented himself as a California businessman. As it turned out though, his early free-wheeling anti-authoritarianism circled back on him: he died after having been struck by a car while jaywalking in Los Angeles. Such a little law.

Even, or perhaps especially, tyrants have little laws. But we wouldn't accept the rule of tyrants, whether they got their power by force of personality or by force of arms. We're content to be governed by laws *we've* been given a chance to reject; laws we accept because people we've chosen for that purpose have adopted them on our behalf; laws that apply to everyone, whether you're a street person or a big-wig or somebody in between; laws we know will, as far as possible, balance competing private and competing public and private interests; laws that protect women's rights, prisoners' rights, gay rights and the rights of all minorities; laws that won't be used arbitrarily; laws that allow us to air our grievances; laws that help limit the occasions for dispute; laws that help us resolve unavoidable conflicts impartially; laws that encourage fair and cost-effective dispute resolution whenever possible; and laws that promote fair and equal treatment when we ask for state help and when the state looks to us for compliance.

What is the State?

The "state" (or sometimes, but not quite accurately, "government") is our name for the people we decide can propose, make, administer and enforce the laws we accept. We shouldn't fear these people as they do their state work, but we have to watch them. That's because they're no more perfect than we are. They have jobs to protect, bosses to impress, ambitions to satisfy, political goals they want to achieve and social values they may want to spread. Sometimes they persuade themselves, or are persuaded, they're doing the right thing even though they're not.

It's safer for us to question the exercise of power than it is to be Pollyannaish about what people with power might do, even when they claim to be acting in the public interest.

We have to believe we can trust the state to act appropriately but because the state is a group of people a lot like us, only with power we've given them, we need to be politely, and we sometimes have to be noisily, suspicious. That's because it's human nature to wield a power boldly; because some people are full of themselves or power hungry; and because, almost inevitably, the limits of power are smudged at the edges. It's safer for us to question the exercise of power than it is to be Pollyannaish about what people with power might do, even when they claim to be acting in the public interest.

What is the Public Interest?

The public interest (often also called the public good) is what most of us would agree, in respect of all our relations, is good for most of us most of the time. Experience has taught us that often the public interest has to prevail over individual interests. We can't ignore red lights or perform surgery on our neighbours; children need to be educated; we should manage the internet; it would be chaos if we didn't recognise and record land ownership in a formal, public way.

Sometimes it's hard to say what the public interest is and sometimes it's hard to know when the public interest should prevail.

Consider what happened in British Columbia when a private university, Trinity Western, a faith-based institution, announced its plan to open a law school whose students would have to declare their acceptance of the "Christian belief that sexual intimacy be restricted to married men and women." You can see the difficulty facing applicants for admission who didn't believe. Should they hold their noses, accept the TWU covenant and hope for a place, or thumb their noses at what they might think is an offensive requirement? What a conundrum for those having to decide whether to walk away, passing up scarce law school spots that might otherwise be available to them when they wouldn't know whether there'd be room for them somewhere else.

Because independent lawyers in British Columbia decide who can become a lawyer, TWU needed the Law Society of British Columbia to endorse its school. Whether to endorse or not was a question of great importance because, without the endorsement, TWU law graduates wouldn't be eligible for society membership and, as a result, wouldn't be able to practise law in British Columbia. Here was a clash of basic values - freedom of religion; freedom of thought; equal opportunity for members of minority groups.

Is there a public interest in the affairs of a private university? Can't a private institution do what it wants? Aren't there private golf clubs that still won't have women members, or won't treat equally with the men those they admit? There are questions on the other side too. Why should some people, just because they don't believe, have to gamble their careers when others wouldn't have to spin the wheel? Is there a public interest in ensuring equal access to schools supplying candidates for admission to professions whose work, sometimes exclusively, serves the public good? Think, for example, of the work prosecutors do.

After an emotional debate, the Law Society's directors (known as "benchers") decided to endorse the TWU school. Their equivalents in Ontario refused to approve it and the Nova Scotia benchers okayed the school only if TWU withdrew the requirement for the declaration or allowed students to opt out of declaring.

Should TWU's private religious interests prevail over what some people consider to be the public interest in condemning discriminatory attitudes and conduct? This is a very difficult question. Leading lawyers and distinguished former judges have different views about it. As it happens, the B.C. decision has been challenged by rank and file lawyers on the ground it offends equality rights. Perhaps the B.C. benchers will change their minds. In the end, we'll probably have to wait for the Supreme Court of Canada to give the final answer.

What We Want (at least)

We sign on to our rule of law laws. By the terms of the social contract we silently make because we're citizens, the laws we accept are laws giving us a say when we want a say and laws we hope will promote, even if they won't absolutely guarantee, fairness and equality for everybody in all our communities.

Having a say doesn't just mean picking the laws we think we need. It also means defending yourself before an independent decision-maker when the state claims you've broken a law.

Being fairly treated means there has to be a good reason for everything you don't get from the state and for everything the state expects you to put up with to promote the public good. It's fair you don't get a tax break for a phony charitable donation. It's fair your vote at election time counts only once.

Being treated equally means you won't be singled out unless singling you out can be satisfactorily explained. Sometimes special treatment is good. You might be disabled and need a convenient parking space or you might be an aboriginal person deserving a leg up to try to overcome the effects of historical abuse. Or you might be the director of a public company made to report information about yourself you'd rather keep quiet, or you might be prohibited from trading in the shares of a public company because you have inside information you could use to profit at other people's expense. Here the law discriminates without being discriminatory.

Whether you've been given a chance to be heard, what is fair and what good reasons might exist for treating people differently are all necessarily determined by people who themselves must act lawfully but who aren't the elected representatives and appointed state officials who make, administer and enforce the laws. This brings us to independent judges and then to independent lawyers. Having independent judges and independent lawyers (and robust journalists too!) is how we can be sure the rule of law won't evaporate.

Only courts can judge the legality of state action. But what useful work could independent judges do if there weren't independent lawyers to bring them cases to decide? A former chief justice of British Columbia has said the answer is self-evident.

Judicial Independence

Judicial independence isn't specifically spelled out in Canada's constitution. That's probably because the rule of law is prominently referred to. The drafters of the constitution must have known how hollow the rule of law would be without wise people, secure in their positions, and answerable only to their own consciences as long as they act in good faith, to declare what the law is, who it should apply to and in what circumstances, and, most important, to decide whether the state has acted illegally.

The fact is, among lawyers, political scientists and statespeople, no one doubts judges must be independent. Independence of judges has been accepted in England since the 1700's and in Canada we've never known anything else. It would be astonishing if any government sought to interfere directly with the independence of any single judge or with judges as a group. Even indirect interference, as when a government tries to limit funding the courts need to function as courts, is always met with stern court resistance.

Only courts can judge the legality of state action. But what useful work could independent judges do if there weren't independent lawyers to bring them cases to decide? A former chief justice of British Columbia has said the answer is self-evident. We need thoughtful, highly credible and independent checkers of government conduct. But checking judges can't contribute effectively unless we have thoughtful, highly credible and independent lawyers ready to make competing arguments that will lead the courts to the truth, and who can't be stopped from asking the courts to draw the boundary lines of permissible state action.

Why Lawyers Matter

Consider the tragic case of Stanislav Markelov.
In January 2009 he was murdered on a street near the Kremlin in Moscow as he walked away from a press conference. Who murdered him is still a matter for speculation, even though a Russian neo-Nazi and accomplice were imprisoned for the crime. Markelov had been a human rights lawyer. Many of his clients were left wing activists. Others were Chechens said to be victims of unlawful conduct by officials of the Russian government who opposed the Chechen independence movement.

Markelov was either killed by someone he did or didn't know for a reason having nothing to do with his work as a lawyer; by the neo-Nazi the Russian state prosecuted; by someone seeking private revenge for something Markelov had done as a lawyer; by someone sympathetic to the Russian government acting without the knowledge or approval of state officials or at the state's direction.

Perhaps Markelov was just unlucky. Perhaps he was in the wrong place at the wrong time and was randomly shot, or perhaps he was shot in a public place for a purely personal reason. Perhaps the neo-Nazi was the killer, thinking the seat of Russian state power was the place to make his dramatic point. Perhaps Markelov had made an enemy who had no political agenda. (It's a terribly unfortunate fact that lawyers are sometimes killed by their unhappy clients and by unhappy opponents of clients). Perhaps, directly or indirectly, the Russian state was behind Markelov's death and the truth of the killing will never be known.

It does seem unlikely Markelov was a hapless victim. If he wasn't, then he died because he was a lawyer. This isn't to suggest there aren't countless cases of people around the world who are killed for being what they are. Journalists, doctors and social activists immediately come to mind. But the death of any lawyer *as lawyer* tears the fabric of our security blanket, undermining confidence in our ability to preserve the ideal arrangements we've settled on to ensure we all live together rightly and smoothly. This is so because lawyers help to create and maintain the conditions that allow the journalists, doctors and social activists to go about their important public interest work, just as much as lawyers help to build and as much as they help to oil the machinery of our private and business lives.

What We Mean By Lawyer Independence

Like judicial independence, independence of lawyers isn't expressly provided for in Canada's constitution. That doesn't mean it isn't constitutionally guaranteed. It's generally accepted that lawyer independence, like judicial independence, is an "ingredient" of the rule of law. "Ingredient" is a word used by Lord Bingham, an English rule of law champion. He said in a little book (what else?, *The Rule of Law)* that independence of lawyers is scarcely less important than is independence of judges. He isn't alone. Canada's Supreme Court has declared independence of lawyers from the state to be one of the hallmarks of a free society. And the Court of Appeal for British Columbia regards lawyer independence as a principle of fundamental justice.

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When we say lawyers are independent, we mean they do their work as lawyers free of every influence that might cloud their judgement in the service of their clients' interests. Their judgement is the product of their technical legal knowledge, special training, integrity, experience, wisdom and common sense. It's the most important thing they have to offer their clients. But all the rest of us also gain from the exercise of their judgement. We're all long term beneficiaries of their valuable work on countless business transactions and on countless cases at court. The sum total of all those transactions and all those court cases makes all our lives better.

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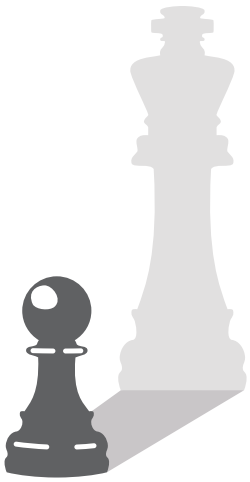
Lawyers have to be free of every limiting influence. That includes the influence of external regulators. External regulation and lawyer independence aren't bedfellows. This isn't to suggest lawyers should go unregulated. It's unrealistic to suggest they should, because they're a lot like the rest of us. They have jobs to protect, bosses to impress, ambitions

to satisfy, personal goals they want to achieve and values to which they're committed. But there's something different. The difference is that lawyers really are professional people. From their first days at law school, they learn they're expected to serve the public interest. This expectation doesn't diminish over time, even as, after they're qualified, they look out for the interests of individual clients, including wealthy citizens and big companies. Lawyers grow up in an environment of integrity. With experience, they develop the feel for managing duties that sometimes conflict, including the duty to be true to themselves; to be loyal to their clients; to be respectful of their fellow lawyers; to assist the courts; and to uphold the rule of law.

Who's a true professional? Consider the almost unbelievable story of Dick Byl, his lumber company client and the government of the province of British Columbia.

Byl is a lawyer in the small, rugged city of Prince George, a 10 hour drive north of Vancouver. His client, the Carrier lumber company, had made a contract with the provincial ministry of forests. The contract allowed Carrier to harvest trees in defined areas of public land. But seeing a need to act for political advantage, the government threw over the Carrier agreement, causing the company serious loss. Happily, as it turned out, Carrier found Byl. Courageously and resolutely, he set about doing what had to be done to get Carrier the relief it needed. This meant a lawsuit. After a great deal of trouble, Carrier triumphed. But it wasn't just that the judge found the government had breached the agreement. He also found it had held back significant documents the court, by court rule, had expected it to disclose.

Byl stood up for the underdog. He climbed over the roadblocks his client's state opponent placed in the way. He dug in and he carried Carrier to victory.



What if he'd been ho hum? Or had only been interested in earning a fee? Well, he'd have ignored the traditions of his honourable profession and Carrier would have been badly served. But even then, at least Carrier would have had a chance to win. Look at it from another angle. What if Byl could only practise law with state approval? Isn't it at least possible a government willing to ignore contracts and the rules of court might say: "Sorry, we're not able to renew your licence to practise"? That's a mild way *dictators* clear out opposition. (And we know in real life states don't always act gently).

Regulation of Lawyers

There is no case for unregulated lawyers. It's a matter of regulating them without limiting their independence. So, under longstanding regulatory arrangements in Canada, lawyers in each province and territory govern themselves. They're all members of self-financed provincial or territorial societies formed to protect the public interest in the administration of justice. These aren't what political scientists would call "interest groups", looking out for lawyers. They're regulatory, not representational bodies. They're distinct from advocacy groups like the Canadian Bar Association, which has no regulatory power and whose goal is to serve its lawyer members. (Still, the CBA does some very useful work for the public good).

Lawyers elect fellow lawyers as benchers. Benchers commit to perform the necessary regulatory functions largely as volunteers. They take satisfaction from contributing to the public welfare. That's their reward. The regulatory functions, designed to ensure there's always a supply of honest, competent, independent lawyers, include deciding what minimum educational requirements wannabe lawyers must have met; determining who would not make suitable lawyers because, for example, they can't prove they know the difference between right and wrong; setting professional practice standards that promote competence, efficiency and civility; and disciplining members whose conduct falls below the benchers' expectations.

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lawyers because, without self-governance, lawyers could not be independent. How could they be independent if, for example, they could be compelled to meet government standards of performance when acting for clients who challenge state action, or if, while they did so, they could be made to report to the state the advice they're giving the clients?

Laws in every Canadian province and territory provide the administrative machinery for lawyer self-regulation. Usually the benchers are consulted before these laws are made. The laws aid the benchers as regulators; they don't direct or confine them. The government does appoint a small number of non-lawyers to serve as lay benchers. These people, who are almost always of the highest quality in every respect, help the lawyer benchers to understand what the public interest is and encourage them not to think like lawyers all the time. The value of the contributions the appointed benchers make can't be underestimated. They participate fully in the regulatory work, but they aren't in control.

Canada's regulatory arrangements don't translate into lawyers looking out for their own and don't mean lawyers are able to preserve a monopoly over legal work. It isn't, as is sometimes suggested, a case of the fox guarding the hen-house. That's an unfair attack, implying that benchers, leading lawyers of the highest integrity, are other lawyers' stooges, incapable of appropriately carrying out the regulatory responsibilities they've undertaken in the service of the community. The false premise underlying the allegation, sometimes made, that lawyer regulators look after their own is that there are "own", other than the members of the public the benchers commit to serve, and that upstanding lawyers would want to associate themselves with, or would want to be seen to support, lawyers who bring the legal profession into disrepute. Which lawyers want to be embarrassed by questionable conduct of other lawyers?

Lawyers couldn't claim the right to govern themselves if they aimed by doing so to further their own interests. It's sometimes said self-regulation is a privilege, bestowed by the state, but there's a good argument it's not a mere privilege

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Lawyers believe they must govern themselves because, without the independence self-governance guarantees, they couldn't challenge state authority when their clients' interests demanded it and couldn't adequately advise their clients about matters in which the clients were interested that turned on or were affected by state action. Isn't it obvious that a state that regulated lawyers could manage, or at least influence, how the lawyers were able to represent their clients, even if the state didn't try to exclude all the Byls?

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Isn't it also obvious lawyers don't seek in their own interests to monopolise the performance of legal work? Wouldn't much if not most legal work be reserved to lawyers even if they didn't regulate themselves? Not many of us could diagnose and treat our own kidney ailment. Or build a house, or make a good pair of shoes, or design the Canadarm. So it's unrealistic to think people without legal training could identify all the pieces needed to complete a corporate merger or would know how to put them together the right way. And it's unrealistic to think just anyone in the community would know what facts to prove in a highly emotional family case at court, or how to prove them; or would know how to write and support an argument on a point the court could decide either way.

Our complex personal lives, our complex business arrangements and our resulting complex laws all demand highly specific legal knowledge, technical training and the application of common sense we expect years of experience to generate. The public interest in getting things right and in using courts efficiently wouldn't be served if any Tom, Thien or Mary were allowed to do most of the work lawyers are currently called on to do. Whether some work lawyers now do might safely be done by non-lawyers is a question Canadian law societies are working hard to try to answer.

In Canada, the lawyer regulators of lawyers won't concede lawyers' clients would be better served by relaxed regulation or by regulation at state hands. This doesn't mean the regulators think they're perfect or that their regulatory work shouldn't be subject to public scrutiny. Almost everything they do they do publicly, and they're subject to judicial review at court if they don't act fairly or if they stray outside the boundaries of their regulatory authority. They don't fear media attention and they don't object to oversight by a non-governmental official with the power to publicise doubtful regulatory conduct and to make recommendations about improvement, as long as that official has no authority to *require* benchers to do anything.

The reasonableness of lawyers' fees can be inquired into at court. This means lawyers can't charge just any amount for their work and it means they don't themselves ultimately determine the price for their services. Overcharging can be righted at court but it can also lead to disciplinary action by the benchers.

Losing Lawyer Independence

There are many ways lawyers could lose their independence. The state could claim the power to regulate them directly; or insist on being their partners in regulation; or restrict the ways they fund themselves as self-regulators; or require the disclosure of confidential communications between lawyers and their clients; or dictate which people could or could not become lawyers; or say which lawyers were approved for challenging state action.

Further, big clients to whom lawyers might be heavily indebted for practice expenses, or whose business lawyers couldn't afford to lose, could insist on terms of employment with the lawyers that might tend to discourage the lawyers from using their talents in the service of the public interest. Or lawyers could be allowed to sell non-lawyers majority interests in, and therefore control over, their law practices.

These are not outlandish possibilities. In Canada, the state has tried to justify compulsory disclosure by lawyers of client information, including information about their financial transactions, as a necessary step in trying to win the international war on terrorism. (Stay tuned: you can expect the question of disclosure to be answered in the Supreme Court of Canada sometime soon). In California, the state governor once withheld his required approval of funding the state bar needed to do its regulatory work when a spat developed over his proposed appointment of a judicial candidate the bar would not approve. In another well-known American example, a government lawyer was heavily criticised for writing memos about what he concluded was the lawful use, by government, of torture. Did he write what he believed, or did he write what he believed his government "client" wanted to hear? On the other side of that coin, a Canadian lawyer employed by the federal department of justice was suspended without pay after suing his "client", the government, in the belief the client had acted unlawfully when considering whether draft laws were constitutionally invalid. In Europe, employed in-house lawyers ("corporate counsel") are by definition not independent. That's because it's assumed the objectivity of their professional opinions would be "influenced by their working environment."

State regulation in England is said to be justified on the ground it will mean better, cheaper service for "consumers". Those client consumers are treated as if they were buying vegetables or motorcycles, without regard for fundamental rule of law values.

Big clients do, and big investors could, wield big power. The extent to which lawyers could maintain their independence by resisting that power depends on their personal integrity. This is where professionalism is really tested. It's where the leadership of senior lawyers, with the public good in mind, is particularly needed.

The state in England now effectively regulates lawyers, using the mechanism of a government-appointment board having authority to name itself as regulator if bodies to whom it delegates the regulatory functions do not perform satisfactorily. These bodies are said to be "independent", but in England that word is used to mean independent of the regulated lawyers, not independent of government. State regulation in England is said to be justified on the ground it will mean better,

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cheaper service for "consumers". Those client consumers are treated as if they were buying vegetables or motorcycles, without regard for fundamental rule of law values. In Australia, government and lawyers are said to be "co-regulators", acting in partnership. But how can lawyers submit to a regulatory partnership with the entity they're bound to challenge on behalf of clients to whom they owe a duty of loyalty?

The Duty of Loyalty

Everyone accepts that all lawyers owe each of their clients a duty of loyalty. That duty necessarily includes promises the lawyers make not to act against the clients' interests and not to reveal their clients' secrets to anyone without the clients' permission. The law takes great care to respect these promises. There are very, very few situations in which lawyers can be made to prefer court or state interests over their clients' interests and there are very, very few situations in which lawyers can be made to say what their clients have told them. (Definitely lawyers can't misrepresent anything at court and definitely they can't let their clients use them as instruments of fraud).

This duty of loyalty is an essential element of the rule of law. It's an indispensable attribute of lawyer independence because it's the way people can be sure their lawyers won't give them up for someone better and the way they're sure they'll get their lawyers' best advice.

By knowing lawyers won't repeat what they're told, clients can reveal everything the lawyers have to know to decide how best to advise the clients what to do. There's an important public interest, recognised repeatedly by the Supreme Court of Canada, in the promotion of open and full exchanges between people and their lawyers. It's a public interest because we all accept we can't always know, without expert help, what to do when the law confronts us, or when we confront it. If you were involved in a marital dispute, how much would you tell your lawyer, knowing he or she might pass along what you said, or knowing who he or she might pass it along to? And if your lawyer had to report on you to the state, how much would you tell him or her if, for example you were called up for having your

dog off leash, or for removing a tree you were supposed to protect, and you wanted to know whether to admit guilt or defend?

If you were J.K. Rowling, wanting to move on from Harry, wouldn't you expect to be able to guard your identity from disclosure? Rowling's lawyer slipped. He and his firm learned a hard lesson and paid a big reputational price for the mistake. Other lawyers were reminded of the importance of their duty. But what if, in the interests of consumer protection, the English regulatory board, hand in hand with government, had decided the duty of loyalty was overvalued and had directed its regulatory delegates to take it off the list of lawyer commitments, and what if protests by the delegates were ignored and the board assumed the regulatory power for itself? What if, for whatever reason, government wanted to know what Rowling was up to? Even Harry couldn't help her then.

What if the state dictated which cases lawyers were allowed to take or which lawyers could take them? Or could limit lawyers' practices to work aimed at achieving particular social or commercial goals, no matter what personal or business goals the lawyers' clients might have set for themselves?

Recently, in Canada, the prime minister wanted to appoint as a Supreme Court of Canada justice a man, Marc Nadon, whose outlook on social policy issues was thought by some to be consistent with the current views of the Canadian government. (Whether or not his outlook *did* match the government's wasn't determined in the events described here). The Supreme Court of Canada is Canada's highest court and the court in which all constitutional questions are ultimately decided. By Canada's constitution, three of the nine Supreme Court justices must have a close connection with the province of Quebec, the heart of French culture in Canada. Mr. Justice Nadon (said to be as one of the nicest people around) had once been a Quebec lawyer but he'd been a judge of the Federal Court of Canada, outside Quebec, for many years. His appointment as a Supreme Court justice (he'd actually been sworn in!) was challenged by an Ontario lawyer, later joined by other like-minded people, who believed he didn't meet the Quebec connection criteria. The prime minister had to obey the rule of law. Because there were independent

lawyers he could see were ready to dig in if he didn't do something, he asked the Supreme Court of Canada itself for its opinion on the legality of the appointment of his nominee. The court, with Mr. Justice Nadon on the sidelines, answered the question against him.

What if the government were the regulator of lawyers and had said no lawyer was allowed to argue the points that in the end prevailed?

That's part of the big question: what if the state controlled the appointment of lawyers; naming who was qualified; deciding how many lawyers there should be; who they could represent; and where they had to practise? Or what if the state dictated which cases lawyers were allowed to take or which lawyers could take them? Or could limit lawyers' practices to work aimed at achieving particular social or commercial goals, no matter what personal or business goals the lawyers' clients might have set for themselves? Or could tell you who had to draft your will? Or could set a limit on the fee a lawyer could charge to defend your son where your boy's involvement in a serious crime was alleged? Or could restrict lawyers' resources by telling them who they could or could not practise with?

What do you think? Are there independent lawyers in China, North Korea, Iran?

If lawyers in Canada weren't independent or if they couldn't regulate themselves to ensure their independence, the rule of law wouldn't necessarily collapse in a heap. State-appointed regulators of lawyers outside Canada make that point all the time. But it isn't a question of whether the sky will fall. It's a question of whether, if it did, we'd be able to lift it back into place. As a check against potential state excess, isn't it wise for us to have truly independent lawyers the state knows are ready to assist citizens with challenges to state action? And if the state has acted unlawfully, particularly in a time of crisis, isn't it then too late to try to build an inventory of independent lawyers with a tradition of integrity and an unqualified commitment to uphold the rule of law?

You decide.

For further reading, see Mr. Turriff's other publications:

1. "The Law Society, the Rule of Law and Independence of Lawyers" (2009) 67 The Advocate 477
2. "Self-Governance as a Necessary Condition of Constitutionally Mandated Lawyer Independence in British Columbia" (A speech at the Conference of Regulatory Officers, Perth, Australia, September 17, 2009), available at http://www.lawsociety.bc.ca/docs/publications/reports/turriff-speech.pdf
3. "The Consumption of Lawyer Independence" (2010) 17 Int'l Jo. of the Legal Prof. 283
4. "The Importance of Being Earnestly Independent" 2012 Mich. St. L. Rev 281

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Internationally, Mr. Turriff has been making the case for lawyer independence since 2009. He is a founding director of the International Society for the Promotion of the Public Interest of Lawyer Independence (ISPPILI). His fellow directors are:

Martin Taylor, Q.C.

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ISPPILI is dedicated to the promotion of public understanding of the vital roles independent lawyers and an independent legal profession play in the protection of the rule of law and of individual rights in a free society. ISPPILI has published this pamphlet in the hope it will generate wide discussion of this very important subject.

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