IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Trial Lawyers Association of British Columbia v. British Columbia,* 2025 BCSC 311

Date: 20250225
Docket: 243325
Registry: Vancouver

Between:

Trial Lawyers Association of British Columbia and Kevin Westell

Plaintiffs

And

His Majesty the King in Right of the Province of British Columbia, the Attorney General of British Columbia, and the Lieutenant Governor In Council

Defendants

Before: The Honourable Chief Justice Skolrood

Reasons for Judgment

In Chambers

Counsel for the Plaintiffs, Trial Lawyers Association and Kevin Westell:	G.R. Cameron
Counsel for the Plaintiff, Law Society of British Columbia:	C. Ferris L. Bevan J. Andrews
Counsel for the Defendants:	E. Lapper S. Ortega T. Bant K. Kotliarsky
Counsel for the Applicant, Society of Notaries Public:	I.M. Knapp S. Lee

Counsel for the Applicant, Canadian Bar Association:	C. Bildfell L. Frame
Counsel for the Applicant, Indigenous Bar Association:	D. Redman
Counsel for the Applicant, Law Society of Manitoba:	L. Troup (by videoconference)
Counsel for the Applicant, Law Foundation of British Columbia:	R. Farooq
Place and Date of Hearing:	Vancouver, B.C. January 14 and 15, 2025
Place and Date of Judgment:	Vancouver, B.C. February 25, 2025

Introduction

[1] This is an application by the defendants to set aside an appointment issued by the plaintiffs to examine the premier, the Honourable David Eby, for discovery. The defendants have proposed an alternative representative to be examined, Ms. Armitage, who they say is more suitable in that she is the person most knowledgeable about the development and enactment of the *Legal Professions Act*, S.B.C. 2024, c. 26 [*LPA*].

[2] The underlying litigation involves a challenge brought by the plaintiffs to the constitutional validity of the new *LPA*. A similar action (S-243258) has been commenced by the Law Society of British Columbia, and the two actions are to be heard together.

[3] Without meaning to oversimplify the content and objectives of the *LPA*, generally speaking it creates a new regulatory structure for lawyers, along with notaries public and paralegals, whereby all three professions are governed by a single regulatory body.

[4] The plaintiffs in both actions take the position that the *LPA* is unconstitutional because it eliminates the self-governance and self-regulation of lawyers, and thus offends the constitutional principle of an independent Bar. The plaintiffs in this case also challenge the *LPA* on the basis that it infringes the *Canadian Charter of Rights and Freedoms* [*Charter*].

[5] Little more need be said about the surrounding circumstances, although additional details can be found in the reasons for judgment of Justice Gropper in *Law Society of British Columbia v. British Columbia*, 2024 BCSC 1292.

The Plaintiffs' Claims

[6] It is useful to consider the claims advanced by the plaintiffs. The central allegation is the *LPA* violates the constitutional imperative of an independent Bar by, among other things, eliminating lawyer self-regulation, establishing a system of co-governance such that standards of practice and conduct for lawyers will be

established by non-lawyers and granting regulation-making authority to the Lieutenant Governor in Council which is intended to prevail over the regulation-making authority of the regulator. As a result of these and other provisions of the *LPA*, the plaintiffs say that the *LPA* is *ultra vires* the Province.

[7] In addition, the plaintiffs allege that the *LPA* infringes the rights of lawyers under ss. 2(d), 7 and 8 of the *Charter*.

Legal Principles

[8] The defendants' application and the plaintiffs' response engage separate lines of authority that have not been reconciled, at least in any recent case law.

[9] The defendants rely on the decision of Chief Justice McEachern, then of the Supreme Court, in *B.C. Teachers' Federation v. British Columbia*, 68 B.C.L.R. 319, 1985 CanLII 304 (S.C.) [*BCTF 1985*], which involved a constitutional challenge to legislation excluding teachers from collective bargaining rights. There, the government defendants sought to set aside an appointment to examine the Minister of Education. In granting the application, Chief Justice McEachern said as follows:

> [20] In my view, this question must be decided upon a consideration of the law relating to discovery, even though there are strong policy reasons why ministers should not, except in very special cases, be examined personally. Ministers are not defendants in the usual sense. Neither, in my view, are they directors, officers, employees or agents of the Crown for the purposes of R. 27… Rather, they are nominal parties unless there are specific allegations to the contrary, and there is so much Charter litigation that ministers cannot be expected to submit to discovery which may be endless unless there are powerful reasons justifying such a procedure.
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> …
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> [22] Thus, although the plaintiffs have a prima facie right to examine a defendant party, that right may be displaced under R. 27(4) upon showing that some other person should be examined…
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> …
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> [24] In place of the minister, the defendants have offered a knowledgeable alternative. I have no hesitation in concluding that the minister should not be examined. In fact, I do not think any minister should be examined in a constitutional challenge unless it can be shown that he has particular knowledge that cannot be obtained from some other witness. I would not exclude the possibility that it may be necessary to conduct a second

> examination, possibly of a minister, if the examination of some other officer of the Crown proves unsatisfactory, but that is not the question before me.

[10] The defendants also cite *British Columbia Teachers' Federation v. Attorney General of British Columbia*, 2008 BCSC 1699 [*BCTF 2008*], in which the Court set aside an appointment to examine the premier's chief of staff for discovery, also in constitutional litigation. Justice Rice observed at para. 80 that to require a senior political aid to appear and justify the "evolution of thought underpinning the challenged legislation" would turn every constitutional case into "political theatre" with the courts being asked to pass judgement on the legitimacy of government motivations in introducing legislation. In Justice Rice's view, this would amount to an "attack on the sovereign autonomy of the Legislature": para. 80.

[11] Justice Rice underscored the distinction, relied on by the defendants here, between the purpose and effects of impugned legislation, which is directly relevant to the constitutional analysis, and the motives of individual members of government, which is not: paras. 49–52, citing *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.*, 2 O.R. (3d) 65, 1991 CanLII 7068 (C.A.) at 111; *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3, 1998 CanLII 762 at para. 45; and *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, 1999 CanLII 649 at paras. 17, 20.

[12] The Alberta Court of Appeal recently addressed the circumstances in which a minister or former minister of the Crown could be required to submit to examination: *Forsyth v. LC*, 2024 ABCA 14. The Court said:

> [23] The law is clear. The onus is upon the party applying to question a Minister or former Minister of the Crown to meet the two intertwined criteria:
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> 1. special circumstances exist requiring the questioning of the Minister or former Minister; and
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> 2. the Minister or former Minister is the person best informed to answer the questions to be posed.
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> These criteria must be strictly adhered to. If these criteria are proven, there is a shift of the evidentiary burden to the Crown to satisfy the Court that there are persons equally well informed.

[13] For their part, the plaintiffs rely on the general principle governing examinations for discovery that the Court will not lightly interfere with a party's choice of witness to be examined.

[14] Under R. 7-2(5), the examining party has the *prima facie* right to examine the representative of its choice. However, that right is not absolute, being circumscribed by the opening words of R. 7-2 that give the court the power to otherwise order: *XS West Construction Group v. Brovender*, 2021 BCSC 917 at para. 19; *Dann v. Dhaliwal*, 2012 BCSC 1817 at para. 24. While the right of the examining party to choose the representative is an important one, it is limited by the Court's residual discretion, on application of the opposing party, to substitute another representative: *MacDonald v. Roth*, 2000 BCSC 1670 at para. 34.

[15] In *R.A.B. Properties Ltd. v. Canadian Horizons (182A) Development Corp*., 2022 BCSC 1716 at para. 93, Justice Veenstra made the point that a party seeking to displace the examining party's choice must demonstrate that the choice of witness gives rise to "overwhelming prejudice". Similarly, in *British Columbia Lightweight Aggregate Ltd. v. Canada Cement Lafarge Ltd.*, 7 B.C.L.R. 108, 1978 CanLII 372 (C.A.) at para. 10, the Court of Appeal cited with approval the case of *Barry v. Toronto & Niagara Power Co.*, 7 O.W.R. 700, [1906] O.J. No. 512 (H.C.J.), aff'd 7 O.W.R. 770, [1906] O.J. No. 535 (H.C.J.) in which it was observed that "serious injustice might be done if the right of examination for discovery was in any way to be regulated by the adverse party".

Discussion

[16] The plaintiffs submit that they seek to examine the premier on matters necessary to adjudicate the constitutional questions at issue in the litigation. They argue that he was directly involved in the development of the *LPA* and has unique knowledge about its likely impact on the independence of the Bar and about legislative alternatives that may have been considered.

[17] The plaintiffs point to a number of statements made by the premier, then in the role of Attorney General, in the Legislature as recorded in Hansard. For

example, on November 26, 2018, Mr. Eby is reported as saying “The Law Society is independent of government -- and necessarily so”. Mr. Eby is also reported to have acknowledged that the Law Society will have the authority to determine the proper scope of practice for paralegals under the new *LPA* and that the “Law Society was consulted throughout this process”.

[18] The plaintiffs submit that they should be able to examine Mr. Eby on his statement about the independence of the Law Society, which they say is a question of fact at the heart of the constitutional case, as well as whether there is a constitutional convention requiring consultation with the Law Society.

[19] The plaintiffs cite a number of authorities that they say support the proposition that a Minister of the Crown may be examined for discovery. For example, in *Smallwood v. Sparling*, [1982] 2 S.C.R. 686, 1982 CanLII 215, the former premier of Newfoundland was issued a subpoena compelling him to testify at a federal public inquiry. On application, the Federal Court Trial Division granted an injunction effectively quashing the subpoena; however, that order was set aside by the Federal Court of Appeal. The Supreme Court of Canada dismissed the further appeal. According to Justice Wilson, “there is no exemption for officials as such or for the executive as such from the universal testimonial duty to give evidence in judicial investigations”: 695. Justice Wilson acknowledged that Mr. Smallwood might be able to assert privilege in respect of certain documents or questions, but that would have to be determined based upon the specific documents or questions in issue, as there was no right to a blanket immunity: 708.

[20] In *St. Anthony (Town) v. Newfoundland and Labrador*, 2010 NLTD(G) 140 [*St. Anthony*], the applicant township sought to enjoin the respondent from removing air ambulance service and as part of its case, wanted to examine the responsible Minister for discovery. The respondent took the position that the Minister should not be subject to examination.

[21] Justice Seaborn disagreed. He cited *BCTF 1985* and held that there were specific allegations made against the Minister, particularly of bias and improper

actions, and there was no other Crown witness who would be a knowledgeable alternative to the Minister in respect of those allegations: paras. 25–26.

[22] Closer to home, in *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2017 BCSC 258 [*Cambie Surgeries*], which involved a *Charter* challenge to provisions of the *Medicare Protection Act*, R.S.B.C. 1996, c. 286, Justice Steeves gave a mid-trial ruling setting aside a subpoena issued by the plaintiffs to the Minister of Health seeking to compel his testimony at trial. He did so on the basis that the Legislature was then in session and the Minister was therefore entitled to assert parliamentary privilege: para. 56. However, Justice Steeves found that absent that privilege, the Minister could be compelled to attend and testify about certain specific statements he made that were directly relevant to the issues raised in the litigation: paras. 50–53.

[23] Respectfully, these cases do not assist the plaintiffs in resisting the defendants' application. The *Smallwood* case involved a public inquiry, not a judicial proceeding, and the central issue was the extent of Crown immunity. In *St. Anthony*, as noted by Justice Seaborn, there were allegations of misconduct specifically levelled at the Minister. In *Cambie Surgeries*, the issue was whether a Minister could be compelled to testify at trial. Justice Steeves, at para. 31 distinguished *BCTF 1985* on the basis that it was concerned with discovery representatives rather than trial witnesses.

[24] Further, none of these cases purport to depart from the general principles established by Chief Justice McEachern in *BCTF 1985* concerning the examination of Crown Ministers. Indeed, given that decision was cited in *St. Anthony* and *Cambie Surgeries*, it is apparent that *BCTF 1985* is still considered good law. This is also reflected in the test identified by the Alberta Court of Appeal in *Forsyth*, which, although worded differently, aligns well with the approach taken by Chief Justice McEachern.

[25] Indeed, I would endorse the specific formulation articulated by the Alberta Court of Appeal, which again provides that in order for a party to be entitled to examine a Minister of the Crown for discovery, the party must satisfy two criteria:

a) There are special circumstances requiring that the Minister be questioned; and

b) The Minister is the person best informed to answer the questions to be posed.

[26] The "special circumstances" that would warrant subjecting a Minister to examination for discovery would, in my view, include circumstances in which the Minister's personal conduct is put in issue by the pleadings, which was the case in *St. Anthony*.

[27] I do not view this approach as a departure from the general rule that an examining party has the right to choose the witness to be examined, subject only to the opposing party establishing "overwhelming prejudice". Rather, it reflects the principles referred to by Justice Rice in *BCTF 2008* at para. 80 concerning the separate roles of the legislative and executive branches of government and the prejudice that would arise if constitutional cases were turned into "political theatre" by compelling Ministers to testify, outside of the narrow circumstances referred to above, about the motivations of government in introducing legislation.

[28] Here, I am not satisfied that there are special circumstances that require Premier Eby to be subjected to examination for discovery, in either his current role or in his former role as Attorney General. There are no allegations made against Mr. Eby in respect of his personal conduct and, as the defendants submit, the constitutional issues in the litigation will turn on the impacts of the *LPA* on the regulation of lawyers. Mr. Eby has no special or particular knowledge about those impacts. Further, to the extent that the plaintiffs wish to explore the history and policy development behind the *LPA*, including legislative alternatives that may have been

considered, I am satisfied that that knowledge rests not with Mr. Eby but with Ms. Armitage, the discovery representative proposed by the defendants.

Conclusion

[29] The defendants' application is therefore allowed and the appointment to examine Mr. Eby for discovery is set aside. The defendants did not seek an order substituting Ms. Armitage as their discovery representative so that will not be a term of the order.

[30] Costs of the application will be in the cause.

"Chief Justice Skolrood"