Legal Professions Regulatory Modernization

Ministry of Attorney General Public Update

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BRITISH COLUMBIA

Contents

Introduction

In March 2022, the Ministry of Attorney General (the Ministry) announced a project to modernize the regulatory framework for regulated legal professions – lawyers, notaries, and a new class of regulated paralegals – in British Columbia to help make it easier for the public to access legal services and advice. Specifically, the Ministry announced it would develop a legislative proposal for further consideration by the government.

We have organized this update based on the format of the Intentions Paper that was released in September 2022. Overall, the policy advanced by the Ministry aligns with the Intentions Paper and is based on the following key principles:

1) Situating the legal professions' regulator in the public interest and increasing access to justice in the Province
2) Ensuring the independence of legal professionals as a fundamental tenet of our justice system
3) Establishing a single regulator regime that moves towards the licensing of paralegals in B.C.
4) Modernizing the regulator's powers to progress the Law Society's work under its Innovation Sandbox
5) Advancing reconciliation and the Declaration Act on the Rights of Indigenous Peoples Act (the Declaration Act)

In advancing this work, we have conducted public consultation, consulted experts, key partners, legal professionals, and the public.

Public engagement took place from September 14 to November 18, 2022. During the engagement period, the Intentions Paper and a public survey were posted on the govTogetherBC website. Legal professionals and members of the public were invited to provide feedback by completing a survey or by sending a written submission by email to the Ministry.

At the conclusion of the engagement period, the Ministry received 776 completed surveys through the govTogetherBC website and 96 written submissions by email. The Ministry published a What We Heard Report in May 2023 to report back on the feedback received through this process.

We appreciate the deep engagement and involvement of the current regulators (the Law Society of British Columbia and the Society of Notaries Public of British Columbia). We are grateful for the input provided by the BC Paralegal Association, the BC Notaries Association, the Canadian Bar Association – BC Branch, and all other entities and individuals who have provided guidance.

With respect to the work of advancing our commitments to the Declaration Act, the First Nations Justice Council and technical representatives of the First Nations Leadership Council have provided important and extensive feedback Ministry staff have also reached out to First Nations directly.

The Independence of Legal Professionals

Our work emphasizes that independence of the Bar (and all legal professions) has been and continues to be an important principle. As noted in the Intentions Paper:

"The importance of an independent bar to the functioning of a free and democratic society cannot be overstated. The Ministry is not proposing, and has no intention of implementing, changes that would interfere with the ability of a lawyer (or other legal service provider) to fearlessly advocate for their client and provide independent legal advice to their client, even, and especially, when their client is at odds with government."

In developing a proposed model for the single regulator, the Ministry has been careful to ensure the key elements of independence of the Bar and of all legal professionals are maintained and even strengthened. A key driver of the movement to a single regulator is to improve access by ensuring there are more types of professionals—whether they are lawyers, notaries, regulated paralegals, or limited licence holders, to deliver independent legal advice and assistance to the public.

The Ministry intends that the regulator and its staff be responsible for the day-to-day regulation of legal professionals, as is the situation with the status quo with the current regulators. The key difference between the current model and the future contemplated model is that the single regulator will be responsible for all professions that are or will be licensed to practise law. This requires that all regulated professions be part of the governance process. It is intended and expected that all members of the board, regardless of how they arrive at the board and regardless of their professional designation will act in the public interest, which includes ensuring the independence of legal professionals.

Some proposed examples of how the regulator and board would continue to be free from government interference in the Ministry's contemplated framework include:

- The board of the regulator would be comprised of a majority of licensees (a minimum of 14 out of 17) and lawyer licensees would constitute a majority of the board (9 of 17)
- The government appointments (3 out of 17) would continue to act independently from government and would be appointed following a merit-based process after consultation with the board on the desired skills, attributes and experience of appointees
- The Attorney General would no longer sit on the board
- The regulator, through its board, would be given broad authority and discretion. It would have the authority to make rules it considers necessary or advisable for the performance of the duties of the regulator, including ensuring the independence of licensees. It would also have specific authorities, both mandatory and enabling. The substance of any rules would be left to the regulator. For example, while there may be a requirement in the legislation to have a Code of Professional Conduct, the substance of any Code of Conduct would be left to the regulator.
- Decisions about a licensee or an applicant would be able to be decided by a majority of the class of licensee to which they belong or are seek entry to -- i.e., lawyer, notary or regulated paralegal

For context, it is important to emphasize elements of the regulation of professions seen in other modern statutes that are not being proposed for this new regulator. For example, there would be no process for approval, review or filing of the regulator's rules by government.

Intentions Paper: Potential Reform Areas

1.0 Single Statute, Single Regulator

1.1 A single statute should regulate all current and future regulated legal service providers.

1.2 The statute should establish a single regulator, responsible for the regulation of all current and future regulated legal service providers.

Any forthcoming legislative proposal will be designed to create a single regulator that will be responsible for the regulation of lawyers, notaries, regulated paralegals, and any new legal professions that may be established through initiatives of the board. The new regulator will have oversight over all regulated legal professions, present and future, in the overall public interest.

A transition to a single regulator would take time to ensure a well-ordered changeover. Experience from other sectors suggests this process may take 18 to 24 months.

1.3 The Law Foundation, the Notary Foundation and the Ministry should explore the possibility of a single foundation model for all legal service providers.

The Ministry believes that a single foundation is prudent to ensure that the interest earned from the trust accounts of all legal professionals is handled efficiently and effectively and avoids prospective grantees from making multiple applications. This can be accomplished without major adjustments to the existing Law Foundation's mandate and structure. This mandate and structure also largely reflect the mandate of the current Notary Foundation. Seats on the Law Foundation's board would need to be designated for notaries.

2.0 Clear Mandate

2.1 The statute should assign the regulator the broad authority to regulate the competence and integrity of legal service providers in B.C. and to promote the rule of law.

The board of the regulator requires broad general rule-making authority to make the rules that it considers necessary or advisable for the performance of its duties. It is typical for this broad authority to be supported by specific authorities, some of which are mandatory and some of which are discretionary. Mandatory rule making authorities address areas that are integral to the legislative framework. For example, there would be a requirement to make rules respecting competence, professional conduct and financial responsibility of licensees, but the regulator will have discretion to determine what those rules provide. Discretionary authorities are included to provide clarity as to the types of rules the regulator may make, for the benefit of the regulated licensees and the public, but do not limit the board's general rule making authority.

2.2 The statute should set out the regulator's core responsibilities.

It is important for the core responsibilities of the regulator to be clearly set out in any proposed legislation. These include duties that are common to all professional regulators:

- Regulation of the practice of the profession, in this case the practice of law
- Establishing standards and programs for the education, training, competence, practice and conduct of the licensees

In addition, the need for licensees to be able to provide advice to their clients without fear of interference from government requires that the regulator also be entrusted with the important duty to ensure the independence of all licensees in providing committed representation to their clients.

While traditionally considered in relation to lawyers, this independence is important for all licensees who practise law—whether a lawyer, notary, a regulated paralegal, or other future categories of professionals the regulator may authorize.

2.3 The statute should set out guiding principles to assist the regulator in its decision making.

The regulator should be guided by important principles. A key consideration in the regulator's work is how its regulation of the legal professions impacts the public's access to legal services. Similarly, the regulator should regulate the legal professions in a manner that is proportionate to the risk of harm to the public.

A key priority of people living in British Columbia is to advance reconciliation with Indigenous peoples. The legislature, through the *Declaration on the Rights of Indigenous Peoples Act* includes a commitment to align laws with the UN Declaration. Guiding principles in legislation should recognize and support reconciliation and the implementation of the UN Declaration.

Another important guiding principle in carrying out its mandate is how the regulator will identify, remove, and prevent barriers to the practice of law that have a disproportionate impact on Indigenous persons and other persons or groups that are under-represented in the practice of law.

3.0 Modernized Governance Framework

Governance was a key topic of consultation and engagement. There was no single model or approach that was supported universally. As noted in the What We Heard Report:

- Many lawyers stressed the importance of a board with a lawyer majority for reasons of ensuring independence from government
- Others expressed concern over a regulator potentially dominated by one of the professions, risking a regulator that focuses on one of the professions at the expense of others
- Many advocated for a greater number of public appointees to ensure the public interest remained paramount

Concerns were also raised about ensuring diversity if the board is too small. Creating a diverse board with diverse perspectives is an important objective. However, the board is not the only mechanism to promote diversity within the regulator. Diversity is also important with respect to the appointment of committee and tribunal members, and regulator staff.

3.1 The regulator should be governed by a board composed of a statutory maximum number of directors, some of whom are elected by licensees, some of whom are appointed by the other members of the board, and some of whom are appointed by government.

The Ministry is currently considering proposing a board of 17 directors comprised of licensee directors and public appointees. The licensee directors would be both elected and appointed with the majority of these directors elected. The licensee directors would be made up of the different legal professions with lawyers constituting a majority of the board overall. The Ministry believes a balanced board will focus on the public interest and avoid a board that is merely "representative" of the interests of a particular profession.

3.2 The directors appointed by government should constitute a minority of the board, and the Attorney General should not sit as a member of the board.

The continued intention is that the directors who are appointed by government would be a minority of the board. In addition, the Attorney General would not be a member of the board.

3.3 Consideration should be given to a statutory requirement for Indigenous representation on the board.

Informed by our consultations, the Ministry's view is that there must be a minimum of two Indigenous members on the board. More Indigenous members could be achieved through elections or the appointment process.

The Ministry has been engaging Indigenous partners on how to ensure the regulator is equipped to meet the important objective of reconciliation. The Ministry is encouraged by efforts underway by legal regulators to further reconciliation. However, there is much to be done.

To that end, the Ministry is contemplating the creation of an Indigenous Council as part of the regulator's proposed governance structure. The Council would work in collaboration with the board and the staff of the regulator to advance efforts toward reconciliation.

The creation of the first set of rules provides an opportunity for the regulator to consider how the UN Declaration should be reflected in the rules that regulate the legal professions. Involving Indigenous representatives in that process is critical. Similarly, the selection of the chief executive officer is an important decision where it is contemplated the Council could have an active role.

3.4 The board and government should be required to follow nomination procedures that are fair, transparent, accountable and independent.

The intention is to ensure all appointment processes would be merit-based. With respect to government appointees of directors, consultations with the board are proposed to ensure appointed directors have the skills, attributes, and experience that the board requires best fulfil its mandate.

3.5 Director elections and appointments should be staggered, so that gaps on the board can be identified and filled.

It is a matter of good governance to ensure that the board has a mix of experienced members and new members. The Ministry is considering proposing terms of up to three years for up to six consecutive years of service.

3.6 The board's role should be focused on strategic oversight.

In the Ministry's view, and in accordance with best practices, the board should focus on strategic oversight, including approval of rules, and minimize other roles directors may undertake. Focussing the board in this way allows directors to focus on their governance role, and minimizes potential conflicts of interest.

4.0 Flexible Licensing Framework

4.1 The statute should continue to include a definition of the practice of law, which will also constitute the scope of practice for lawyer licensees.

The 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. The scope of practice for lawyer licensees will continue to encompass all legal services, as is the case under the current legislation, subject only to restrictions that may be put in place by the regulator's board or through discipline proceedings.

4.2 Notaries should have a core scope of practice set out in statute. Mechanisms should be established to allow that scope to be expanded without the need for legislative change.

The proposed legislation will modernize the notaries' scope of practice by including the following new legal services:

- drafting wills that provide for the assets of the deceased to vest in the beneficiary at age 25 (up from 19)
- allowing notaries to prepare wills that grant a life estate
- allowing notaries to prepare documents required to obtain a grant of probate in British Columbia

The latter two services likely require additional education and training; the regulator would need to establish the requirements that a notary would need to meet in order to provide these services to their Further additions enhancements to the scope(s) of practice could be accomplished through the regulator or by government regulation, instead of by legislative change, after consultation with the regulator.

4.3 The statute should authorize the delivery of legal services through licensed paralegals by setting a minimum scope or scopes of practice or requiring the regulator to do so within a prescribed period of time.

There has been considerable discussion about the best way to establish and grow a new category of legal service providers in the province. Some experts have suggested that this is best accomplished on a case-by-case basis. Others suggest that a minimum scope or scopes of practice are required to

encourage and provide clarity for those who wish to pursue this career. The Ministry supports providing authority for both methods (see 4.4. below).

The development of a minimum scope or scopes of practice for regulated paralegals requires more time and additional engagement. As a result, it is anticipated that a process will be set up shortly to continue this more detailed work. This collaborative effort is expected to be undertaken by a working group and involve additional public engagement.

As is the case with notaries, Further additions to the scope(s) of practice could be accomplished through the regulator or by government regulation after consultation with the regulator.

4.4 The statute should enable the regulator to grant licensed paralegals and notaries a license on a case-by-case basis.

The ability to grant licenses on a case-by-case basis continues to be seen as a critical tool that provides flexibility for the regulator. This would allow regulated paralegals and notaries to expand the services they provide that could go beyond the minimum scopes of practice set out either in the statute or by regulation, provided the regulator is satisfied they are competent to do so.

Another important aspect of flexibility for the regulator is having the authority to also grant licences to engage to provide some legal services without being a lawyer, notary, or regulated paralegal. This is intended to build on the "innovation sandbox" initiative of the Law Society by providing licensing authority and is emulated on the limited licensee concept seen in other professions as well as in law in other Canadian jurisdictions. This framework would replace the "no action letter" approach that the Law Society is currently limited to under its innovation sandbox.

We have heard through our engagements the value in giving this, or a similar authority to the Law Society immediately, so it can increase the number of people qualified to provide limited legal services to the public during the transition period prior to the establishment of the new regulator.

4.5 The statute should enable the creation of additional future categories of legal service providers that can be authorized to deliver specific legal services.

The legal marketplace continues to change rapidly. To provide flexibility, it is contemplated the regulator would have the ability to designate and regulate future categories of legal service providers. Practically speaking, we expect this would be initiated by the regulator on a case-by-case basis. The mechanism to accomplish this, like changes to scope of practice, is intended to be by government regulation. The Ministry anticipates that any legislative proposal would include a requirement for consultation with the regulator and would set out the considerations to be considered in such a decision, including any potential impact on the independence of the existing professions.

4.6 The statute should include a requirement for a future independent review of legal service provider regulation and its impact on access to legal services.

The Ministry continues to believe that a future independent review would be important to provide an opportunity to examine whether the new legislation and the new single regulator have been effective in achieving the legislative mandate. This review should be independent of government and result in a public report tabled in the legislature, which is customary for similar reviews of statutes. The Ministry

currently sees two separate reviews likely at separate timeframes to focus (1) on the statute generally and its impact on access to legal services and (2) on reconciliation with Indigenous peoples.

5.0 Efficient Discipline Framework

5.1 The regulator's discipline framework should reflect modern regulatory best practices and should be flexible enough to accommodate changes in process as regulatory trends evolve.

The Ministry's intention is to build on best practice and incorporate the evolution of relevant common law. This would be reflected in updated definitions of the grounds for discipline including conduct unbecoming a professional, incompetence and professional misconduct. Distinct authorities and paths are also planned to be provided to the regulator to address professional misconduct and competence matters. Appeal mechanisms to the tribunal would also be clearly established. Appeals to the Court of Appeal would continue to be available.

6.0 Enhanced Focus on Public Interest

6.1 The statute should refer to regulated individuals as licensees and not members.

Consistent with language in similar legislation regulating other professionals in British Columbia (and the legislation regulating lawyers and licensed paralegals in Ontario), it is intended that "licensee" would be used in place of "members" in any legislative proposal.

6.2 The statute should include public accountability mechanisms suitable to that of a regulator that regulates in the public interest and not that of a membership-driven association.

We heard through the engagement process that although annual general meetings may have been useful to engage the professions, they have not been a useful tool to engage with, and report to, the public. This would not preclude the regulator from holding annual (or regular) meetings with licensees or developing other mechanisms to ensure it is conscious of the professions' concerns and views.

6.3 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.

6.4 Licensees should not have the authority to approve or reject the regulator's rules as determined by the board mandate to address the public interest.

The Intentions Paper provided the specific suggestions above to enhance focus on the public interest. This remains the intent but none of this precludes the regulator from developing strong mechanisms to consult and engage licensees. While that is encouraged, it does not need to be outlined in detail in the legislation.