

CASE LAW UPDATE

Jordan Glick *

Sazant v. College of Physicians and Surgeons of Ontario

[2011] O.J. No. 192 (Released January 17, 2011)

Administrative Law – Investigative Powers – College of Physicians and Surgeons

In this case the Divisional Court upheld the constitutionality of search and seizure provisions embedded within more than 60 provincial statutes. The court also confirmed the jurisdiction of the Discipline Committee of the College of Physicians and Surgeons (the “College”) to adjudicate the constitutionality of its own provisions.

The Appellant Sazant, a longstanding Member of the College, appealed a number of decisions of the Discipline Committee, including the decision to revoke his licence. Before the Discipline Committee and on appeal, Sazant challenged the constitutionality of section 76 of the *Health Professions Procedural Code* (“Code”), Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c.18. This provision provides a College investigator with the powers of a commission of inquiry under the *Public Inquiries Act*, R.S.O. 1990, c. P.41.

Sazant argued that the impugned provision violated his rights under section 8 of the *Canadian Charter of Rights and Freedoms* (“Charter”) which contains the right to be secure against unreasonable search and seizure. He submitted that the provision infringed section 8 of the *Charter* in three ways: (1) it empowered investigators to issue their own summons to compel the production of any document or witness without prior judicial authorization; (2) it gave investigators the exclusive ability to determine issues of relevance, privacy and privilege; and (3) the summoning power is unconstrained, entitling the investigator to compel both witnesses who are not regulated by the College and documents that contain highly personal information.

In upholding the constitutionality of the impugned provision, the court distinguished the regulatory scheme of the College from the rules that govern criminal trials. The court also stressed the value to various self-regulated professions of this investigatory power. Importantly, the court diminished concerns regarding a lack of pre-authorization by describing the summons powers as a less intrusive form of investigation than traditional searches. The court ultimately concluded that safeguards embedded in the Code removed any concerns regarding the constitutionality of the section. Such safeguards include requiring investigators to demonstrate reasonable and probable grounds to believe that the member has committed an act of

professional misconduct before being appointed, and the limiting of the summons to relevant evidence that is not subject to privilege.

Sazant also pleaded before the Divisional Court that the Disciplinary Committee erred in ruling that it had jurisdiction to adjudicate the constitutional question. Sazant had sought before the Disciplinary Committee a declaration of unconstitutionality pursuant to section 52(1) of the *Constitution Act, 1982*, even though the Disciplinary Committee did not have jurisdiction to strike down the legislation. The Divisional Court acknowledged that the Disciplinary Committee does not have jurisdiction to strike down the impugned provision, but concluded that the Disciplinary Committee had properly decided the constitutional question. It concluded that the Disciplinary Committee is able to avail itself of the broad powers enshrined in section 24(1) of the *Charter* to craft an appropriate remedy to cure the alleged *Charter* violation.

The court rejected several other grounds of appeal and ultimately upheld the findings of the Disciplinary Committee, as well as the penalty and order of costs.

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