

69 W.W.R. 475, (sub nom. Reference Re Powers of Notaries Public in British Columbia) 6 D.L.R. (3d) 447

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Reference re Notaries Public Society (British Columbia)

Reference re Society of Notaries Public of British Columbia

British Columbia Court of Appeal

Davey, C.J.B.C., Robertson and Nemetz, J.J.A.

Judgment: June 23, 1969

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Counsel: John L. Farris, Q.C., and J. Giles, for law society of B.C.

L. S. Parsons, for society of notaries public.

Subject: Public

Professions and Occupations --- Notaries public -- Powers.

Professions and Trades -- Notaries Public -- No Power to Incorporate Companies -- Notaries Act, S. 15 (1).

A notary public, qualified and enrolled under the Notaries Act, RSBC, 1960, ch. 266, does not have and may not exercise the right and power for reward to prepare documents necessary for the incorporation of a corporation, or to make application therefor.

The judgment of the court was delivered by Robertson, J.A.:

1 An order in council passed under the *Constitutional Questions Determination Act*, RSBC, 1960, ch. 72 set out secs. 15 (1) and 16 of the *Notaries Act*, RSBC, 1960, ch. 266, and the exceptions to the definition of "practice of law" in sec. 111 of the *Legal Professions Act*, RSBC, 1960, ch. 214. It recited that doubt existed whether or not the provisions mentioned or any other law conferred upon a notary public the right and power to incorporate companies and recited that the law society of British Columbia and the society of notaries public of British Columbia had

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requested the attorney-general to place a question before the court of appeal, and the order then placed before this court the following question:

Does a Notary Public, qualified and enrolled under the Notaries Act, have and may he exercise the right and power for reward to prepare documents necessary for the incorporation of a corporation and to make application therefor?

2 Sec. 15 (1) of the *Notaries Act* reads as follows:

15 (1). Subject to section 21, every barrister and every solicitor enrolled under the *Legal Professions Act* and every Notary Public qualified under this Act has and may use while so enrolled or qualified the style and title of 'Notary Public in and for the Province of British Columbia,' and, save as in this Act provided, has and may exercise while so enrolled or qualified the right and power to

(a) draw, pass upon, keep, and issue deeds, contracts, charter parties, and other mercantile instruments within the Province;

(b) draw and supervise the execution of wills of the class prescribed by the by-laws of The Society of Notaries Public;

(c) attest or protest all commercial instruments brought before him for attestation or public protestation;

(d) administer oaths, affidavits, affirmations, or statutory declarations that may or are required to be administered, sworn, affirmed, or made by the law of the Province, or of any other Province or territory of Canada, or of Canada, or of any country other than Canada;

(e) perform such duties as may be authorized or prescribed by Act of the Legislature.

3 Sec. 72 of the *Legal Professions Act* reads in part as follows:

72. No corporation and no person other than a member of the Society in good standing shall, subject to the *Inferior Courts Practitioners Act*, engage in the practice of law, except that

4 None of the exceptions is relevant here.

5 Sec. 111 of the *Legal Professions Act* reads in part as follows:

111. In this Act and in any rule made under this Act, unless the context otherwise requires,

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'practice of law' includes

(a) appearing as counsel or advocate;

(b) drawing, revising, or settling

(i) any petition, memorandum of association, articles of association, application, statement, affidavit, minute, resolution, by-law, or other document relating to the incorporation, registration, organization, reorganization, dissolution, or winding-up of a corporate body;

(ii) any document for use in any proceeding, judicial or extra-judicial;

(iii) any will, deed of settlement, trust deed, power of attorney, or any document relating to any probate or letters of administration, or the estate of any deceased person;

(iv) any document relating in any way to proceedings under any Statute of Canada or the Province;

(v) any instrument relating to real or personal estate which is intended, permitted, or required to be registered, recorded, or filed in any registry or other public office;

(c) doing any act or deed or negotiating in any way the settlement of, or settling, any claim or demand for damages founded in tort;

(d) agreeing to place at the disposal of any other person the services of a barrister or solicitor;

(e) giving legal advice; but it does not include any such act if not done for or in expectation of any fee, gain, or reward, direct or indirect, from any other person; and does not include the drawing or preparing of any instrument by a public officer in the course of his duty, or the lawful practice of a Notary Public;

6 Counsel for the law society submitted that the preparation of documents necessary for the incorporation of a company and the making of application therefor are not part of "the lawful practice of a Notary Public" (the phrase at the end of sec. 111 quoted above) either by statute or at common law. So far as common law was concerned he referred us to the rights and powers that notaries had in England on the date when English law was declared to be in force in British Columbia and he cited a number of books to show that none of them mentioned incorporation of companies as one of the rights which notaries public exercised. The books which he cited were all three editions of *Halsbury, Brooke's Notary*, C.E.D. (Western), and *Russell on Canadian Notaries*. Counsel for the society of notaries public was not able to cite anything to the contrary. I am satisfied that, apart from statute, the functions of notaries public in England and in British Columbia have never included the incorporation of companies.

7 I come now to the statute law. Reading the last part of par. (e) in the definition of "practice of law" in sec. 111 of the *Legal Professions Act*, it is clear that that Act is to be read in conjunction with the statutory provisions as to the practice of notaries public. Par. (b) in the definition deals with the "drawing, revising, or settling" of documents

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and instruments of various descriptions. Sec. 15 (1) of the *Notaries Act* sets out five powers, of which (a) and (b) have to do with the drawing of certain documents and instruments. In sec. 111, par. (b) (i) reads:

111. (b) (i) any petition, memorandum of association, articles of association, application, statement, affidavit, minute, resolution, by-law, or other document relating to the incorporation, registration, organization, reorganization, dissolution, or winding-up of a corporate body;

and par. (b) (iii) refers to "any will." The power of notaries with respect to wills under par. (b) of subsec. (1) of sec. 15 of the *Notaries Act* is limited to "wills of the class prescribed by the by-laws of The Society of Notaries Public." Par. (a) of the same subsection refers to three specific classes of instruments -- deeds, contracts and charter parties -- and to one general class -- other mercantile instruments. Any specific reference to matters such as those mentioned in par. (b) (i) of sec. 111 of the *Legal Professions Act* is conspicuous by its absence. To my mind it is a fair inference that it was not intended that the things which a notary might do should include the matters with respect to corporate bodies that are referred to in the definition of practice of law in the *Legal Professions Act*.

8 Further, as to the statute law, counsel for both parties were agreed that, if the right in question is to be found anywhere, it must be found in the words "other mercantile instruments" in sec. 15 (1) (a) of the *Notaries Act*. I think that this submission was correct and I shall next consider the matter on that basis.

9 A series of dictionary definitions of "mercantile" and of the word "merchant," with which it is connected, cited by counsel for the law society, indicate a meaning of "mercantile" which does not include a relation to the incorporation of companies. The following authorities bearing on the question were cited to us: *Pearse & Edworthy Bros. v. Bjorkdale (R.M.)*; *B. F. Harris Co. v. Bjorkdale (R.M.)*, [1929] 1 W.W.R. 682, 23 Sask. L.R. 386 (C.A.), and *In re Notaries Act*; *In re Law Society of B.C. and Proctor*, [1948] 1 W.W.R. 576, reversed [1950] 1 W.W.R. 1110 (B.C.). *Stevens on Mercantile Law* was referred to from the bench.

10 I shall not discuss these definitions or authorities in detail, but shall content myself with saying that, in my opinion, it is abundantly clear that no statute has enlarged the functions of notaries public to include the incorporation of companies.

11 I would therefore certify to the lieutenant-governor in council the opinion on the question referred that a notary public, qualified and enrolled under the *Notaries Act*, does not have and he may not exercise the right and power for reward to prepare documents necessary for the incorporation of a corporation or to make application therefor.

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