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1998 CarswellBC 2199

Law Society (British Columbia) v. Gravelle

The Law Society of British Columbia, Petitioner and Marian B. Gravelle, Respondent and The Society of Notaries Public of British Columbia, Intervenor

British Columbia Supreme Court

Bauman J.

Heard: July 24, 1998
Judgment: October 9, 1998
Docket: Vancouver A964141

Counsel: Elizabeth B. Lyall, for the Petitioner.

Dwight H. Whitson, for the Respondent.

Adrian Chaster, for the Intervenor.

Subject: Civil Practice and Procedure; Public

Barristers and solicitors --- Organization and regulation of profession -- Practice of law -- Unlawful practice -- Notaries public

Applicant law society applied for declaration that respondent notary public engaged in unauthorized practice of law and for injunction enjoining her from such practice on ground that notary gave client legal advice on probating will -- Application granted -- Sufficient evidence to conclude beyond reasonable doubt that notary gave legal advice and offered to prepare documents relating to probate of will in expectation of fee -- Section 18 of Notaries Act outlining rights and powers of members does not expressly authorize notary to advise on probate matters -- Common law does not expressly authorize notaries to practice in probate matters -- Notaries' practice in probate matters is unauthorized practice of law as defined in s. 1 of Legal Profession Act -- Legal Profession Act, R.S.B.C. 1996, c. 255, s. 1 -- Notaries Act, R.S.B.C. 1996, c. 334, s. 18.

Cases considered by Bauman J.:

Bursey v. Bursey (1966), 51 M.P.R. 256, 58 D.L.R. (2d) 451 (Nfld. T.D.) -- referred to

R. v. Scriveners' Co. (1830), 109 E.R. 540 (Eng. K.B.) -- considered

Reference re Notaries Public Society (British Columbia) (1969), 69 W.W.R. 475 (B.C. C.A.) -- considered

Statutes considered:

Court of Probate Act, 1857 (20 & 21 Vict.), c. 77

Generally -- considered

English Law Ordinance, 1867, S.B.C. 1867, No. 70

Generally -- considered

Interpretation Act, R.S.B.C. 1996, c. 238

s. 1 "Act" -- referred to

Judicature Act, 1873 (36 & 37 Vict.), c. 66

Generally -- considered

Law and Equity Act, R.S.B.C. 1996, c. 253

s. 2 -- considered

Legal Profession Act, R.S.B.C. 1996, c. 255

Generally -- considered

s. 1 "practice of law" -- referred to

s. 1 "practice of law" (b)(iii) -- considered

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Notaries Act, S.B.C. 1926-27, c. 49

s. 13 -- considered

Notaries Act, R.S.B.C. 1960, c. 266

s. 15 -- considered

Notaries Act, R.S.B.C. 1996, c. 334

s. 18 -- considered

s. 18(f) -- referred to

Notaries Public Appointment Act, 1872, S.B.C. 1872, c. 8

s. 2 -- referred to

Solicitors Act, 1932 (22 & 23 Geo. 5), c. 37

s. 47 -- considered

Rules considered:

Probate Rules, 1925

R. 2 -- considered

Tariffs considered:

Rules of Court, 1990, B.C. Reg. 221/90

App. B, r. 2, Scale of Costs, Scale 3 -- referred to

APPLICATION by law society for declaration that notary public engaged in unauthorized practice of law and for injunction enjoining notary from such practice.

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***Bauman J.*:**

I. Introduction

1 I begin with a question:

> Could a notary public lawfully advise and assist in the probating of wills in England on 19 November 1858?

2 Legal relevance, not idle curiosity, prompts the question. Its answer will assist in the disposition of the issue before me.

3 The Law Society says that Marian Gravelle engaged in the unauthorized practice of law at Sparwood, British Columbia on 6 May 1996. It is said that she gave legal advice on the probating of a will.

4 Ms. Gravelle is a notary public. She denies the Law Society's allegation.

5 The intervenor, The Society of Notaries Public, says that in any event, Ms. Gravelle was fully entitled to do that which she is alleged to have done.

6 The author of *The Origin and Historical Development of the Profession of Notaries Public in England* (Cambridge: W. Hefler and Sons Ltd., 1926) suggests (at 124) that the decision in *Harrison v. Smith* was the culmination of "the bitter struggle between the various non-forensic branches of the legal profession". That decision marked the "triumph of the attorneys and solicitors over their rivals, the scriveners and the notaries".

7 *Harrison v. Smith* was decided in 1760. Two hundred and thirty-eight years later the struggle continues in British Columbia. One hopes, however, that it is marked, not by bitterness, but by principled disagreement.

II. Issues

8 I will deal in turn with these issues:

> (i) Did Marian Gravelle offer to advise or assist in the probate of a will?
>
> (ii) Is s. 18 of the *Notaries Act*, R.S.B.C. 1996, c. 334 exhaustive of a notary's jurisdiction in British Columbia?
>
> (iii) If it is not, were notaries probating wills in England on 19 November 1858 such that the authorization

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to do so became part of the law in British Columbia, pursuant to The *English Law Ordinance, 1867*?

III. Disposition

(i) Did Gravelle offer to probate?

9 On 6 May 1996, a private investigator retained by the Law Society attended at Ms. Gravelle's office in Sparwood, British Columbia.

10 The investigator, Ms. Lefebvre, advised Ms. Gravelle that her father had died and that she needed assistance "in probating his estate."

11 It is Ms. Lefebvre's evidence that Ms. Gravelle during the course of the meeting:

- advised her on gaining access to her father's safety deposit box;
- advised her on the necessity of doing a will search and the cost thereof;
- asked about the nature of her father's assets;
- took notes and recorded information such as Ms. Lefebvre's address, telephone number, whether she had siblings, and particulars of her deceased father, including his address and age at death;
- enquired about documentation concerning the deceased's assets;
- indicated that she had sufficient information to open a file;

12 In paragraph 10 of her affidavit, Ms. Lefebvre deposes:

> I asked Ms Gravelle how she could help me. She said that she would type up the documents and direct me. She told me that if there was no Will then releases from the remaining family members would have to be signed. She then asked me if there was any animosity between myself and my siblings (I had told her I had two brothers and one sister). I told her that there was not. Ms. Gravelle said that we would need more information, such as my father's tax returns, copies of registration of vehicles and information on the house and property.

13 Finally, Ms. Gravelle indicated, according to the investigator, that she generally charged a flat rate and not a percentage of the value of the estate. Ms. Gravelle later indicated that her fee, including disbursements, would be in the range of $1,000.

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14 Ms. Gravelle has filed a lengthy affidavit upon which she was cross-examined.

15 In paragraph 3 Ms. Gravelle deposes:

> I am well aware that as a Notary Public, I am prohibited from drawing, revising, or settling, for or in expectation of a fee, gain or reward, a document relating to any probate letters of administration for the estate of a deceased person. On the basis of this general awareness, I did not offer or hold myself out in any way to Ms. Tanya "Smythe" as being in any way entitled or qualified to provide to her for or in the expectation of a fee, gain or reward, any of the legal services relating to drawing, revising, or settling, a document relating to any probate or letters of administration for the estate of a deceased person.

16 It is telling that Ms. Gravelle has misquoted the relevant section of the *Legal Profession Act*, R.S.B.C. 1996, c. 255. That section does not refer to "a document relating to any probate or letters of administration *for* the estate of a deceased person."

17 The definition of "practice of law" in the act reads:

> "**practice of law**" includes
>
> . . . . .
>
> (b) drawing, revising or settling
>
> . . . . .
>
> (iii) a will, deed of settlement, trust deed, power of attorney or a document relating to any probate or letters of administration or the estate of a deceased person,
>
> . . . . .

18 The phrase "a document relating to ... the estate of a deceased person" covers much broader conduct than does Ms. Gravelle's version of the definition.

19 This confusion may lie at the heart of what I have found to be her misunderstanding of what amounts to the "practice of law."

20 Counsel for the Law Society submits that quite apart from the evidence of the investigator (whose evidence I accept) Ms. Gravelle's own evidence in her affidavit and on cross-examination is sufficient to found a breach of the *Act*.

21 Counsel cites these extracts from the evidence of Ms. Gravelle:

> With this background experience and knowledge of estate work and the distinction between the practice of

law and my practice as a Notary Public in mind, I proceeded to discuss with Ms. "Smythe" the estate situation she said she faced in relation to her father's estate. (emphasis added by counsel for the petitioner)

Affidavit of Ms. Gravelle, paragraph 5, Tab 11, Volume I, Petitioner's Amended Chambers Brief.

I took the information required from her for a Will search and I told her that I could apply for that for her...

Affidavit of Ms. Gravelle, paragraph 7, Tab 11, Volume I, Petitioner's Amended Chambers Brief.

I continued to ask Ms. "Smythe" further questions regarding the assets of the estate that she was there to discuss. I advised her that I could probably draft the necessary letters for her signature to write to the banks. (emphasis added by counsel for the petitioner)

Affidavit of Ms. Gravelle, paragraph 8, Tab 11, Volume I, Petitioner's Amended Chambers Brief.

Regarding income tax, I do recall advising her that income tax would have to be filed ... and that no part of the estate could be distributed without releases from the income tax department. (emphasis added by counsel for the petitioner)

Affidavit of Ms. Gravelle, paragraph 8, Tab 11, Volume I, Petitioner's Amended Chambers Brief.

... Ms. "Smythe" states that she told me that her eldest brother was interested in purchasing the property to keep it in the family ... I recall advising her that the best way to arrive at a sale price would be to have the property appraised through a qualified B.C. appraiser and that her brother's portion of the estate could be used toward payment of the purchase price. (emphasis added by counsel for the petitioner)

Affidavit of Ms. Gravelle, paragraph 9, Tab 11, Volume I, Petitioner's Amended Chambers Brief.

... I did tell her ... that I would require copies of birth certificates to apply for Canada Pension Plan benefits. (emphasis added by counsel for the petitioner)

Affidavit of Ms. Gravelle, paragraph 10, Tab 11, Volume I, Petitioner's Amended Chambers Brief.

I am very clear in my recollection that I told her that she will not have to attend court as the probate order she would receive was a desk order... (emphasis added by counsel for the petitioner)

Affidavit of Ms. Gravelle, paragraph 16, Tab 11, Volume I, Petitioner's Amended Chambers Brief.

When asked whether Ms. Gravelle told Ms. Lefebvre that she could assist her with the probate of an estate, Ms. Gravelle said: "I can assist only in a certain portion of it, like drafting letters for banks, a will search."

Ms. Gravelle's Cross-examination on Affidavit, Q. 28.

When asked whether she could write a letter for Ms. Lefebvre regarding the duties of the administrator or executor, Ms. Gravelle said: "No ... I don't believe I would draft any letters like that. I would probably find something in our books that would - I could photocopy for her."

Ms. Gravelle's Cross-examination on Affidavit, Q. 62.

Q. Now, someone like Ms. Lefebvre, at least on the fact pattern, the scenario that she gave you, wouldn't know what she was supposed to be doing at all, so how would you help her then?

A. Just by telling her simply that the duties of an executor are to ensure all debts are paid...

Ms. Gravelle's Cross-examination on Affidavit, Q. 66.

When asked whether she could give legal advice or a legal opinion to Ms. Lefebvre while assisting her with the probate of her father's estate, Ms. Gravelle said that she could not, but that: "I can tell her how the process works. But that's not a legal opinion or legal advice; that's just how the process works, and she could find that out on her own."

Ms. Gravelle's Cross-examination on Affidavit, Q. 89.

Q. ... you advised Ms. Lefebvre about CPP benefits, and am I correct in concluding that she didn't raise that with you; you were the one who said to Ms. Lefebvre, "You should apply for CPP benefits"? Am I correct?

A. Yes.

Ms. Gravelle's Cross-examination on Affidavit, Q. 100.

Q. At paragraph 10 of Ms. Lefebvre's Affidavit, the second sentence, she deposes that "she", meaning you, Ms. Gravelle, "told me that if there was no will, then releases from the remaining family members would have to be signed." Did you tell her that?

A. Yes. As we were going through the process, I told her that at the very end of it, the releases would have to be signed, releasing her or her sister, or whoever was going to be the administrator, from any further action.

Ms. Gravelle's Cross-examination on Affidavit, Q. 141.

After discussing a hypothetical fact pattern in which a father died leaving a $10,000 mobile home as his sole asset, the following exchange took place:

Q. And, though, because it's a minor estate with only one asset, say, even if it required probate, is it your view that that is still minor sized enough that someone could do that [the probate] themselves?

A. I get an awful lot of questions about what is a small estate and "Can I do it myself?" Well, you can check. But "Yes, give it a try," is usually what my answer is.

Q. Okay. And then, if it's a minor estate, what you can do is you can be the heads-up person who's saying, "Well, don't forget about the CPP benefits and ..."

A. Exactly. Exactly.

Q. Okay.

A. And then in that case, they would only be able to apply for the death benefit.

Q. Okay. And so then...

A. Because a lot of times people will say, "Well, what else should I look into? How do I notify Old Age Pension security?" Well, you make a copy of the death certificate and sent it with a little letter.

Q. Right.

A. "How do I know how to notify Canada Pension that my mother passed away?"

Q. Right.

A. I get asked all these little questions that are a real worry to people.

Q. Yes. Okay. And so you know that stuff, you can help them with that, and they actually complete the probate documents and file those?

A. If that's what they choose to do, yes. Or they can take it to a lawyer of their choice.

Ms. Gravelle's Cross-examination on Affidavit, Q. 152 - 158.

22 Looking at the conduct of Ms. Gravelle in its totality I have concluded beyond a reasonable doubt that she gave legal advice and offered to "draw, revise or settle ... a document relating to any probate or letters of administration or the estate of a deceased person" in the expectation of a fee, gain or reward from the person for whom the acts were to be performed.

(ii) Section 18 of the Notaries Act.

23 Section 18 of the *Notaries Act* provides:

> **Rights and powers of members**
>
> 18 A member enrolled and in good standing may do the following:
>
> (a) draw instruments relating to property which are intended, permitted or required to be registered, recorded or filed in a registry or other public office, contracts, charter parties and other mercantile instruments in British Columbia;
>
> (b) draw and supervise the execution of wills
>
> (i) by which the testator directs the testator's estate to be distributed immediately on death,
>
> (ii) that provide that if the beneficiaries named in the will predecease the testator, there is a gift over to alternative beneficiaries vesting immediately on the death of the testator, or
>
> (iii) that provide for the assets of the deceased to vest in the beneficiary or beneficiaries as members of a class not later than the date when the beneficiary or beneficiaries or the youngest of the class attains majority;
>
> (c) attest or protest all commercial or other instruments brought before the member for attestation or public protestation;
>
> (d) draw affidavits, affirmations or statutory declarations that may or are required to be administered, sworn, affirmed or made by the law of British Columbia, another province of Canada, Canada or another country;
>
> (e) administer oaths;
>
> (f) perform the duties authorized by an Act.

24 None of these subsections expressly authorizes a notary to advise on matters of probate. By "probate" I mean

and include "drawing, revising or settling a document relating to any probate or letters of administration or the estate of a deceased person."

25 It is argued by the respondent and the intervenor that "may" in the opening sentence of s. 18 is permissive and that it should not be construed as precluding a notary from doing things which they have historically and lawfully done.

26 The Court of Appeal considered the predecessor of s. 18 in *Reference re Notaries Public Society (British Columbia)* (1969), 69 W.W.R. 475 (B.C. C.A.). The list of powers in s. 15 of the *Notaries Act*, R.S.B.C. 1960, c. 266 was preceded by these empowering words:

> ... every Notary Public ... has and may exercise while so enrolled or qualified the right and power to...

At issue before the Court of Appeal in the *Notaries Reference* was whether notaries might prepare documents necessary for the incorporation of a company. The specific list of powers in s. 15 did not include that authority. Nevertheless, that was not an end to the matter.

27 The Court of Appeal considered counsel's submission that a notary could not prepare incorporation documents either by statute or at common law.

28 Mr. Justice Robertson said this concerning counsel's submission (at 477):

> 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. (emphasis added)

29 It is implicit in the Court of Appeal's reasoning that s. 15 of the *Notaries Act* (1960) was not exhaustive in defining what the lawful practice of a notary was. The Court went beyond the statute and looked at what notaries were doing in England on the effective date of The *English Law Ordinance, 1867*.

30 That is authority for adopting a similar approach to the issue at bar.

31 Further, there is an argument supporting such an approach on the face of the statute.

32 Section 18(f) of the *Notaries Act* (1996), says that a notary "may perform the duties authorized by an *Act*."

33 "Act" is defined in the *Interpretation Act* as including:

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> ... an ordinance or proclamation made before 1871, that has the force of law;

(*Interpretation Act*, R.S.B.C. 1996, c. 238, s. 1.)

34 "Act" accordingly includes The *English Law Ordinance, 1867* and its successor, s. 2 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253.

35 That section provides:

> ... the Civil and Criminal Laws of England, as they existed on November 19, 1858, so far as they are not from local circumstances inapplicable, are in force in British Columbia,...

36 If the law of England on 19 November 1858 permitted notaries to probate wills, then it can be said that The *English Law Ordinance, 1867* (and s. 2 of the *Law and Equity Act*) authorizes, that is, "empowers" or "gives authority to" notaries to so act in this province.

37 Finally, adopting the view that s. 18 of the *Notaries Act* does not represent an exclusive menu of services which a notary might offer, accords with the regulatory scheme before the adoption of the predecessor to s. 18 in 1956.

38 That scheme, in various wordings, allowed notaries to practice "as usual in the office of notary." That was the wording in s. 2 of the *Notaries Public Appointment Act, 1872*, S.B.C. 1872, c. 8.

39 In the *Notaries Act*, S.B.C. 1926-27, c. 49, s. 13 provided in part that:

> ... every notary public ... shall have and may exercise while so enrolled all the powers, rights, duties, privileges and emoluments hereto for or hereafter attaching to the office of Notary Public.

40 If the intended effect of the 1956 legislation was to alter the common law (as effectively continued by the 1872 and 1926 legislation) by taking away powers and functions from notaries, it is argued that the legislature should have clearly said so.

41 The editor of *Driedger on the Construction of Statutes* (Toronto: Butterworths, 3rd ed., 1994) says this of the presumption against changing the common law (at 298-299):

> Several of the common law presumptions of legislative intent relate to the legislature's presumed respect for the common law. These include the presumption that legislation is not meant to interfere with common law rights, nor to oust the jurisdiction of common law courts nor, generally, to change the common law. As explained in **Halsbury** in a formulation adopted by Canadian courts:
>
> > Except in so far as they are clearly and unambiguously intended to do so, statutes should not be construed so as to make any alteration in the common law or to change any established principle of

law.6

> These presumptions permit the courts to insist on precise and explicit direction from the legislature before accepting any change. The common law is thus shielded from legislative encroachments that appear to be inadvertent or are unacceptable to the courts.
>
> (footnotes omitted)

42 Accordingly, I will approach the issue as the Court of Appeal did in the *Notaries Reference* by looking at the common law of England at the relevant date, as well as the statutory provisions in place today in this province.

(iii) English notarial practice before 1858.

43 On this issue I am indebted to the diligence of counsel. They have provided me with an extremely comprehensive review of the historical literature, including relevant extracts from all eleven editions of Brooke's *Treatise on the Office and Practice of a Notary of England*.

44 As well, I have reviewed affidavit material based upon court archives of estate documents from the 19th century in British Columbia and expert evidence of an English notary and solicitor who is a former president of the Notaries Society.

45 I will divide the material into a review of the text writers, followed by a reference to the historical anecdotal information.

46 It is first helpful, however, to briefly describe estate administration in England during the relevant periods.

47 Until 1857 estates were administered in England through the ecclesiastical courts.

48 I quote this observation by one of the text writers:

> ... Previously, however, to the reign of Edward I., - how long it matters not here to inquire, -(probate) jurisdiction had become generally vested in the clergy, and usually in the bishop of the diocese where the goods were situate, although in many cases this right of jurisdiction was exercised by lords of manors and others. The bishop, being the usual judge in such cases, was, from the circumstances, styled the ordinary, by way of distinction from his extraordinary or peculiar jurisdiction.[FN1]
>
> **Duty of ecclesiastical courts**. - It was the office of these tribunals to judge of the validity of wills, and, upon being satisfied with the proofs, to give authority to the persons named for that purpose in the instrument, - in other words, to the executor, - to perform them. If no executors were named, or if the executors named refused to act, the ordinary, or other person having the jurisdiction, was bound, by himself or his deputy, to carry them into effect; and in like manner, where no will was made, to carry into effect that disposition of the dead man's personal estate which the law prescribed.[FN2]

> W. John Dixon, Esq., B.A., LL.M. (CANTAB.), **Probate and Administration Law and Practice**, (London: Reeves and Turner, 1880, pp. 3 and 4).

49 In 1857 the *Court of Probate Act* was passed. Its recital stated:

> Whereas it is expedient that all jurisdiction in relation to the grant and revocation of probates, wills, and letters of administration in England, should be exercised in the name of Her Majesty by one court.

50 The Court of Probate, thus established, assumed the testamentary jurisdiction of all other tribunals.

51 The Court of Probate was in turn transformed into the Probate Division of the Supreme Court by The *Judicature Act, 1873*.

52 The first edition of *Brooke's Notary* was published in 1838.

53 Aptly enough, the learned author discusses the functions of the notary in chapter one. Nothing there suggests that English notaries were notoriously known to practice in probate matters.

54 Importantly, however, Brooke states that he is dealing with notarial practice "as connected with mercantile instruments." This statement is found in the "long version" of the work's title.

55 This limitation is more fully set out at page 5 of chapter one:

> As the object which is wished to compassed by this treatise, is to give an explanation, of those branches of the practice, and duties, of a notary of England, which relate to such transactions, and instruments, as are of a mercantile nature only, it forms no part of the plan, to detail any powers, or functions, which he either was formerly, or is now, empowered to perform, connected with any ecclesiastical or other court.

56 Brooke does purport to generally describe the functions of notaries in his introductory chapters and the absence of a reference to probate practice has some significance. This is especially so because the editors of the work expressly note, in the 9th edition (1939), that by virtue of s. 47 of the *Solicitors Act, 1932* notaries:

> ... are entitled to take instructions for and draw or prepare any papers on which to found or oppose a grant of probate or letters of administration.

57 The 1912 edition of *Halsbury's* (a source cited by the Court of Appeal in the *Notaries Reference*) does not include probate practice in its general description of a notary's functions (at 493):

> A notary public is a duly appointed officer whose public office it is, amongst other matters, to draw, attest, or certify, usually under his official seal, deeds and other documents, including conveyances of real and

> personal property, and powers of attorney relating to real and personal property situate in England, the British dominions beyond the seas, or in foreign countries; to note or certify transactions relating to negotiable instruments; to prepare wills or other testamentary documents; to draw up protests or other formal papers relating to occurrences on the voyages of ships and their navigation as well as the carriage of cargo in ships.
>
> His office, which is one of great antiquity (*a*), is recognised in all civilised countries, and by the law of nations his acts have credit everywhere (*b*).

58 The reference to preparation of testamentary documents requires a brief discussion. *Black's Law Dictionary* defines "testamentary paper or instrument" as:

> An instrument in the nature of a will; an unprobated will; a paper writing which is of the character of a will, though not formally such, and, if allowed as a testament, will have the effect of a will upon the devolution and distribution of property.

59 The importance of this definition is that it is restricted to the unprobated instrument. It does not extend to the actual administration of the estate.

60 The only case authority discussing the role of a notary which counsel unearthed is the decision of Lord Tenterden C.J. in *R. v. Scriveners' Co.* (1830), 109 E.R. 540 (Eng. K.B.).

61 There, the Chief Justice was considering whether an applicant for registration as a notary had duly served his apprenticeship. In the course of his reasons, his lordship said (at 543 and 544):

> ... and it is suggested that the whole business of a notary is the presenting of bills of exchange, and drawing up protests. Even if that were so, it would be very difficult to make out that this young man, between five o'clock and bed-time, could draw up the protests upon the bills he had presented in that interval; but it is by no means correct to say that that is the whole business of a notary. A notary in the City of London has many more duties. Almost all the charter parties are prepared by notaries; that appeared in a very late case in a trial before me at Guildhall. The ship's broker prepares the minutes of the contract; it is afterwards put into form by a notary. There is another part of the duty of notaries, and that is, to receive the affidavits of mariners and masters of ships, and then to draw up their protests, which is a matter which requires care, attention, and diligence. Besides that, may (*sic*) documents pass before notaries under their notarial seal, which gives effect to them, and renders them evidence in foreign Courts, though certainly not in our Courts of Common Law. There is a great deal, therefore, to be done by a notary perfectly independent of, and distinct from, this mere matter of presenting bills of exchange and drawing up protests.

62 While the Chief Justice does not say that he is being exhaustive in describing a notary's practice, it is instructive that he makes no mention of probate matters.

63 One authority upon which the intervenor places some reliance is C.W. Brooks and others, *Notaries Public in England Since the Reformation* (London: Erskine Press, 1991).

64 The authors note that most aspects of legal practice associated with notaries in civil law jurisdictions are, in

England, now performed by solicitors. This includes the making of wills and matters of probate.

65 The authors then state their mission (at 2-3):

> The present work aims to supply some part of the missing story of the notaries. It will be shown that notaries played a larger role in the legal life of early modern England than most historians have allowed.

66 This passage from the text is cited by the respondent society (at 13):

> Notaries would have taken a central part in a jurisdiction which dealt with essential aspects of English law: marriage and divorce, the proof and enforcement of the last wills and testaments, the law of defamation, disputes over tithes and church rates, as well as many questions of internal clerical discipline and ecclesiastical right.

67 It is noted that the authors are not saying that notaries took a central part in the proof and enforcement of wills, simply that they took a central part in the jurisdiction that did, that is, the ecclesiastical courts.

68 Indeed the authors later in the same chapter state (at 39):

> Somewhat surprisingly in light of the extensive jurisdiction of the English Church over questions of succession, decedents' last wills and testaments also seem rarely to have been written by notaries. There are registers of testaments in existence, but they turn out to be records of the testaments probated by the ecclesiastical courts, 89 not the same sort of notarial registers one finds regularly kept in Continental archives. Moreover, very few of the causes involving testaments that were heard in the ecclesiastical courts mention that any role in their preparation had been taken by notaries. Most written testaments were offered for probate entirely innocent of the notarial hand....
>
> (footnote omitted)

69 The role of the notary in the ecclesiastical courts is of central importance to the issue before me.

70 First, I note that ecclesiastical notaries are a distinct branch of the profession.

71 Under the *Public Notaries Act, 1801* the first English regulatory enactment affecting notaries, notaries who practiced wholly in the ecclesiastical courts were exempted from registration so long as they did not engage in general practice.

72 *Halsbury* (1912 edition) discusses ecclesiastical notaries (at 494):

> The office of ecclesiastical notary is held by the registrars of the ecclesiastical courts (*c*). The secretary of a bishop, or any person necessarily created a notary in order to hold any ecclesiastical office, may be appointed as an ecclesiastical notary. An ecclesiastical notary need not serve an apprenticeship, but is

> appointed if personally fit as a matter of course. He must not allow his name to be used improperly (*d*); nor can he have or retain an apprentice to serve him (*e*).
>
> The provisions of the statutes hereinafter referred to (*f*) relating to apprenticeship and other matters do not apply to ecclesiastical notaries except as to penalties for allowing the name of the ecclesiastical notary to be used improperly (*g*).
>
> Ecclesiastical notaries are appointed by the Master of the Faculties (*h*).

73 The authors state in a footnote that there were few ecclesiastical notaries, besides registrars of the ecclesiastical courts.

74 This suggests that the notary in the ecclesiastical court was primarily a court official as distinct from a practitioner before the tribunal.

75 This is the conclusion of Alexander and others in *The Origin and Historical Development of the Profession of Notaries Public in England* (*supra*). In footnote 2 they observe (at 124):

> In order to avoid complication it is thought well to refrain from dealing with the history of the Ecclesiastical Notaries. The two branches of the profession are quite distinct, and have always been so ever since the establishment of an organised body of Notaries Public in England. The Ecclesiastical Notary is an officer of the Courts of the Church, and can hardly be described as a legal practitioner.

76 To the same effect are these extracts from Brooks, *Since the Reformation* (*supra* at 14):

> The careers of individual notaries tell much the same story. Many English notaries enjoyed an established and relatively privileged status, particularly in the provincial centres of England. In York, for example, it was decreed towards the end of the sixteenth century that the notaries attached to the Archbishop's court, serving as scribes and registrars there, were 'to give place to the sheriffs of York', but that they were to take precedence over all other citizens of York on ceremonial municipal occasions.10 In Canterbury, William Watmer, a local notary serving in the diocesan tribunals, was twice elected mayor of the city during the first half of the seventeenth century,11 and it was another notary public of the same city, William Somner, who during the same century wrote a celebrated work, *The Antiquities of Canterbury*.12 In St. Albans, Thomas Rokett, notary and registrar of the consistory court of the archdeacon of St. Albans, was similarly twice elected mayor, first in 1590 and then again in 1616.13 In some English cathedral cities, notarial office became almost a family tradition. Sons succeeded fathers in its exercise.
>
> . . . . .
>
> In the ecclesiastical sphere, the sort of work entrusted to English notaries that is easiest for the historian to describe is that undertaken by the diocesan registrar, the person in charge of the records of each ecclesiastical court. It has left the most evidence. Fortunately, it is also the most significant, since it was to the position of registrar that most English notaries aspired....
>
> (footnotes omitted)

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77 Characterizing the ecclesiastical notary as a latter-day registrar of the court also explains some of the anecdotal information from the Lawson affidavit. Mr. Lawson's colleague, Francis Michael Pulvermacher, a notary public, searched the microfilm records of the Summerset County Record office at Taunton. He has extracted probate copies of various wills from the 15th, 16th and 17th centuries. In a number of these we find notaries endorsing an estate inventory "as to its exhibition in court" on a certain day. That certainly recalls a central task of the registrar's clerk in our courts today.

78 The English probate files also include a number of examples of a notary attesting execution of bonds by executors and administrators. I observe that that is not inconsistent with the notary's role as a court official nor, indeed, the traditional role of the notary in attesting the execution of documents of all sorts.

79 The notary's role in the ecclesiastical courts is to be contrasted with the role assumed by other practitioners.

80 In the ecclesiastical courts, proctors were the equivalent of attorneys or solicitors in the other courts and doctors performed the barrister's function.

81 Thomas Gwynne, writing in *The Law Relating to the Duties on Probates and Letters of Administration in England* (London: Saunders and Benning, 3rd ed., 1841), describes the proctor's role (at 6):

> If it be necessary to take out probate or administration in either of the prerogative courts, the proper person to employ in the business, is a proctor, who acts in the ecclesiastical and civil law courts as an attorney does in the courts of common law; but in proving a will, or obtaining letters of administration, in any other ecclesiastical court in which there are no practising proctors, application is to be made either to the registrar or deputy registrar, (the latter in most cases,) of the court in question, or to any surrogate of the court residing in the neighbourhood of the executor or administrator.

82 Richard Burn authored a four volume treatise on *The Ecclesiastical Law* (London: Sweet, Stevens and Norton, 9th ed., 1842). He indicates that it was the proctor who initially applied for the probate of a will. He describes the procedure (and his description of the responsibilities of the various players will sound familiar to practitioners today) (at 852):

> [On application to any proctor to extract a grant, it is his duty, if there be any matter requiring explanation, to obtain that explanation of the party, in order to satisfy his own conscience and the inquiries of the public officer, - why, for instance, if there has been a considerable lapse of time, the grant was not earlier applied for. It is the duty of the clerk of the seat, before he forwards the business, to require that explanation of the proctor, in order that he may be enabled to state it to the registrar. It is the duty of the registrar, when the grant comes before him for signature, if he sees any thing requiring explanation, to refer to the clerk of the seat, and to ascertain whether the difficulty has been removed: and thus by the inquiry of the proctor (if necessary) to satisfy himself that the grant may properly issue. If the explanation be not satisfactory to the registrar, he is either to stop the business on his own discretion, or to apply to the judge for his directions. - ED.]

83 Mr. Lawson has deposed as follows:

> From the matters set out in this affidavit I am firmly of the opinion that continuously since early in the Middle Ages Public Notaries in England had been practicing in what are now termed non-contentious probate cases that is to say the preparation of Wills and applications to the appropriate Court for the proving of Wills and Granting of letters of administration and were so practicing on the 19th November 1858.

84 Assuming for the purpose of argument that that statement is admissible, it appears to run contrary to the historical facts as related by the various text writers.

85 In addition to those cited above, I have also reviewed W. John Dixon, *Probate and Administration Law and Practice* (*supra*).

86 The learned author discusses the procedure for applying for probate in common form (i.e. a non-contentious application). He cites rule 2 of the *Probate Rules* (at 276):

> The next question which presents itself is, -By whom should the application be made? "Such applications may be made through a proctor, solicitor, or attorney, *or in person, by executors, and parties entitled to grants of administration*; but these *latter* applications will not be received by letter, nor through the medium of any agent."

87 That refers to the practice in 1880. Dixon notes (at 6) that the *Judicature Act, 1873* reappointed solicitors, attorneys and proctors of the Court of Probate as solicitors of the Supreme Court.

88 The author notes the practice regarding "audience in probate" which continued from the Court of Probate (at 8):

> ... It seems that motions in chambers may be made by either proctor or counsel, but in conformity with the usual practice, it has been customary, upon the direction of Sir C. Cresswell for counsel *only to make motions in court*.

89 Again it is noteworthy that the notary's role is not discussed here. It is clearly suggested that practitioners in these matters included only solicitors, proctors, attorneys and barristers.

90 On the issue of fact with which I am engaged, I have concluded that notaries were not, in general practice, involved in probate matters in England on 19 November 1858. To the extent that their duties in the ecclesiastical courts touched on such matters, I believe that it was very largely in a registrar's role.

91 Even if ecclesiastical notaries, before 1858, performed a solicitor's role in probate matters, the exception set out in s. 2 of the *Law and Equity Act* would apply.

92 That exception imports English civil and criminal laws as of the relevant date "so far as they are not from local circumstances inapplicable".

93 On or before 19 November 1858, the only notaries who arguably could be said to have been involved with probate matters were the ecclesiastical notaries. As we have seen, they are to be distinguished from general notaries. They had no corresponding presence in British Columbia.

94 Probate through the ecclesiastical courts was "from local circumstances inapplicable" and any lawful practice by notaries in that regard was not imported into British Columbia. On this alternative ground, the intervenor's submissions must fail. This point is made stronger by the fact that as of 1857 (that is, almost immediately before the relevant date in The *English Law Ordinance, 1867*) probate in England was no longer handled through the ecclesiastical courts.

95 In saying this, I am not suggesting that the courts of British Columbia cannot deal with secular matters which were dealt with in the ecclesiastical courts of England as of 19 November 1858. That would appear to be error: J. E. Cote, *The Reception of English Law* (1977), XV Alta. Law Rev. 29 at 59 and *Bursey v. Bursey* (1966), 58 D.L.R. (2d) 451 (Nfld. T.D.).

96 The intervenor has filed the affidavit of a legal researcher. He searched the British Columbia Provincial Archives and he reviewed files from various probate registries in the province.

97 He exhibits extracts from eight files for years between 1882 to 1946.

98 There is no doubt that notaries appear to have been involved in the files, at least to the extent of attesting various estate documentation. Even assuming, however, that these notaries prepared the documents for gain, such anecdotal evidence is not proof that the notaries acted in accordance with the law.

99 Counsel for the Law Society notes that three of the eight notaries referred to are not on the notaries register. She wonders if they are in fact notaries.

100 Three of the remaining five notaries probated estates before 1897 and they could have been lawyers from another jurisdiction authorized to practice law in British Columbia.

101 One of the notaries, was in fact a British Columbia lawyer.

102 Finally, counsel notes that even in England today notaries cannot make application for probate. She, as do I, asks: "Where does one suppose that these individuals in British Columbia derived their authority to make application for probate?"

103 It is certainly not the case that notaries over the years have consistently acted in probate matters or taken the position that they could.

104 Indeed, in 1989, The Society of Notaries Public petitioned government soliciting "the required changes to assure our right to prepare and file Probate applications in areas we refer to as 'non-contentious probate' - those involving matters that do not have to be spoken to." (Letter to the Law Society dated, 21 July 1989).

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105 Neither the statute nor the common law authorizes notaries to practice in probate matters. It follows, in line with the Court of Appeal's reasons in the *Notaries Reference*, that it is the unauthorized "practice of law" as defined in s. 1 of the *Legal Profession Act*, R.S.B.C. 1996, c. 255 for a notary public to so act.

106 As to the precise relief, there will be a declaration that Ms. Gravelle engaged in the unauthorized practice of law by giving legal advice to and offering to assist a member of the public with respect to the probate or letters of administration or the estate of a deceased person for or in the expectation of a fee, gain or reward.

107 There will be a permanent injunction enjoining Ms. Gravelle from engaging in the unauthorized practice of law in the terms sought.

108 In this regard Ms. Gravelle's offer of an undertaking is not sufficient. This respondent has given such an undertaking in the past and it did not preclude this particular contravention.

109 The Law Society seeks this further declaration:

> ... that it is the practice of law, pursuant to the **Legal Profession Act**, for a notary public to:
>
> > offer to do everything with respect to the probate or letters of administration or the estate of a deceased person for or in the expectation of a fee, gain or reward, including drafting letters for an Executor or Administrator as it may relate to the execution of their particular duties as Administrator or Executor, drafting the necessary letters for an Administrator or Executor's signature to go to banks, providing advice regarding income tax as it relates to the probate of an estate, providing advice regarding the distribution of the assets of an estate as it relates to the probate of an estate, advising on the need to apply for Canada Pension Plan benefits in the context of the probate of an estate, offering to and advising on how to apply for Canada Pension Plan benefits in the context of the probate of an estate, providing advice generally on the process of probating an estate, providing advice as to the Court process associated with probating an estate, providing advice on the duties of an Executor, advising on the necessity of having an Executor or Administrator released following probate, advising on applying for death benefits as it relates to the probate of an estate, and drawing, revising, or settling a document relating to any probate or letters of administration or the estate of a deceased person.

110 I do not think it appropriate to effectively supplement the *Legal Profession Act* by expanding the formal definition of "practice of law" in this manner. It is sufficient to say, as I have, that on the facts as found in this case the respondent notary public has engaged in the unlawful practice of law.

111 The Law Society is entitled to its costs on scale 3.

Application granted.

FN1. *Dyke v. Walford*, 5 Moore, P.C.C. 489 et seq.

FN2. *Dyke v. Walford*, 5 Moore, P.C.C. 491.

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