2007 LSBC 49
Report issued: November 5, 2007
Citation issued: January 16, 2006

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

Re: Lawyer 11

Decision of the Hearing Panel
on Respondent's Charter Application

Hearing dates: July 24 and 25, 2007

Panel: Gordon Turriff, Q.C., Chair, David Renwick, Q.C., Warren Wilson, Q.C.

Counsel for the Law Society: Maureen Baird, David Lunny and J. Chong
Counsel for the Respondent: Gary Nelson
Counsel for the Attorney General of British Columbia: Jonathan Penner and Jennifer Stewart

INTRODUCTION

[1] The Respondent is a member of the Law Society of British Columbia. A citation has been issued against him pursuant to Rule 4-13 of the Law Society Rules. The gravamen of the citation is that the Respondent was a party to arrangements:

> (a) intended to mislead the Supreme Court of British Columbia in connection with an application his father made to the Court for funding for the father's defence of criminal charges; and
>
> (b) intended to mislead the Business Development Bank of Canada about the affairs of a family business.

[2] The particulars of the allegations, some of which are set out in an Agreed Statement of Facts, are not germane to the matter at hand; nor are the "background facts", so described by counsel, found by a Judge of the Supreme Court of British Columbia in reasons for judgment. For our purposes, we treat the Judge's findings as evidence of nothing.

[3] The matter at hand, as set out in a Constitutional Question Notice dated June 8, 2007 and served on the Deputy Attorney General of British Columbia and on the Minister of Justice for Canada, is the Respondent's challenge of:

> (a) … the constitutional validity or constitutional applicability of s. 41 of the *Legal Profession Act* and Rule 5-4 of the Law Society Rules under ss. 7 and 11(c) of the *Charter of Rights and Freedoms*; and
>
> (b) … the admissibility of any evidence of the respondent member from previous proceedings

under s. 7 and s. 13 of the *Charter of Rights and Freedoms*.

[4] The Respondent invokes the *Charter* in answer to the announced intention of the Law Society of:

1. calling the Respondent as a witness on the hearing of the citation; and

2. seeking to adduce as evidence on the hearing of the citation affidavits sworn by the Respondent in support of his father's Court application.

[5] Section 41 of the *Legal Profession Act*, S.B.C. 1998, c. 9 provides:

> 41(1) The benchers may make rules providing for any of the following:
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> (a) the appointment and composition of panels;
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> (b) the practice and procedure for proceedings before panels.
>
> (2) A panel may order an applicant or respondent, or a shareholder, director, officer or employee of a respondent law corporation, to do either or both of the following:
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> (a) give evidence under oath or by affirmation;
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> (b) at any time before or during a hearing, produce all files and records that are in the possession of that person and that may be relevant to a matter under consideration.

[6] Rule 5-4 of the Law Society Rules provides that:

> 5-4 A panel may
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> (a) compel the applicant or respondent to give evidence under oath, and
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> (b) at any time before or during a hearing, order the applicant or respondent to produce all files and records that in the applicant's or respondent's possession or control that may be relevant to the matters raised in the citation.

[7] Rule 5-5 of the Law Society Rules, a rule about procedure, provides that:

> 5-5(6) The hearing panel may accept any of the following as evidence:
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> …
>
> (c) any other evidence it considers appropriate.

[8] The Respondent asks us to decide that the quoted provisions are constitutionally invalid or inapplicable and of no force or effect by reason of section 52(1) of the *Constitution Act*, 1982, R.S.C. 1985, App. II, No. 44, Sched. B to the *Canada Act* 1982 (U.K.), 1982, c. 11. With specific reference to Law Society Rule 5-5(6), the Respondent's position is that the discretion given to admit appropriate evidence must be "informed and confined" by the *Charter*.

JURISDICTION

[9] The Minister of Justice for Canada did not appear on the hearing of the Respondent's application. The Law Society, the Respondent and the Attorney General of British Columbia all agreed that we have jurisdiction to decide the question of the constitutional validity of the provisions, which it is agreed would, but for any constitutional impediment, allow the Law Society to do the things to which the Respondent objects. But of course consent cannot confer jurisdiction. We have therefore satisfied ourselves, following our consideration of *Martin v. Nova Scotia (Workers' Compensation Board*),

[2003] 2 S.C.R. 504, that our jurisdiction to answer questions of law, including the constitutional questions the Respondent has raised, is implied, having regard to the public interest object and the disciplinary provisions of the *Legal Profession Act* and to the *Act* as a whole. As lawyers, we have the capacity to answer the questions. Without the authority to answer them, we do not see how we could effectively fulfill our adjudicative mandate.

THE CHARTER PROVISIONS

[10] The Respondent relies on sections 11(c), 13 and 7 of the *Charter*, which provide as follows:

> 11. Any person charged with an offence has the right
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> > …
> >
> > (c) not to be compelled to be a witness in proceedings against that person in respect of the offence; …
>
> 13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.
>
> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

SECTIONS 11 AND 13

[11] Counsel for the Respondent conceded that neither section 11 nor section 13 of the *Charter* is applicable to disciplinary proceedings under the *Legal Profession Act* if those proceedings do not involve the imposition of "true penal consequences".

[12] The phrase "true penal consequences" was used by the Supreme Court of Canada in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, a judgment that all counsel agree must be our starting point. Wigglesworth concerned a Royal Canadian Mounted Police constable who had assaulted a person he had been interviewing and who had been disciplined for the assault and fined by an RCMP service tribunal. He had also been charged criminally with common assault. The officer argued successfully in the criminal proceeding in the Provincial trial court that section 11(h) of the *Charter* prevented his being convicted twice for the same offence. After appeals, first successfully by the Crown and then unsuccessfully by the officer, the Supreme Court of Canada decided that the proceedings before the service tribunal were not "by nature" proceedings that attracted section 11 but that those proceedings did involve the imposition of "true penal consequences" (para. 24) because the tribunal had had the power to imprison the officer for a year, even though, in fact, he was only fined $300. In the course of articulating what were described as the "by nature" and "true penal consequences" tests, the Court said that section 11 was applicable to matters "… of a public nature, intended to promote public order and welfare within a public sphere of activity" and that section 11 was not applicable to "… private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity" (para. 23).

[13] Counsel for the Respondent conceded that the *Legal Profession Act* disciplinary proceedings are "by nature" not proceedings which attract section 11 but argued that the section applied nonetheless because the proceedings, even though private by nature, involve the imposition of true penal

consequences. In *Wigglesworth*, the Court said that "… a true penal consequence which would attract the application of section 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing [a] wrong done to society at large rather than to [sic] the maintenance of internal discipline within the limited sphere of activity" (para. 24).

[14] Section 38 of the *Legal Profession Act* prescribes what a panel may do when it has determined that a member has committed professional misconduct:

> 38(5) If an adverse determination against a respondent, other than an articled student, under subsection (4), the panel must do one or more of the following:
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> (a) reprimand the respondent;
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> (b) fine the respondent an amount not exceeding $20,000;
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> (c) impose conditions on the respondent's practice;
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> (d) suspend the respondent from the practice of law or from practice in one or more fields of law
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> (i) for a specified period of time,
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> (ii) until the respondent complies with a requirement under paragraph (f),
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> (iii) from a specific date until the respondent complies with a requirement under paragraph (f), or
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> (iv) for a specific minimum period of time and until the respondent complies with a requirement under paragraph (f);
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> (e) disbar the respondent;
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> (f) require the respondent to do one or more of the following:
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> (i) complete a remedial program to the satisfaction of the practice standards committee;
>
> (ii) appear before a board of examiners appointed by the panel or by the practice standards committee and satisfy the board that the respondent is competent to practise law or to practise in one or more fields of law;
>
> (iii) appear before a board of examiners appointed by the panel or by the practice standards committee and satisfy the board that the respondent's competence to practise law is not adversely affected by a physical or mental disability, or dependency on alcohol or drugs;
>
> (iv) practise law only as a partner, employee or associate of one or more other lawyers;
>
> (g) prohibit a respondent who is not a member but who is permitted to practise law under a rule made under section 16 (2)(a) or 17 (1)(a) from practising law in British Columbia indefinitely or for a specified period of time.

Counsel for the Respondent did not suggest that section 38(7) of the *Legal Profession Act*, by which a panel may "make any other orders and declarations and impose any conditions it considers appropriate," included a power to order a member to be imprisoned.

[15] We accept that a person who is subject to true penal consequences is entitled, as Madam Justice Wilson said for a majority of the Supreme Court of Canada in *Wigglesworth*, “to the highest procedural protection known to our law” (para. 24). We must therefore ask ourselves whether any of the consequences that might befall the Respondent, if any of the allegations with which we are concerned are proved against him, are truly penal. Are they, as *Wigglesworth* requires us to ask, measures imposed in proceedings for the purpose of redressing a wrong done to society at large or are they measures imposed in proceedings for the maintenance of internal discipline within a limited private sphere of activity?

[16] Counsel for the Respondent argued that we must ignore the Supreme Court of Canada judgment in *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, in which *Wigglesworth* was considered; that we must follow *Donald v. Law Society of British Columbia* (1983), 48 B.C.L.R. 210 (C.A.), as interpreted by the Saskatchewan Court of Appeal in *Knutson v. Saskatchewan Registered Nurses’ Association* (1990), 75 D.L.R. (4th) 723 (Sask. C.A.); that we must test the possible section 38(5) sanctions against the “indicia” of a true penal consequence dictated by the Supreme of Canada in *Martineau v. Minister of National Revenue*, [2004] 3 S.C.R. 737; and that factors commonly used by disciplinary panels in British Columbia, when deciding which sanctions to impose under section 38(5), as summarized by a panel in *Law Society of BC v. Ogilvie*, [1999] LSBC 17, demonstrate that panels are aiming to redress public wrongs or to promote public order and welfare and not to maintain discipline, professional integrity and professional standards.

[17] *Pearlman* (*supra*) involved a lawyer who was disciplined by the Law Society of Manitoba for not paying costs ordered against him in a proceeding at court to which he was a party, for writing menacing letters and for threatening criminal proceedings in an attempt to obtain a civil advantage. He challenged the jurisdiction of the Law Society to proceed against him, arguing delay, among other things, and relying on section 11 of the *Charter*. In dismissing Mr. Pearlman’s appeal from a judgment of the Court of Appeal for Manitoba, Mr. Justice Iacobucci, for the Supreme Court of Canada, said at p. 880:

> I find persuasive and agree with the reasoning of the majority in the Court of Appeal below, where two decisions of this court were cited (*R. v. Wigglesworth* and *R. v. Kalanj*, supra) in support of the conclusion that s. 11(b) does not apply to the facts of the instant appeal, which, as already noted, involve disciplinary matters of a regulatory nature designed to maintain professional integrity, discipline, and standards and do not have true penal consequences. (emphasis added)
>
> We have highlighted the last clause from this quoted passage because counsel for the Respondent argued that we were not bound to have regard to it. He submitted that the conclusion reached by the Supreme Court of Canada in *Pearlman* did not involve an analysis of the true penal consequences test or any examination of the powers of the Law Society of Manitoba to suspend, disbar, fine or otherwise punish. His point was that the Court’s use of the clause “and do not have true penal consequences” was not related to dispositive facts in the *Pearlman* case and that, therefore, we were not required by the doctrine of precedent to conclude that the Court had declared that no disciplinary proceedings of any Law Society could ever be said to lead to true penal consequences. In support of his argument, he cited *R. v. Henry*, [2005] 3 S.C.R. 609 as authority for the proposition that statements from judgments must be categorized before their effect, if any, can be determined and that any such statement could be one of the following: a dispositive ratio decidendi; guidance that should be accepted as authoritative because it is stated as part of a general analytical framework; or commentary intended to be helpful and that might be persuasive but would not

> be binding. We find that we need not determine the effect of the reference to true penal consequences in *Pearlman* because we do not see a need to ground our section 11 and section 13 decisions in a general statement from the *Pearlman* judgment.

[18] Counsel for the Respondent argued that we must follow *Donald v. Law Society of British Columbia*, (supra) and that we were therefore bound to conclude that determinations of professional misconduct made under section 38 necessarily lead to true penal consequences. *Donald* involved the introduction by the Law Society of British Columbia as evidence at a disciplinary hearing of a transcript of evidence given by the respondent lawyer in an earlier proceeding at court. The Court of Appeal for British Columbia decided that the disciplinary panel had wrongly allowed the transcript into evidence. For the Court, Mr. Justice Hinkson (Carrothers J.A. concurring) said, at p. 218:

> In my opinion s. 13 of the Charter should not be restricted to criminal proceedings but, rather, should be given a broader meaner extending its operation to any proceedings where an individual is exposed to a criminal charge, penalty or forfeiture as a result of having testified in earlier proceedings. This would extend the protection of s. 13 to Acts of the provincial legislatures which provide for the imposition of penalties. The effect of s.13 is to extend its application to all such proceedings without the necessity of the witness expressly invoking it in the earlier proceedings".

[19] Patently this judgment, if binding, would give the Respondent the section 13 protection he claims. But counsel for the Law Society argued that *Donald* had been impliedly overruled by *Wigglesworth*, and she referred us to *McDonald v. Law Society of Alberta*, [1994] 3 W.W. R. 697 (Alta. Q.B.) where, at para. 17, an Alberta trial judge had concluded, after considering *Wigglesworth* and *Pearlman* among other judgments, that *Donald*, "an early Charter case," was wrongly decided.

[20] Counsel for the Respondent conceded that judgments can be overruled even though no Court has said expressly that they have been and, recognizing that the relationship of *Wigglesworth* and *Donald* had to be rationalized, argued that *Donald* had effectively been revitalized by *Knutson v. Saskatchewan Registered Nurses' Association*, (*supra*). Ms. Knutson had been a registered nurse in Saskatchewan. She stole money from her employer and was convicted under the *Criminal Code of Canada* for theft of property worth more than $1,000. Disciplinary proceedings followed at the instance of the Saskatchewan Registered Nurses' Association, of which Ms. Knutson was a member. In reaching a decision to expel Ms. Knutson from membership, the Association relied as evidence on a transcript of the criminal proceedings. That transcript included a record of testimony given by Ms. Knutson herself. She successfully appealed her expulsion in a proceeding in the Saskatchewan trial court. The Association then appealed from the trial court judgment, and in its judgment allowing the appeal the Saskatchewan Court of Appeal considered *Wigglesworth* and *Donald*, among other judgments. About *Donald*, the Court said, at p. 730:

> The judgments in *Donald* defining the nature of proceedings to which s. 13 applies are consistent with the test prescribed in the judgment of Wilson J. in *Wigglesworth*.
>
> and
>
> The liability of *Donald* to fines of up to $10,000 for each offence, leaving aside the additional liability to reprimand, suspension and disbarment, would in all likelihood have been found to be a true penal consequence within the meaning of *Wigglesworth*, supra, had that judgment been available to the court at time of decision.

[21] We do not understand counsel for the Respondent to have argued that we are bound to follow

Knutson. Indeed, in paragraph 53 of his written argument, counsel suggested that its effect on *Donald* "… in relation to the true penal consequences test is persuasive."

[22] We are not persuaded that the Saskatchewan Court of Appeal was correct in postulating that it is more likely than not that the Court of Appeal in *Donald* would have concluded, having regard to the purposive test stated in *Wigglesworth*, that the possible sanctions a panel could impose after finding professional misconduct constituted true penal consequences. By this, we mean that we are not persuaded that the *Donald* Court would necessarily have decided that powers to suspend, fine or disbar, among others, had been prescribed in order to redress wrongs done to society at large. By saying, as the Saskatchewan Court of Appeal did in page 731 of its *Knutson* judgment, that in *Knutson* "… there is no liability to imprisonment or fine, and thus no possible element of punishment" (emphasis added), the Court appears to have ignored the conclusion of the Supreme Court of Canada in *Wigglesworth* that only fines of a certain magnitude could ever be said to be truly penal, and as we understand *Wigglesworth*, no consequence will be truly penal unless it was intended to achieve the purpose of redressing a wrong done to society at large. In *Knutson*, the Saskatchewan Court of Appeal does not appear to have applied the purposive test, at least in its consideration of the effect of a power to impose a fine. For that reason, we are not persuaded that *Knutson* revives *Donald*.

[23] In any event, we are satisfied that *Donald* has been impliedly overruled by *Wigglesworth*. As we see it, this must be so because the Court of Appeal in *Donald* did not address the possibility, articulated in *Wigglesworth*, that disciplinary panels might have the power to impose sanctions that are not "true penal consequences" without the *Charter* applying.

[24] *Martineau v. Minister of National Revenue*, (*supra*) was said by counsel for the Respondent to provide indicia by which the purpose of any possible disciplinary sanction could be determined. He summarized those indicia in paragraph 61 of his written argument as follows:

1. whether guilt or innocence is relevant to the sanction;
2. whether principles of sentencing will be applied;
3. whether the sanction involves a stigma; [and]
4. whether the sanction will result in a "record".

Martineau was about a man who was alleged to have made false statements in an attempt to export goods from Canada and who was made to pay the estimated value of the goods, $315,548, as an "ascertained forfeiture" under section 124 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp). He called for a review of the decision to pay, and in the course of the appeal process the Minister of National Revenue sought an order from the Federal Court requiring Mr. Martineau to attend for an examination for discovery. Mr. Martineau responded by invoking section 11 of the *Charter*. Relying on *Wigglesworth*, the Federal Court of Appeal determined that the forfeiture was not a true penal consequence and decided that Mr. Martineau was bound to attend for the examination. His appeal from that judgment to the Supreme Court of Canada was dismissed. The neat question on that appeal, the Court having satisfied itself that the "ascertained forfeiture [was] not penal in nature" (para. 56), was whether the required payment of $315,458 was " ...a fine that, by its magnitude, is imposed for the purpose of redressing a wrong done to society at large, as opposed to the purpose of maintaining the effectiveness of customs requirements" (para. 60). The underlined words were highlighted by the Court, plainly in reference to the language the Court had used in *Wigglesworth*.

[25] Mr. Martineau had argued that the payment requirement was in truth a fine of considerable magnitude, six times greater than the fine that could have been imposed had he been convicted of a

summary conviction offence under section 160(a) of the *Customs Act*. The Court decided that that argument rested on a false premise because the maximum fine on a conviction by way of indictment, another possible route under the *Act*, would have been $500,000. In any event, the ascertained forfeiture and the payment of a fine on a conviction were said, at para. 62, to be "distinct consequences":

> One of them, the fine, is clearly penal in nature and thus takes into account the relevant factors and principles governing sentencing; the other, being civil in nature and purely economic, is instead arrived at by a simple mathematical calculation.

The Court went on to say that forfeiture was an in rem proceeding and that in such a proceeding "… the guilt or innocence of the owner of the forfeited property is irrelevant" because, as section 125 of the *Customs Act* provides, a notice of forfeiture is cancelled if the property in respect of which the notice was given is seized (para 63).

[26] As to Mr. Martineau's argument that the purpose of the ascertained forfeiture was to redress a wrong done to society, the Court said, at paras. 64 and 65:

> Unlike a criminal conviction, the demand [for the payment of the $315,458] by written notice stigmatizes no one; and
>
> … the principles of criminal liability and sentencing are totally irrelevant when fixing the amount to be demanded. Such a notice does not result in a criminal record for either the offender or the owner of the property. Its purpose is neither to punish the offender nor to elicit societal condemnation. In short, the notice of ascertained forfeiture has neither the appearance nor the distinctive characteristics of a sanction intended to "redress a wrong done to society".

Earlier in its judgment, the Court had said, at paragraph 37: "Thus, although ascertained forfeiture may in some cases have the effect of 'punishing' the offender, that is not its purpose."

[27] In these quoted passages from *Martineau*, one can see the source of the indicia to which counsel for the Respondent referred in paragraph 61 of his argument: "the guilt or innocence of the owner of the forfeited property is irrelevant" (*Martineau* at para. 63); the fine "is clearly penal in nature and thus takes in account the relevant factors and principles governing sentencing" (para. 62); "the demand by written notice stigmatizes no one" (para. 64); and the "notice does not result in a criminal record"(para. 65).

[28] About the indicia, we say this:

> (a) In the proceeding with which we are concerned, the Respondent will either be found to have committed professional misconduct or not. Section 38(3) and (4)(a) and (b) of the *Legal Profession Act* require us to make a "determination" on that question, not to say whether the respondent was "guilty" or "innocent" of any allegation. The current language of the statute may be contrasted with language in earlier versions: see, e.g., *Donald*, where "guilty" and "verdict" and "verdict of guilt" appeared in what were then section 50 of the *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26 and Law Society Rules 5.11 and 5.12;
>
> (b) If we determine that the Respondent has committed professional misconduct, we will have to decide what consequence or consequences should result. One of the possible sanctions is that we would decide to fine the Respondent. If we made that decision, as section 38(5)(b) of the Act provides, the fine could not exceed $20,000. In deciding which sanction we should

impose, we would necessarily have to take relevant factors into account; our decision about what the consequence or consequences should be would have to be a principled one, and no doubt we would have to consider at least some factors that would appear in a list of "principles governing sentencing", including considerations of specific and general deterrence;

(c) Certainly the Respondent would be stigmatized by a determination that he had committed professional misconduct;

(d) If such a determination were made, he would not have a "criminal record".

[29] As we see it, the indicia that counsel for the Respondent extracted from *Martineau* are matters that we should consider when we decide whether the possible sanctions listed in section 38(5) are "true penal consequences", but we must not be constrained by the indicia he identified or by any others. *Martineau* does not dictate constraints; it suggests factors that might or perhaps even ought to be taken into consideration when deciding the ultimate *Wigglesworth* question, expressed in paragraph 33 of *Wigglesworth* in three ways: first, are the possibilities "primarily intended to maintain discipline, integrity or to regulate conduct within a limited private sphere of activity"; second, are the possibilities "... fully consonant with the maintenance of discipline and order within a limited private sphere of activity"; third, are the possibilities intended "to achieve [a] particular private purpose."

[30] Counsel for the Respondent focused his attention on three possible section 38(5) sanctions, namely, the possibility of a fine; the possibility of disbarment; and the possibility of an award of what he called solicitor-client costs. He mentioned the possibility of a suspension as being a consequence that would produce societal condemnation and that would stigmatize the Respondent but did not develop the suspension point otherwise.

A Fine

[31] Counsel for the Respondent acknowledged that we could not fine the Respondent more than $20,000; that the fine would be payable to the Law Society; and that, if the fine were not paid, it would be a debt owed to, and when collected, the property of the Society, as provided for by section 38(8) of the *Legal Profession Act*. He also acknowledged in paragraph 58 of his written argument that we must determine whether the purpose of a fine would be to redress a wrong done to society. He relied on the *Martineau* indicia, arguing in paragraph 62 that any fine we might impose would be intended to punish, that its purpose could "only" be to punish and that there was no "hue" of protective purpose; that the Respondent's guilt or innocence was "obviously" relevant; and that we would "apply principles of sentencing", as evidenced by what the panel had done in the *Ogilvie* case, (*supra*). In *Ogilvie*, it was said, at paragraph 10, that the "criminal sentencing process provides some helpful guidelines" when deciding what should be done after an adverse determination has been made against a respondent, such as "the need for specific deterrence of the respondent, the need for general deterrence, the need for rehabilitation and the need for punishment or denunciation." In *Ogilvie*, also at paragraph 10, the panel listed the following factors, which it said "… might be said to be worthy of general consideration in disciplinary dispositions":

(a) the nature and gravity of the conduct proven;

(b) the age and experience of the respondent;

(c) the previous character of the respondent, including details of prior discipline;

(d) the impact upon the victim;

> (e) the advantage gained, or to be gained, by the respondent;
>
> (f) the number of times the offending conduct occurred;
>
> (g) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;
>
> (h) the possibility of remediating or rehabilitating the respondent;
>
> (i) the impact on the respondent of criminal or other sanctions or penalties;
>
> (j) the impact of the proposed penalty on the respondent;
>
> (k) the need for specific and general deterrence;
>
> (l) the need to ensure the public's confidence in the integrity of the profession; and
>
> (m) the range of penalties imposed in similar cases.

[32] The *Ogilvie* guidelines are often expressly considered by panels who must decide what sanctions should be imposed when it has been determined that a lawyer has committed professional misconduct. Some of the *Ogilvie* guidelines mirror considerations that are taken into account when decisions are made about how to punish convicted criminals. As we have said, it would be wrong for a panel not to take into account factors like those articulated in Ogilvie, partly because some of those factors, indeed one expressly so stated, would tend towards mitigation and would, if applicable, assist a respondent. But it must be remembered that, in *Ogilvie*, after referring to the need for specific and general deterrence, for rehabilitation and for "punishment or denunciation", and before listing the guidelines, the panel said, at para. 10:

> In the context of a self-regulatory body one must also consider the need to maintain the public's confidence in the ability of the disciplinary process to regulate the conduct of its members.

As we see it, indeed as one of us who was an *Ogilvie* panel member now sees it, the imposition of a fine with the object of deterring a lawyer who has misconducted himself or herself professionally and with the object of deterring other lawyers from misconducting themselves professionally is consistent with the maintenance of public confidence in the regulation of lawyers and is therefore consistent, to quote from *Wigglesworth* at paragraph 24, with the "maintenance of internal discipline within [a] limited sphere of activity." As the Supreme Court of Canada said in *Martineau*, at paragraphs 38 and 39, an ascertained forfeiture is intended to produce a "deterrent effect", but the fact that that effect might be produced did not mean that the objective of an ascertained forfeiture was to redress a wrong done to society. Equally, the capacity of a panel, using the broad powers provided by sections 38(5) and (7), to fashion a consequence that might tend to educate and therefore to rehabilitate a miscreant lawyer is consistent, again to quote from *Wigglesworth* at paragraph 24, with the maintenance of "discipline and order within a limited private sphere of activity" so that the "private" purposes of the *Legal Profession Act* can be achieved. Those purposes are set forth in section 3 of the Act:

> 3 It is the object and duty of the society
>
> (a) to uphold and protect the public interest in the administration of justice by
>
> (i) preserving and protecting the rights and freedoms of all persons,
>
> (ii) ensuring the independence, integrity and honour of its members, and

(iii) establishing standards for the education, professional responsibility and competence of its members and applicants for membership, and

(b) subject to paragraph (a),

(i) to regulate the practice of law, and

(ii) to uphold and protect the interests of its members.

[33] Even consequences designed to punish or to denounce respondents, to use variants of the panel's words from *Ogilvie*, are not inconsistent with the achievement of the private objects of the *Legal Profession Act*. As the Supreme Court of Canada said in *Martineau*, at paragraph 37, although an "ascertained forfeiture may in some cases have the effect of 'punishing' the offender, that is not its purpose." The same statement can be made about a fine and, indeed, about any other section 38(5) possibility, including suspension and disbarment. And for us, denunciation is simply an instrument for achieving the goal of general deterrence.

[34] We are satisfied, to use the language of *Wigglesworth*, that the possibility of a fine is "fully consonant with the maintenance of discipline and order within [the] limited private sphere of [disciplinary] activity" sanctioned by the *Legal Profession Act*. As we see it, a fine not exceeding $20,000, as allowed by the Act, would not be a true penal consequence.

Disbarment

[35] As counsel for the Respondent said in paragraph 72 of his argument, "[d]isbarment and even proceedings with a potential for disbarment are devastating." Doubtless they are, not only for the people who lose their capital investments in education and training, their financial investments in their practices and their reputations, but also for their stigmatized families. And, as counsel said in paragraph 76 of his argument, disbarment results in "professional ruin and humiliation." This also cannot be doubted. But as we understand *Wigglesworth*, even a possible sanction that would yield devastating consequences, including professional ruin and humiliation, is not a "true penal consequence" if the purpose of the sanction is to "regulate conduct within a limited private sphere of activity" (para. 33). We are satisfied that that is the purpose of the section 38(5) power to disbar, even accepting, as counsel for the Respondent asked us to do in paragraph 76 of his argument, that disbarment is of a "different order of magnitude" from mere dismissal from employment. For us, it is hard to think of a more perfect method than disbarment of protecting the public interest and of maintaining professional integrity and standards. This is so because disbarment ensures that a lawyer whose conduct is deserving of that consequence is removed from the class of people privileged to practise law until, if it is possible, he or she is able to prove his or her good character and repute and fitness. Disbarment also provides other lawyers with a chilling reminder of what might happen to them if they fall below the required standards. Necessarily, the power to disbar and disbarment operate as powerful reminders of the capacity of the Law Society to maintain discipline and order for the particular private purposes of the *Legal Profession Act*. We are satisfied that disbarment would not be a true penal consequence.

Costs

[36] Counsel for the Respondent also argued that the power of a panel to order a lawyer to pay the costs of a disciplinary proceeding was a true penal consequence. The theory he advanced was that the costs that could be awarded are the equivalent of special costs ordered in proceedings at court and that, because special costs at court are ordered as a punishment for reprehensible conduct, it must

follow that costs of Law Society disciplinary proceedings are punitive. We are not persuaded by this argument. Quite apart from the fact that special costs are sometimes ordered at court where no reprehensible conduct has been proved (for example, in favour of executors and trustees), there is no provision in the *Legal Profession Act* or Law Society Rules requiring proof of reprehensible conduct as a condition of the pronouncement of a costs order. Nor are we persuaded that costs are a "true penal consequence" just because they must be paid to ensure that a practising certificate will not be refused. We consider Law Society Rule 5-9(7), which contemplates the possibility of a refusal, to be an instrument for achieving discipline and order within the Law Society's private sphere of activity. And so we are satisfied that a liability to pay costs would not be a true penal consequence.

SECTION 7

[37] Counsel for the Respondent argued that, even if section 11 of the *Charter* did not avail the Respondent in respect of the Law Society's intention to call him as a witness at the hearing of the citation, nonetheless he was entitled to the protection of section 7 of the *Charter*. That section was said to be a repository of residual rights, including the right to silence and the right not to have to incriminate oneself. As counsel put it, the "liberty interest [was] engaged" (*British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, at para. 38) when notice of the Law Society's intention was given. This was said to be the "point of testimonial compulsion" (para. 38). Counsel relied on the following passage from *R. v. Jones*, [1994] 2 S.C.R. 229, adopted in *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154, at para. 33:

> Any state action that coerces an individual to furnish evidence against him- or herself in a proceeding in which the individual and the state are adversaries violates the principle against self-incrimination. Coercion, it should be noted, means the denial of free and informed consent.

[38] As counsel put it, when the Law Society stated its intention of calling the Respondent as a witness on the hearing of the citation, the Respondent's right to liberty was compromised: he was, otherwise than in accordance with the principles of natural justice, deprived of the right not to furnish evidence against himself. Counsel pointed out that the Court in *Fitzpatrick* had said, at paragraph 27, that, in order to determine what the principles of fundamental justice required, it is necessary to seek "to achieve a contextual balance between the interests of the individual and those of society" and that the "… balancing is crucial in determining whether or not a particular law, or in the present case state action, is inconsistent with the principles of fundamental justice."

[39] Counsel for the Respondent argued that the principles of fundamental justice did not sanction the Law Society's attempt to require the Respondent to testify against himself where the Law Society and the Respondent were adversaries in the disciplinary proceeding; that the Respondent was being compelled by state legislative action to testify; that he was being "conscripted" to "promote a self-defeating purpose" (from *Fitzpatrick*, at para. 45, quoting *R. v. S.* (R.J.), [1995] 1 S.C.R. 451); and that the compulsion was "stressful and invasive." We were asked to conclude that these circumstances were not benign, as were the circumstances that led to *Fitzpatrick* itself, and we were asked to conclude, on balance, that section 7 must be invoked. *Fitzpatrick* was about a commercial fisherman charged with overfishing. He objected, and relied on section 7 of the *Charter*, when the Crown sought to introduce against him evidence of fishing logs and hail reports, which he had been required by the Department of Fisheries and Oceans to keep and make.

[40] Counsel for the Law Society and for the Attorney General of British Columbia met the Respondent's section 7 argument by citing *Belhumeur v. Barreau (Quebec)* (1988), 54 D.L.R. (4th) 105 (Que. C.A.).

There, in circumstances that closely parallel the circumstances in the proceeding before us, the majority of the Court said, at pages 116 and 117:

> But, however broadly one may interpret the right to liberty or security of the person under s. 7, I do not believe it includes an absolute or unconditional right to practise a profession, unfettered by the professional rules and standards that are applicable to it.
>
> and
>
> I do not believe that s. 7 was intended to provide a residual right to remain silent extending beyond s. 11(c) to non-penal cases.

While we are not bound by what the Court in *Belhumeur* said, nonetheless we are persuaded that that judgment is correct, and we adopt the language of that Court as our own. On balance, we choose the interests of society over the interests of the Respondent, accepting, as counsel for the Attorney General of British Columbia said, that the Respondent had "knowingly, willingly and voluntarily" agreed to be governed by the *Legal Profession Act* and Law Society Rules when he swore his oath on call and admission. Counsel's point was consistent with statements made by the Supreme Court of Canada in *British Columbia Securities Commission v. Branch*, (supra), at paras. 84 and 88: in the current proceeding, we have no basis on which to conclude that the Law Society is engaged in an "unlicensed fishing expedition" "intended to unearth and prosecute criminal conduct"; and we are satisfied that the proceeding that concerns us is an action "… undertaken by a regulatory agency, legitimately within its powers and jurisdiction and in furtherance of important public purposes that cannot realistically be achieved in a less intrusive manner." Overall, we are satisfied that this proceeding has not "run afoul" of section 7.

[41] Finally, on this point, we refer to *Johnson v. British Columbia (Securities Commission)* (1999), 67 B.C.L.R. (3d) 145 (S.C.), aff'd (2001) 94 B.C.L.R. (3d) 233 (C.A.), where Madam Justice Allan determined, at para. 119, that, when deciding whether section 7 of the *Charter* is applicable, it is "necessary to determine the predominant purpose of the inquiry at which the witness is compelled to attend," and where Her Ladyship referred to a passage from *British Columbia Securities Commission v. Branch*, (supra), in which the Supreme Court of Canada had said that "… the predominant purpose of the inquiry [in *Branch* was] to obtain the relevant evidence for the purpose of the instant proceedings, and not to incriminate" people asserting a section 7 violation (emphasis in original). In the case that concerns us, we have no basis on which to conclude that the object of the Law Society is to incriminate the Respondent in a subsequent criminal or quasi-criminal proceeding.

[42] Accordingly, we are satisfied that it is not contrary to fundamental justice for the Law Society to require the Respondent to testify on the hearing of the citation.

DISPOSITION

[43] The Respondent's application is dismissed.