New Brunswick Court Opens up Lawyers' Discipline Hearings

A New Brunswick court has struck down a section of a law mandating that its province's Law Society disciplinary meetings be held in private.[1] The New Brunswick News Inc. challenged section 62(2) of the New Brunswick *Law Society Act*, which states:

All hearings of the Competence, Complaints and Discipline Committees shall be in private.[2]

The court ruled that the legislation, which prohibited open disciplinary hearings at the Law Society, violated the right to freedom of expression enshrined in the *Charter of Rights and Freedoms*.[3] The province was given until June 2009 to redraft the law.

Standing

In order to be able to challenge the legislation, the party challenging the law must be granted standing before the court. New Brunswick News Inc. applied for "public interest" standing to challenge the Law Society legislation. The test for public interest standing is found in the case: *Canadian Council of Churches v. Canada*.[4] The court found that New Brunswick News satisfied the following three criteria:[5]

1) "Is there a serious issue raised as to the invalidity of legislation in question?"

The court said the legal profession's disciplinary process was a serious matter, which had important implications for how the public perceives the legal profession.[6]

2) "Has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity?"

The court found that this question was also satisfied. The media is responsible for publicly broadcasting the disciplinary proceedings of lawyers, and thus has a genuine interest in invalidating the legislation which keeps such proceedings private.

3) "Is there another reasonable and effective way to bring the issue before the court?"

Finally, the court said that a media-group challenge to the law is the most effective way to bring the matter before the judiciary.

Thus, the test for standing was satisfied.

Open-court principle

The court then examined whether or not the "open court principle" applied to the law mandating private law-society disciplinary meetings. The open-court principle presumes

that "the administration of justice thrives on exposure to light – and withers under a cloud of secrecy."[7] The legitimacy of judicial or quasi-judicial hearings depends on both their internal integrity and on the perception of their transparency by the public. Such legitimacy can only be maintained by proceedings that are open to the media and the public. The court found that the open-court principle applied to law-society disciplinary proceedings.

Freedom of expression

The court found that the legislation violated the right to freedom of expression found in section 2 of the *Charter of Rights and Freedoms*. Section 2(b) says that everyone has the right to:

freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

The court decided that the legislation in question prohibited freedom of expression by making disciplinary meetings private. The right of the press to freely communicate disciplinary proceedings was thus limited. It found that although the press could report on the outcome of a disciplinary meeting, the press was unable to attend the hearing, report on the happenings of the meeting, or analyze any of the evidence presented during proceedings. Thus, the court decided the legislation constituted an unconstitutional restriction on the right to freedom of expression.[8]

Section 1

The court found that the legislation could not be justified under section 1[9] of the *Charter of Rights and Freedoms*. Section 1 reads:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The court said that "[t]he interests which the Law Society seeks to protect – things like solicitor-client privilege, confidential matters and the like – can be accomplished without having the negative effect of a total privacy ban on the proceedings of the discipline committee."[10]

Delay

The Law Society asked the Court for a time-delay of its declaration that the legislation was unconstitutional. It wanted the time to ask the government to make legislative changes which would not only open up the Society's proceedings, but also to protect the solicitor-client privilege of lawyers' clients and other privacy rights. In determining whether or not the action striking down the legislation should be delayed, the court mainly considered a balancing test. The court weighed the negative effects of keeping the legislation against the consequences of its invalidation. The court found that on balance, the effects of the legislative invalidity should be delayed until June 30, 2009, in order to give the New Brunswick legislature time to draft revised legislation that complied with the *Charter*.

[1] *Brunswick News Inc. v. New Brunswick (Attorney General)*, 2008 NBQB 289.
[2] *Law Society Act,* S.N.B. 1996, c. 89.
[3] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the*Canada Act 1982 (U.K.),* 1982, c. 11, s. 2(b).
[4] *Canadian Council of Churches v. Canada*, [1992] 1 S.C.R. 236.
[5] *Ibid*. at para. 37.
[6] *Brunswick News*, *supra* note 1 at para. 27.
[7] *Toronto Star Newspaper Ltd. v. Ontario*, [2005] 2 S.C.R. 188 at para. 1.
[8] *Brunswick News*, *supra* note 1 at para. 54.
[9] See Terry Romaniuk, "The Oakes Test."
[10] *Brunswick News*, *supra* note 1 at para. 58.