

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Gray v. Nova Scotia Barristers' Society*, 2025 NSSC 199

**Date:** 20250619

**Docket:** SN No. 467843

**Registry:** Sydney

**Between:**

Clara Elizabeth Gray

Plaintiff

v.

Nova Scotia Barristers' Society

Defendant

**DECISION**

**Judge:** The Honourable Justice Mona Lynch

**Heard:** May 21, 2025 in Sydney, Nova Scotia

**Counsel:** Clara Elizabeth Gray, Self-Represented Plaintiff

Justin Adams, counsel for the Nova Scotia Barristers' Society

Jocelyn Campbell, KC counsel for Justice Jillian Barrington, Sheldon Nathanson, Sheldon Nathanson Law Inc.

Matthew Kuzak, for Victor Goldberg, counsel for Nova Scotia Legal Aid (Watching Capacity)

Duane Eddy, counsel for the Nova Scotia Public Prosecution Service (Watching Capacity)

**By the Court:****Introduction**

[1] The Plaintiff, Clara Gray, filed motions to compel disclosure from the Defendant, the Nova Scotia Barristers' Society (NSBS), to obtain subpoenas for current or former employees of the NSBS, and to obtain a subpoena for Justice Jillian Barrington. For the reasons that follow, the motions are dismissed.

**Background**

[2] Clara Gray was admitted to the Bar in Nova Scotia in approximately 2000 and was therefore entitled to practice law in Nova Scotia. After a few years practicing with a private law firm in Sydney, Nova Scotia, she opened her own practice in 2005. In 2007 Clara Gray was suspended by the NSBS for failing to file her trust account report. An audit was conducted at that time.

[3] In 2014, the NSBS initiated another audit of Clara Gray's trust account based on the trust account report filed for 2012. Issues were identified in the audit and a practice review was also initiated. Clara Gray was referred to the Complaints Investigation Committee (CIC) of the NSBS.

[4] The CIC requested that Clara Gray undergo an independent medical assessment and Clara Gray participated in that assessment. The investigation by the CIC raised concerns about Clara Gray's practice. Clara Gray was referred to the Fitness to Practice Program Committee (FTPC).

[5] In July 2014, the FTPC presented Clara Gray with an interim agreement which required Clara Gray to wind down her solo practice by August 29, 2014, and close her trust account by August 31, 2014. She was also not permitted to practice on her own but could practice with one or more other lawyers.

[6] Clara Gray retained a lawyer in July of 2014, and she signed the interim agreement on August 5, 2014.

[7] Clara Gray asked the NSBS whether she could join another lawyer in the practice of law but the proposal to practice with that lawyer was denied by the NSBS.

[8] The NSBS was of the view that Clara Gray had breached the terms of the interim agreement for failure to close her practice and had not provided documentation that she had closed her trust account.

[9] On September 10, 2014, the NSBS suspended Clara Gray for failing to file an accountant's report for her trust account. On September 11, 2014, the FTPC referred Clara Gray back to the CIC. On that same day, the NSBS suspended Clara Gray's practice certificate. Clara Gray was provided a letter from the NSBS, dated September 11, 2014, which provided reasons for her suspension.

[10] Clara Gray was suspended until a hearing could be held to address the suspected failure to comply with the conditions of the interim agreement.

[11] On November 21, 2014, the NSBS approved Clara Gray's request to resign which was received from her legal counsel.

[12] Clara Gray filed a Notice of Action and Statement of Claim seeking damages and other remedies from the NSBS on September 1, 2017. The NSBS filed a Notice of Defence to the action on October 2, 2017. Affidavits disclosing documents were exchanged in April of 2018. Since that time Clara Gray has filed motions, including motions to amend her pleadings to add claims against the NSBS, and to add other parties, including Sheldon Nathanson and Sheldon Nathanson Law Inc., the Nova Scotia Legal Aid Commission, and the Nova Scotia Public Prosecution Service.

[13] On April 23, 2025 Clara Gray filed a motion to compel production from the NSBS of "all electronic and non-electronic records, of every nature and kind, including but not limited to all executive, employee and committee emails, texts, telephone notes and records, from each and every file and source (excepting client files), in the possession of the defendant, the Nova Scotia Barristers' Society, or within its ability, power or authority to obtain, which in any way whatsoever relate to, or refer to, the person, Clara Gray, and in particular to Clara Gray's character, her conduct, her capacity, her competence, her health, her fitness to practice law, her practice of law and the public interest, any complaints, and any discussion thereof, and all of the information requested being for the one year period of time from September 30, 2013 through September 30, 2014".

[14] Clara Gray also moved for an order "to allow subpoenas to be issued and served upon the witnesses of the defendant, Nova Scotia Barristers' Society, whose names are listed in the defendants "witness list, and in the plaintiffs "witness list".

Clara Gray also moved to allow a subpoena to be issued and served upon Justice Jillian Barrington.

[15] Clara Gray also sought to have documents received by her from the proceedings at the Nova Scotia Human Rights Commission regarding the NSBS used in evidence in this proceeding.

[16] The motions were heard together on May 21, 2025.

### **Issues**

1. Are records arising from disciplinary proceedings of the NSBS in relation to Clara Gray compellable and admissible pursuant to s. 77A (2) and (3) of the *Legal Professions Act*, 2004, c. 28 (*LPA*).
2. Should a subpoena be issued for the current and former NSBS employees, agents, and committee members in light of s. 77A (2) of the *LPA*?
3. Has the NSBS waived the protections provided by s. 77A of the *LPA*?
4. Are records obtained by Clara Gray in other proceedings admissible in this proceeding?
5. Should a subpoena be issued for Justice Jillian Barrington?

### **Position of the Parties**

#### **Clara Gray**

[17] Clara Gray's position is that the NSBS communicated with other lawyers about her and invited complaints to be made about her. She also alleges that lawyers in Cape Breton fabricated complaints about her. Clara Gray asserts that she was treated unfairly by the NSBS in an unfair process. Clara Gray says that justice must be seen to be done and that she was denied natural justice. She asserts that the NSBS has waived the protections of the implied undertaking rule and s. 77A (2) and (3) of the *LPA*. She alleges delays in full disclosure by the NSBS. She cites the disclosure obligations under the *Civil Procedure Rules*. Clara Gray says that the NSBS duty to act in good faith and to protect the public means that they

are not “above the law” and their employees, agents, etc. must be able to be subpoenaed and the NSBS must provide full disclosure of documents.

## **The NSBS**

[18] The NSBS’s position is that s. 77A of the *LPA* provides that reports, which has an extremely broad definition, are not admissible in a legal proceeding and that reports, employees, agents, or members of committees of the NSBS cannot be compelled in legal proceedings. The NSBS submits that the protection is provided for a valid reason, and it has not been waived by the NSBS. The NSBS’ position is that the court should find that the NSBS is entitled to the protections in s. 77A. The question as to whether the implied undertaking rule applies to documents that Clara Gray received through the Nova Scotia Human Rights Commission proceedings should be deferred until the documents only received there have been identified.

## **Counsel for Justice Jillian Barrington**

[19] Counsel for Justice Barrington submits that *Civil Procedure Rule* 50.02(2) requires the permission of a judge before a subpoena can be issued for attendance of a witness at the hearing of a motion. One of the issues that will be raised at the hearing of the motion to amend pleadings is whether the motion to amend to add parties was made outside the limitation period and is therefore statute barred. Counsel says there is no evidence to indicate that Justice Barrington has any evidence to provide on the issue of the limitation period and therefore the motion to permit a subpoena to be issued for her client should be dismissed.

## **Other Proposed Parties**

[20] The other proposed parties did not make independent submissions.

## **Analysis**

**1. Are records arising from disciplinary proceedings of the NSBS in relation to Clara Gray compellable and admissible pursuant to s. 77A (2) and (3) of the *Legal Professions Act, 2004, c. 28 (LPA)*.**

[21] The *Civil Procedure Rules* in Nova Scotia provide for broad disclosure by the parties to a proceeding. However, the plain reading of s. 77A of the *LPA* would

lead one to the conclusion that Clara Gray must fail in both her motion to compel records and in her motion to compel witnesses from the NSBS.

[22] The legislative framework of the *LPA*, which governs the NSBS and its members, was recently reviewed by the Nova Scotia Court of Appeal in *Fraser v. Nova Scotia Barristers' Society*, 2024 NSCA 94, paras. 3-14.

[23] Section 40 of the *LPA* requires complaints to be kept confidential by the NSBS. Section 77A of the *LPA* reads:

**Non-compellable testimony or evidence and admissibility of evidence**

77A (1) In this Section,

(a) “legal proceeding” means any civil proceeding, discovery, inquiry, proceeding before a tribunal, court, board of commission or arbitration, in which evidence may be sought or given, and includes an action or proceeding for the imposition of a fine, penalty or imprisonment for the violation of a Provincial enactment, but does not include any proceeding, review, hearing or appeal conducted pursuant to this Act or the regulations;

(b) “relevant committee” means the committee of the Society for whose purpose a report was created or received, and includes the Complaints Investigation Committee, the Fitness to Practise Committee, a panel of the Hearing Committee or the Credentials Committee;

(c) “report” includes any document, statement, electronic record, minute, note, correspondence or memorandum created or received by a person, committee, panel or agent of the Society for the purpose of any process under Section 5 or Part III and regulations under those provisions, but does not include an original document that belongs to a complainant or a member or to a person other than an employee or agent of the Society.

(2) The Society, its employees or agents or persons who are members of committees or panels established or authorized under this Act, are not compelled to

(a) testify in a legal proceeding;

(b) disclose reports in a legal proceeding; or

(c) disclose in a legal proceeding any other information they may have acquired for the purpose of processes under Section 5 or Part III and the regulations under those provisions.

(3) Reports are not admissible in a legal proceeding except where the relevant committee determines that it is in the public interest to make the report available and authorizes the Executive Director to make the report available in the legal proceeding.

(4) Notwithstanding subsections (2) and (3), where a person has made a complaint to the Society respecting a member, the complaint is admissible with the consent of the complainant, but not otherwise.

(5) Notwithstanding subsections (2) and (3), where a member responds to the Society in respect of a complaint or investigation, the member's response is admissible with the consent of the member, but not otherwise, even though the Executive Director may have delivered a copy or a summary to the complainant. 2010, c. 56, s. 21.

[24] The definition of report includes processes under s. 5 and Part III and their regulations. Part III of the *LPA* includes the processes which Clara Gray was subject to, both through the CIC and the FTPC. All reports are inadmissible except where made available by the relevant committee with the authorization of the Executive Director of the NSBS. Clara Gray has not provided evidence that she falls under the exceptions in s. 77A (3), (4) or (5). The definition of report in s. 77A (1)(c) includes all the type of records that Clara Gray is seeking an order to compel. Clearly the records sought by Clara Gray cannot be compelled and are inadmissible (77A (2)(b), (c) and 77A (3)) unless she is able to establish an exception. There is no plain reading of the provisions that would allow the provisions to be read as discretionary.

[25] Clara Gray did not plead or allege any breach of a provision of the *Canadian Charter of Rights and Freedoms*.

[26] Section 77A was added to the *LPA* in 2010. In *McLaughlin v. Rumscheidt*, 2017 NSSC 267 documents were struck from an affidavit as they were not admissible pursuant to s. 77(A) (3) of the *LPA* (para. 33).

[27] While Clara Gray asserts that the provisions should not apply where bad faith has been shown, the purpose of provisions like s. 77A have been discussed in other cases such as *F. (M.) v. Dr. Sutherland*, 2000 CanLII 5761 (ONCA) and a bad faith exception was found to defeat the purpose of the provisions (para. 29). In *F.(M)*. the court was considering similar provisions in an act which regulated the health professions. The court stated that the purpose of a provision like that in s. 77A which states that no reports, etc. are admissible in civil proceeding is “to encourage the reporting of complaints of professional misconduct” and “to ensure that those complaints are fully investigated and decided” without a participant in the proceeding fearing that a document they prepared can be used in civil proceedings (para. 29). The court goes on to find that without that protection, patients would be discouraged from making complaints (para. 30). The court also

noted that another provision in the legislation required good faith to have immunity and if the legislature had intended a fraud or bad faith exception in the provision under consideration, it would have done so expressly (para. 32). This view was reiterated in *Task Specific Rehabilitation Inc. v. Steinecke*, 2004 CanLII 4853 (ONCA) (paras. 21-22) where the court refused to read a bad faith exception into the provision that made documents from the disciplinary proceeding inadmissible. The purpose of the provisions in the *LPA* are the same as those referred to in *F.(M)*..

[28] In *Middleton v. Sun Media Corp and al*, 2006 CanLII 84666 (ON SCDC) the Divisional Court noted that the words in a statute are to be considered in their entire context and in light of the purpose of the legislation. They found that anything other than “not admissible” meaning “not capable of use” would undermine the protection of the confidentiality that was intended (para. 19).

[29] Other courts have also expressed the need to enforce statutory immunity provisions in legislation that regulates professions. In *D'Mello v. The Law Society of Upper Canada*, 2014 ONCA 912 the court said:

[18] The appellant’s submission overlooks the broader context of the legislation: the protection of members of the public in their dealings with lawyers. An official of the Law Society who is investigating a complaint about a lawyer is engaged in furthering the public interest in ensuring that lawyers maintain high standards of conduct and do not abuse their position. If such persons were not granted absolute privilege in defamation actions, their mere allegation of malice on the part of the lawyer being investigated could subject them and the Law Society to costly and lengthy litigation requiring them to justify why an investigation into a complaint was warranted. Such an approach would be inconsistent with the overarching goal of protecting the public through the responsive and timely investigation of complaints.

[30] And in *Ernst v. Alberta Energy Regulator*, 2017 SCC 1, Cromwell J. said:

[51] The rationales underlying the common law and statutory immunity for quasi-judicial and regulatory decision-makers fall into two main interrelated categories. First, immunity from civil claims permits decision-makers to fairly and effectively make decisions by ensuring freedom from interference, which is necessary for their independence and impartiality: [citations omitted]. Second, immunity protects the capacity of these decision-making institutions to fulfill their functions without the distraction of time-consuming litigation.

And,

[55] To conclude on this point, the policy reasons that underlie the common law and statutory immunities for regulatory and quasi-judicial boards like this one relate directly to the types of good governance concerns identified in *Ward*. Opening the Board to damages claims will distract it from its statutory duties, potentially have a chilling effect on its decision making, compromise its impartiality, and open up new and undesirable modes of collateral attack on its decisions.

[31] The law is clear that these immunities are in the governing statutes for valid reasons, there is no bad faith exception, they should be read for the purpose intended and should be enforced.

[32] Here there are two provisions at play. Under s.77A (2)(b) NSBS cannot be compelled to disclose reports in a legal proceeding and under s. 77A (3) the reports, even if obtained by other means than disclosure from NSBS, are not admissible in a legal proceeding. The reports from the proceedings involving Clara Gray by the NSBS are not compellable or admissible under the *LPA* unless the NSBS has waived the protections provided under s. 77A.

## **2. Should a subpoena be issued for the current and former NSBS employees, agents, and committee members in light of s. 77A (2) of the *LPA*?**

[33] Section 77A (2)(a) of the *LPA* says that the NSBS, its employees, agents, or persons who are members of committees or panels established under the *LPA* are not compelled to testify in a legal proceeding. That means that while they are competent to testify, they are not compellable. They can testify if they choose to do so, but not otherwise.

[34] In *Payne v. Ontario Human Rights Commission*, 2000 CanLII 5731 (ONCA), the court was dealing with an appeal of a judicial review where the applicant was seeking to quash decisions of the Human Rights Commission for failing to refer her complaint to a board of inquiry. In that case the court allowed examination for discovery of Commission members despite a limited statutory exclusion. The statutory exclusion in *Payne* only protected Commission members and persons employed in the administration of their *Act* from disclosure of “information obtained in the course of an investigation”. The court found that the exclusion did not amount to a general prohibition against examinations but a specific and limited curtailment of the rights of litigants to obtain evidence relevant to their cause. They distinguished the statutory exclusion from a broader immunity such as in s. 77A of the *LPA* (paras. 174-176).

[35] Clara Gray argues that she should be entitled to discover and subpoena the former employees of the NSBS because they are on the witness list of the NSBS. The NSBS has provided Clara Gray with a list of witnesses they may call. There has not been a Date Assignment Conference held in this matter and there has been no finish date set, therefore no list of witnesses is required under CPR 4.18. Also, the NSBS, except in a few circumstances, is limited to calling witnesses on their witness list (CPR 4.18(2)) and is not required to call the witnesses on their list (CPR 4.18(5)). Placing the names of witnesses on a witness list that may or may not be called does not waive the immunity provided in s. 77A(2)(a) of the *LPA*. As stated above, the witnesses are competent to testify but they are not compellable. They can choose to testify or not.

[36] Some of the witnesses who Clara Gray seeks to discover and call as witnesses are now former employees of the NSBS. However, the testimony that Clara Gray seeks to elicit from those witnesses is in relation to their work when they were employees of the NSBS. The information she is seeking from these witnesses is in relation to the process which led to her practice certificate being suspended in 2014. Considering again the purpose of the provisions, I find that the immunity in s. 77A applies to former employees of the NSBS.

[37] The definition of legal proceedings in s. 77A (1)(a) of the *LPA* includes any civil proceedings, discovery, etc. As above, the plain reading of the words in s. 77A (2)(a) in their ordinary sense and harmoniously with the scheme and object of the *LPA* would lead me to conclude that any employees or former employees who Clara Gray wants to question, either on discovery or as a witness in a proceeding, are not compellable and a subpoena should not be issued.

[38] Subpoenas will not be issued for the employees or former employees of the NSBS unless there was a waiver of the protections provided under the *LPA*.

### **3. Has the NSBS waived the protections provided by s. 77A of the *LPA*?**

[39] Clara Gray has asserted bad faith on the part of employees or former employees of the NSBS and that bad faith waived the immunity provisions under s. 77A of the *LPA*. As stated above there is no bad faith exception to the immunity provisions. Section 81 of the *LPA* contains an immunity from actions for damages, and it does contain distinctions between acts done in good faith and bad faith. If the legislature had wanted to place a bad faith exception in s. 77A, as they did in s. 81, they would have done so expressly (*F.(M)*., para. 32).

[40] Clara Gray sees bad faith in the actions of the NSBS; however, she has not established bad faith. Inviting someone to write down their concerns about a lawyer is not going out seeking a complaint or inviting a fabricated complaint. It is indicating to the person that, if they have concerns, they should be in writing.

[41] Clara Gray has also raised an issue of whether the NSBS was correct in thinking that she was continuing in her solo practice after the date in the interim agreement for her to wind down that practice. Clara Gray says that she was not practicing when the NSBS thought she was. The evidence may well show that she is correct; however, that does not mean that the whole NSBS process was unfair or patently unfair. Clara Gray does not mention the other concern that the NSBS had at that time – that she had failed to provide documentation that she had closed her trust fund account. Clara Gray has acknowledged that she had “persistent issues with her financial reporting” (Legal Brief of Clara Gray filed April 23, 2025). Clara Gray’s suspension was to be an interim measure until a hearing was held. The next step in this process was that Clara Gray resigned. Based on the evidence before me I cannot find the actions or processes of the NSBS to be flawed, patently unfair or so egregious that the NSBS waived the immunity provided to them by s. 77A of the *LPA*.

[42] The plain, unambiguous words of s. 77A of the *LPA*, read in their grammatical and ordinary sense, harmoniously with the scheme and object of the *LPA*, cannot be read to permit a waiver by conduct or implication (*Intergulf Investment Corporation v. Gregory*, 2010 BCSC 607, para. 43).

[43] Clara Gray suggests that the NSBS has waived their immunity by their fraudulent behaviour. I do not have evidence of fraudulent behaviour on the part of the NSBS. Clara Gray believes it is so, but no evidence of fraud has been provided to the court.

[44] There is no bad faith exception to s. 77A and if there was a bad faith exception, no bad faith has been established. There is nothing before me that would support the finding that the NSBS waived the immunity expressly, by its conduct, or by implication.

#### **4. Are records obtained by Clara Gray in other proceedings admissible in this proceeding?**

[45] Clara Gray obtained records and documents from the NSBS, from her applications pursuant to Freedom of Information requests, from a complaint made

to the Office of the Ombudsman, and from her application to the Human Rights Commission. At the present time it is not entirely clear whether Clara Gray is seeking to admit records and documents from the Human Rights Commission proceeding where an implied undertaking rule would come into play.

[46] Clara Gray is directed to identify the documents that she received as a result of the Nova Scotia Human Rights Commission proceeding. Until it is clear which records or documents Clara Gray is seeking to admit in evidence and whether she received those documents only from the human rights proceeding, it cannot be decided whether the documents are admissible in this proceeding.

## **5. Should a subpoena be issued for Justice Jillian Barrington?**

[47] Clara Gray seeks to subpoena Justice Jillian Barrington to give evidence in relation to a letter that she wrote in 2014 prior to her being appointed a judge. At that time Justice Barrington was practicing law with Sheldon Nathanson Law Inc. Clara Gray seeks to add Sheldon Nathanson and Sheldon Nathanson Law Inc. as parties. The only matter that is close to being set down is the motion to amend the pleadings to add parties and causes of action. Sheldon Nathanson and Sheldon Nathanson Law take the position that the amendment cannot be made to add the parties because the limitation period has expired.

[48] In *Automattic Inc. v. Trout Point Lodge Ltd.*, 2017 NSCA 52, the court was very clear that:

... you cannot add a person as a party to the proceeding when a limitation period or extended limitation period has expired. It follows that a motions judge must determine the applicable limitation period before adding a party. [para. 38]

[49] Before it can be determined whether the parties that Clara Gray seeks to add can be added, I must determine the applicable limitation period. Clara Gray has not provided evidence to show that Justice Barrington can provide evidence to help the court determine whether the matter is statute barred.

[50] The matter of the limitation period must be decided before a decision will be made on whether a subpoena should be issued for Justice Barrington to provide evidence.

## **Conclusion**

[51] The motions brought by Clara Gray to compel reports and witnesses from the NSBS are dismissed.

[52] The motion to admit evidence obtained from the Nova Scotia Human Rights Commission proceeding is adjourned until it is clear what that evidence is.

[53] The motion to have a subpoena issued for Justice Barrington is adjourned until the matter of the limitation period is decided on Clara Gray's motion to add claims and parties.

Lynch, J.