VANCOUVER
05-Oct-26
COURT OF APPEAL
REGISTRY

Court of Appeal File No.: CA51535
Trial Lawyers Association of British Columbia et al v. Attorney General of British Columbia et al
Intervener's Factum

COURT OF APPEAL

BETWEEN

TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA and KEVIN WESTELL

APPELLANTS
(Plaintiffs)

AND

ATTORNEY GENERAL OF BRITISH COLUMBIA and LIEUTENANT GOVERNOR IN COUNCIL

RESPONDENTS
(Defendants)

AND

THE CRIMINAL DEFENCE ADVOCACY SOCIETY BRITISH COLUMBIA, THE LAW SOCIETY OF MANITOBA, THE FEDERATION OF LAW SOCIETIES OF CANADA, LAWYERS' RIGHTS WATCH CANADA, THE INDIGENOUS BAR ASSOCIATION IN CANADA, BRITISH COLUMBIA PARALEGAL ASSOCIATION, WORKERS FOR ETHICAL SUBSTANCE USE POLICY SOCIETY, CANADIAN BAR ASSOCIATION, THE SOCIETY OF NOTARIES PUBLIC OF BRITISH COLUMBIA, LAW FOUNDATION OF BRITISH COLUMBIA, THE ADVOCATE'S SOCIETY and BRITISH COLUMBIA ACCESS TO JUSTICE CENTRE FOR EXCELLENCE

INTERVENERS

Court of Appeal File No.: CA51536
Law Society of British Columbia v. Attorney General of British Columbia et al
Intervener's Factum

COURT OF APPEAL

BETWEEN

LAW SOCIETY OF BRITISH COLUMBIA

APPELLANT
(Plaintiff)

AND

ATTORNEY GENERAL OF BRITISH COLUMBIA and LIEUTENANT GOVERNOR IN COUNCIL OF BRITISH COLUMBIA

RESPONDENTS
(Defendants)

AND

THE CRIMINAL DEFENCE ADVOCACY SOCIETY BRITISH COLUMBIA, THE LAW SOCIETY OF MANITOBA, THE FEDERATION OF LAW SOCIETIES OF CANADA, LAWYERS' RIGHTS WATCH CANADA, THE INDIGENOUS BAR ASSOCIATION IN CANADA, BRITISH COLUMBIA PARALEGAL ASSOCIATION, CANADIAN BAR ASSOCIATION, THE SOCIETY OF NOTARIES PUBLIC OF BRITISH COLUMBIA, LAW FOUNDATION OF BRITISH COLUMBIA, THE ADVOCATE'S SOCIETY and BRITISH COLUMBIA ACCESS TO JUSTICE CENTRE FOR EXCELLENCE

INTERVENERS

INTERVENER'S FACTUM
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OPENING STATEMENT

The Law Society of British Columbia (the "Law Society") is one of 13 regulators in Canada who regulate the practice of law within their respective province or territory.

The Law Society of Manitoba (the "LSM"), is one of the other 13 regulators, and is established pursuant to *The Legal Profession Act*, C.C.S.M. c. L. 107 (the "LPA") as the regulator of the legal profession in Manitoba. Pursuant to the LPA, the LSM is to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence. In carrying out its purpose, the LSM must: (a) establish standards for the education, professional responsibility and competence of persons practising or seeking the right to practise law in Manitoba; and (b) regulate the practise of law in Manitoba.

Others in this appeal will address the requirement and importance of having an independent bar.

In considering whether Bill 21 is *ultra vires* ss. 92(13) and (14) of the *Constitution Act 1867* (the "Constitution"), it must be remembered that an independent bar, which was found to be constitutionally protected by the Chief Justice, does not operate independent from its regulator but, rather, is subject to the rules, code, competencies, discipline, and the like, as dictated by the regulator. As such, to truly have an independent bar, the regulator itself must be, and be seen to be, independent.

The LSM has intervened to provide its perspective on three narrow points that centre on the regulator of the legal profession.

PART 1: STATEMENT OF FACTS

1. The facts at issue are as set out in the Appellants' factums.

PART 2: ISSUES ON APPEAL

2. The LSM has been granted leave to address three points:

(a) The composition of the Board pursuant to section 8 of Bill 21;

(b) The broad ability of the Lieutenant Governor in Council to make regulations as contemplated under Part 17 of Bill 21; and

(c) The Chief Justice's findings as it related to the LSM Board.

PART 3: ARGUMENT

3. The LSM submits that to have an independent bar, one must have an independent regulator. It is simply not sufficient for legislation to say there exists a mandate for a regulator to be independent. Rather, the legislative framework by which the regulator is created and operates must give rise to an organization independent from the will of the government of the day or third-party influence.

4. This necessarily means that such things like the composition of the Board, which runs the regulator, and the ability for government to insert itself into the operations of the regulator, must be considered.

5. The regulator of a legal profession is integral to the creation and maintenance of an independent bar. This was expressly found by the Saskatchewan Court of Appeal in *Merchant v. Law Society (Saskatchewan)*, 2002 SKCA 60:

> 57 We now arrive at a consideration of the purpose of the Act and the provision in question. The purpose

> of the Act seems obvious to us. Legislation which creates self-governing professions does so in the interests of society as a whole and for the protection of the public. This Act is no exception. It demands that the Law Society regulate the conduct of its members. **It assists in the creation of an independent bar as one of the institutions of a democratic society.** It does this by providing for the many aspects of the regulation of the profession as outlined in the review of the Act.
>
> 58 As to the purpose of the provision, one cannot hope to maintain an independently regulated profession if it were permitted to market itself in a misleading manner. The provision sets a standard, not an absolute one, but a standard which depends on an interpretation of what would be "reasonably misleading" which requires the benchers and a hearing committee to determine what "reasonably misleading" is in any given case.
>
> 59 **The courts and the benchers share the same ideals regarding the need to maintain an independent and strong bar** (emphasis added)

6. While law societies derive their authority from statute, they are independent policy makers in specific areas with broad mandates to determine public interest. The essential government policy reflected in their home statutes is just that – it is the law societies who are to determine the requirements of the public interest within their sphere of regulation.

7. Self-Regulating bodies, such as the LSM and the Law Society, are created not to preserve a monopoly but to provide protection for the general public that seeks the services of lawyers.[1] The general public cannot be properly served unless the bar is independent, representing that public without fear or favour.

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[1] *Green v. Law Society of Manitoba*, 2015 MBCA 67, affirmed 2017 SCC 20, at para 12

8. It is the governing body that is in not only in the best position to determine issues such as misconduct and incompetence[2], but they ought to be in that position in order to maintain the high standards of the legal profession and therefore the integrity of our system of justice[3].

9. Law societies are to be left to govern the profession independently. A very limited role is preserved for government. For the purposes of regulating the profession, law societies have a statutory mandate to determine the public interest independent from government. Consistent with this, law societies are funded by their members, rather than by government[4].

10. In Canada, the independence of lawyers has been assured by two fundamental things:

a. the devolution of regulatory powers to a regulator that is itself independent, has broad power to determine and act in the public interest, and is within the control of lawyers themselves; and

b. restraint on the part of government from interfering in that regulation[5].

11. As noted by Justice Estey in *A.G. Can. v. Law Society of B.C.*, [1982] 2 S.C.R. 307, at para 335 "*regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference*".

12. The enabling legislation must be assessed as to whether there has been devolution of regulatory powers and restraint on the part of government – in practical effect.

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[2] See *Pearlman v. Manitoba Law Society Judicial Committee, [1991] 2 S.C.R. 869, para 25*
[3] *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, paras. 16 and 19
[4] Kosokowsky Aff. 2, para. 16 - JB 64 pg. 7214
[5] Kosokowsky Aff. 2, para. 31 - JB 64 pg. 7214

13. In *Reference Re: Impact Assessment Act*, 2023 SCC 23, the Court discusses the difference between legal effects and practical effects.

> 104 In contrast to legal effects, practical effects are the "actual or predicted results of the legislation's operation and administration" (Morgentaler, at p. 486). The practical effects of a law may shed light on its essential character (Canadian Western Bank, at para. 26; Reference re Genetic Non-Discrimination Act, at paras. 30 and 51; References re GGPPA, at para. 51). But in some cases, a law's practical effects will not be particularly helpful in the characterization exercise (References re GGPPA, at para. 78). Ultimately, it is not for this Court to assess the effectiveness of the scheme or to attempt to predict its practical consequences in the absence of relevant evidence (para. 78).

Board Composition

14. In *Re: Law Society of Manitoba and Savino* (1993) 1 D.L.R. (4th) 285, Monnin CJM noted[6]:

> 20 Our legislature has given the benchers the right to pass rules and regulations as well as the right to enforce them. **It would be ridiculous and lacking in common sense to call upon another body of men and women to hear and dispose of complaints of professional misconduct.** Professional misconduct is a wide and general term. It is conduct which would be reasonably regarded as disgraceful, dishonourable, or unbecoming of a member of the profession by his well-respected brethren in the group — persons of integrity and good reputation amongst the membership.
>
> 21 **No one is better qualified to say what constitutes professional misconduct than a group of practicing barristers who are themselves subject to the rules established by their governing body**. (emphasis added)

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[6] Quoted with approval by Iacobucci J., in *Pearlman, supra*.

15. If the Court accepts, as is argued by the Law Society, that self-governance and self-regulation is required for independence of the bar, the Court needs to consider the practical effect of the Board composition as proposed under the Bill.

16. A board not within the control of lawyers themselves is, by definition, not an independent/self-regulating body. The body, of course, carries out its work through its board. As such, when the board, at any given time, is carrying out its work without a majority of lawyers present, it cannot be said to be acting as a self-regulating body.

17. Under Bill 21, once the Board is fully populated, lawyers hold a majority by merely one person. It is not difficult to see that the absence of just one lawyer at any given meeting of the Board could render the Board not "self-governing".

18. This would be a marked departure from the regulating boards of the legal profession across Canada.

Regulations

19. Restraint is consistently shown on the part of governments in Canada to refrain from interfering in the regulation of lawyers.

20. It must be the regulator (an independent regulator), and the regulator alone, that determines what is in the public interest when it comes to the provision of legal services in the province.

21. In *Law Society of British Columbia v. Trinity Western*, 2018 SCC 32, the Court at para 38 concluded "In sum, where legislatures delegate regulation of the legal profession to a law society, the law society's interpretation of the public interest is owed deference. This deference properly reflects legislative intent, acknowledges the law society's institutional expertise, follows from the breadth of the "public interest", and promotes the independence of the bar".

22. In *Pearlman,* the Court confirmed that where the legislature has seen fit to create a self-governing body, it must permit that body to govern without direction or influence from government:

> 41 It is appropriate at this juncture to mention the legislative rationale behind making a profession self-governing. The Ministry of the Attorney General of Ontario produced a study paper entitled *The Report of the Professional Organizations Committee* (1980) which, I believe, provides a helpful analysis of this rationale. The following extract from p. 25 is apposite:
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> ***
>
> On the other hand, where the legislature sees fit to delegate some of its authority in these matters of public policy to professional bodies themselves, it must respect the self-governing status to these bodies. ***Government ought not to prescribe in detail the structures, processes, and policies of professional bodies. The initiative in such matters must rest with the professions themselves, recognizing their particular expertise and sensitivity to the conditions of practice.*** In brief, professional self-governing bodies must be ultimately accountable to the legislature; but they must have the authority to make, in the first place, the decisions for which they are to be accountable. [emphasis original and added]

23. The ability for the government to override the decisions of the regulator by the passing of a regulation runs contrary to the ideas expressed by the Courts above.

24. There is no independence or deference available to the regulator if the government has a trump card to be played.

25. The mere existence of that card is the issue. The regulator and the public must hope and rely on the government of the day to show restraint to not use the regulating power government has granted to itself

LSM Board

26. Chief Justice Skolrood referred to and relied on the board composition of the LSM in his consideration of whether Bill 21 was constitutional.

27. The Chief Justice found:

> 54. Manitoba and Québec are also particular outliers. Manitoba does not meet the LSBC's definition of self-governance as only 12 of its 25 benchers are lawyers elected by lawyers. The other 13 benchers consist of four appointed lawyer benchers, six appointed lay benchers, one articled student elected by the articling class, the immediate past president of the Law Society of Manitoba, and the Dean of the Faculty of Law of the University of Manitoba. Appointed benchers are selected through a committee process established by the Law Society of Manitoba.

55. While the Chief Justice was focused on the number of elected lawyers, he did not appear to consider two key differences between the LPA and Bill 21.

56. First, none of the appointed benchers (lawyer or lay benchers) under the LPA are appointed by government. Second, the appointed lawyer benchers are appointed by the balance of the benchers who have been duly elected.

57. These are important distinctions.

58. The population of the LSM board proceeds as follows. First, an election takes place wherein 12 lawyers are elected to the board.

59. In addition to the 12 elected lawyers, an articling student is elected by the students in the Bar Admission program and, by virtue of their positions, the Dean of the Faculty of Law at the University of Manitoba and the past president of the Law Society, who will be a lawyer as only a lawyer can be president, are also members of the board.

60. It is this group, the 12 elected lawyers and the 3 additional members, who appoint four additional practicing lawyers to the board. It is, in essence, the elected

benchers, 12 of 15 members at this point, who appoint the four additional lawyers after consideration is given to the need for representation by region, demographics, type of law practice, or professional, leadership, or management skills (section 7(1) of the LPA).

61. The elected Benchers control this process. Not government. Not non-lawyers. It is the elected benchers who are further self populating with a goal to increase diversity following their own election. The legislation sets this out; the election occurs and then the board appoints four additional lawyers.

62. The LSM board is an example of ensuring independence and self-governance while not relying solely on elected lawyers. The key, however, which was not explored by the Chief Justice, is that the process remains within the control of the elected lawyers and lawyers themselves.

PART 4: NATURE OF ORDER SOUGHT

63. The LSM seeks an order that no costs or disbursements be awarded for or against the LSM in respect of these Appeals.

Dated at the City of Winnipeg in the Province of Manitoba this 5th day of October, 2026.

Thompson Dorfman Sweatman LLP
Per: Lynda K. Troup

Counsel for the Intervener
The Law Society of Manitoba