2007 : No. 5 December

Re: Lawyer 11

Vancouver, BC
Called to the bar: September 5, 2001

Charter Application hearing : July 24 and 25, 2007
Panel : Gordon Turriff, QC, Chair, David Renwick, QC and Warren Wilson, QC
Report issued : November 5, 2007 (2007 LSBC 49)
Counsel : Maureen Baird, David Lunny and J. Chong for the Law Society; Gary Nelson for the Respondent; Jonathan Penner and Jennifer Stewart for the Attorney General of BC

Background

A citation was issued against the Respondent, alleging that he was a party to arrangements intended to mislead the BC Supreme Court in an application by his father for funding his defence of criminal charges, and intended to mislead the Business Development Bank of Canada about the affairs of a family business.

The Respondent invoked sections 11(c), 13 and 7 of the *Charter of Rights and Freedoms* to challenge the constitutional validity of the Law Society's plan to introduce as evidence affidavits sworn by the Respondent in support of his father's Court application, and to call him as a witness on the hearing of the citation.

The Charter Issues

The panel considered submissions from counsel for the Law Society and for the Respondent on the application of the *Charter* and specifically with reference to the Respondent's point that the discretion of a hearing panel to admit evidence (see s. 41 of the *Legal Profession Act* and Rules 5-4 and 5-5(6) of the Law Society Rules) must be "informed or confined" by the *Charter*.

All counsel conceded that unless a discipline proceeding by the Law Society involves the imposition of "true legal consequences" as that term was used by the Supreme Court of Canada in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, neither s. 11 nor s. 13 of the *Charter* apply. The panel said it must ask itself if any of the consequences that might befall the Respondent — if the allegations raised in the citation are proved — 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?" asked the panel.

The panel concluded the imposition of even the maximum fine of $20,000 allowed by the *Legal Profession Act* would fall fully within the maintenance of discipline within a limited sphere of activity, and therefore would not be a truly penal consequence.

Similarly, the panel ruled that while disbarment imposes "devastating" consequences, "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*" and therefore would not be a true penal consequence.

The panel also rejected the Respondent's argument that a panel's power to order a lawyer to pay the costs

of a disciplinary proceeding was a true penal consequence, concluding that the possibility of a refusal to issue a practising certificate for failure to pay hearing costs levied under Rule 5-9(7) is “an instrument for achieving discipline and order within the Law Society’s private sphere of activity."

Finally, the panel was not persuaded that the society’s authority to compel the giving of evidence under s. 41 of the *Legal Profession Act* and Rules 5-4 and 5-5(6) “runs afoul" of the right to silence and the right not to be compelled to incriminate oneself provided by s. 7 of the *Charter.* The panel ruled that it is not contrary to fundamental justice for the Law Society to require the Respondent to testify on the hearing of the citation.

Adopting the language of the Supreme Court of Canada in *BC Securities Commission* v. *Branch*, [1995] 2 S.C.R. 3, the panel found that the exercise of the Law Society’s evidentiary authority giving rise to this application was “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."

The Respondent's *Charter* application was dismissed.