IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mulgrew v. The Law Society of British Columbia,* 2016 BCSC 1279

Date: 20160711
Docket: S145320
Registry: Vancouver

In the Matter of the *Legal Profession Act*, S.B.C. 1998 c. 9

Between:

Ian Mulgrew and
Postmedia Network Inc. d.b.a. The Vancouver Sun

Petitioners

And

The Law Society of British Columbia and
Its Designate, Kurt Wedel

Respondents

Before: The Honourable Mr. Justice Butler

Reasons for Judgment

Counsel for the Petitioners:	Ludmila B. Herbst, Q.C. Scott A. Dawson Martin Twigg
Counsel for the Respondents:	Michael A. Feder Patrick D.H. Williams
Counsel for the Attorney General of British Columbia:	Sarah A. Bevan
Place and Date of Hearing:	Vancouver, B.C. January 20-22, 2016
Place and Date of Judgment:	Vancouver, B.C. July 11, 2016

[1] In 2012, the *Legal Profession Act*, S.B.C. 1998, c. 9 (the "*LPA*") was amended in part to give the Law Society of British Columbia (the "Law Society") greater ability to investigate and regulate the activities of law firms. Section 26 of the *LPA* authorizes the Law Society to conduct an investigation into the conduct of a lawyer, articled student or law firm when a complaint is made against a lawyer, former lawyer or articled student. The Law Society can designate an employee or lawyer to conduct the investigation according to the rules of the Law Society. Pursuant to s. 26(4)(b) of the *LPA*, the designated individual is authorized to make an order requiring a person to "produce for the designated employee or appointed person a record or thing in the person's possession or control."

[2] In June or July 2012, the Law Society designated Kurt Wedel, one of its employees, to investigate the conduct of Thomas Harding, one of its members. In the course of his investigation, and pursuant to s. 26(4)(b), Mr. Wedel issued two orders to Ian Mulgrew and Postmedia Network Inc. d.b.a. The Vancouver Sun (collectively the "petitioners") to produce information and material in their possession.

[3] The production orders were issued following the publication of an article in the Vancouver Sun on July 3, 2012, written by Mr. Mulgrew about Mr. Harding (the "Mulgrew Article"), in his role as counsel for the plaintiff in *Walker v. Doe*, Vancouver No. M085239 (B.C.S.C.). *Walker* was a personal injury trial that proceeded before a judge and jury. The presiding judge declared a mistrial following Mr. Harding's address to the jury. The statements attributed to Mr. Harding in the Vancouver Sun article were critical of Dr. Amrit Toor, an expert witness who testified at the trial on behalf of the defendants. Dr. Toor made a complaint to the Law Society about the conduct of Mr. Harding, which eventually led to the designation of Mr. Wedel for the purpose of conducting an investigation.

[4] The petitioners have not produced any of the files and records sought by the Law Society by way of the orders issued by Mr. Wedel. Shortly after the first production order (the "FPO") was issued, the petitioners commenced this

proceeding, in which they sought to set aside or quash the order on the basis that it was issued without adequate legislative support or is unconstitutional on the basis that it violates ss. 2(b), 7 and 8 of the *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 (the "*Charter*"). When the second production order (the "SPO") was issued, the petitioners amended the petition to seek similar relief with respect to that order.

[5] The respondents oppose the orders sought by the petitioners. They say the FPO was rescinded and that any issues regarding solicitor-client privilege raised by that order are moot. The respondents also say the *LPA* does not offend the *Charter* and that there is no basis on which to set aside the SPO. The Attorney General of British Columbia (the "AGBC") appeared at the hearing of the petition pursuant to the *Constitutional Question Act*, R.S.B.C. 1996, c. 68, and also opposes the granting of the orders sought by the petitioners.

Background

[6] The background facts are not controversial. On July 5, 2012, following the publication of the Mulgrew Article, Dr. Toor demanded an apology from the petitioners. On July 31, 2012, he commenced an action in defamation (the "Defamation Action") against Mr. Harding, the respondents and Harold Munro, the editor-in-chief of the Vancouver Sun. In the notice of civil claim, Dr. Toor sets out statements from the Mulgrew Article attributed to Mr. Harding. The responses filed by all of the defendants in late August 2012 admit that those statements were made. Mr. Harding issued an apology to Dr. Toor on August 10, 2012. The respondents removed the article from the newspaper's website on July 20, 2012, and published an apology on August 16, 2012. Some examinations for discovery have been conducted, but the Defamation Action has not proceeded to trial.

[7] The Law Society says that its investigation of Mr. Harding relates to whether Mr. Harding made the statements attributed to him in the Mulgrew Article and whether his conduct constituted a discipline violation. Mr. Wedel first contacted Mr.

Mulgrew in May 2013 by telephone to request information about the interview with Mr. Harding. Mr. Mulgrew asked that the request be placed in writing. Mr. Wedel then sent a written list of questions for Mr. Mulgrew and asked to meet with him to take a brief recorded statement or, alternatively, that written answers be provided to him. In that letter Mr. Wedel states, "[i]nformation you provide to the Law Society during our investigation is confidential. However, it may be disclosed to Dr. Toor and Mr. Harding, and it may be used in connection with Law Society proceedings in accordance with the *Legal Profession Act* and the Law Society Rules."

[8] In response to the request for information, counsel for the petitioners wrote to Mr. Wedel and asked that the Law Society refrain from making an interview order while the Defamation Action remained extant. Counsel provided informal responses to the questions based on "what we currently think the likely evidence on the subjects you raise will be." Mr. Mulgrew did not meet with Mr. Wedel.

[9] On March 5, 2014, Mr. Wedel issued the FPO which required production of the following:

> **Material you Must Produce**
>
> A. For the period June 1, 2012 to September 1, 2012:
>
> 1. **print-outs or paper copies** of the following records and things in your possession or control relating to the July 3, 2012 *Vancouver Sun* article authored by Ian Mulgrew and titled "*Mistrial declared after lawyer channels Carson to mock witness"* ("Article"):
>
> a. All correspondence, electronic or otherwise, to or from Thomas Harding or his counsel;
>
> b. All notes, electronic or otherwise, and other records of communication with Thomas Harding;
>
> c. All drafts, versions or working copies of the Article;
>
> d. All Lists of Documents of [the respondents] in [the Defamation Action].
>
> 2. Copies of all audio recordings of communications with Thomas Harding.
>
> [Emphasis in original.]

[10] The FPO required the material to be produced by March 26, 2014 and set out the provisions of s. 26(6) of the *LPA*. It also contained instructions including the following:

> 5. Under section 88(1.1) of the *Legal Profession Act*, you must produce the material set out below **even if it is confidential or subject to solicitor client privilege**.
>
> a. Please identify all material you claim is confidential or subject to solicitor client privilege.
>
> [Emphasis in original.]

[11] The petitioners then commenced these proceedings on July 9, 2014. The Law Society did not file a response, but on December 18, 2014, Mr. Wedel wrote to counsel for the petitioners stating as follows:

> In order to clarify the scope of the material the Law Society seeks from your clients, I hereby rescind the March 5, 2014 order and enclose an Order to Produce to your clients dated December 18, 2014 pursuant to section 26(4) of the *Legal Profession Act*. The March 5, 2014 order is no longer operative.

[12] The letter of December 18, 2014 enclosed the SPO, which states as follows:

> **Material you Must Produce**
>
> Unless subject to solicitor client privilege:
>
> A. Print-outs or paper copies of the following records and things in your possession or control that relate to the July 3, 2012 *Vancouver Sun* article authored by Ian Mulgrew and titled "*Mistrial declared after lawyer channels Carson to mock witness"* ("Article"):
>
> 1. All correspondence, electronic or otherwise, between Ian Mulgrew and Thomas Harding during the period of June 29, 2012 to July 3, 2012;
>
> 2. All notes, electronic or otherwise, and other records of communications between Ian Mulgrew and Thomas Harding made during the period of June 29, 2012 to July 3, 2012;
>
> 3. All drafts, versions or working copies of the Article created during the period of June 29, 2012 to July 3, 2012.
>
> B. Copies of all audio recordings in your possession or control of communications between Ian Mulgrew and Thomas Harding during the period of June 29, 2012 to July 3, 2012 that relate to the Article.
>
> [Emphasis in original.]

[13] The SPO is different from the FPO in three significant respects. First, it seeks production of documents made during the period June 29, 2012 to July 3, 2012. It does not seek documents created after the publication of the Mulgrew Article. Second, it does not contain the instruction which refers to s. 88(1.1) of the *LPA* and it specifically excludes material which is subject to solicitor-client privilege. Third, the language clearly restricts the request for materials to correspondence and communications between Mr. Mulgrew and Mr. Harding. There can be no suggestion that the Law Society is requesting correspondence and communications between other individuals, such as legal counsel, and Mr. Harding or counsel acting on his behalf.

[14] In an affidavit filed in this proceeding, Mr. Wedel says that when he issued the FPO, he did not intend or anticipate that it would capture any material subject to solicitor-client privilege. He also says that instruction no. 5 was included because it is part of a template form of order developed by the Law Society, not because he anticipated that the material sought by the FPO would include solicitor-client privileged documents. Of course, the time period covered by the FPO included the time when Dr. Toor demanded an apology from the respondents and Mr. Harding, as well as the period during which the notice of civil claim and the responses were filed in the Defamation Action. There is no question that the petitioners engaged legal counsel in that time period.

[15] The petitioners have not produced any documents pursuant to the production orders and, by agreement between the parties, the Law Society has not sought to enforce the SPO in this Court pending determination of the issues raised in this proceeding.

Provisions of the *LPA*

[16] The provisions of the *LPA* which are relevant to the issues raised by this petition are:

> 26 (1) A person who believes that a lawyer, former lawyer or articled student has practised law incompetently or been guilty of professional misconduct,

conduct unbecoming a lawyer or a breach of this Act or the rules may make a complaint to the society.

(2) The benchers may make rules authorizing an investigation into the conduct of a law firm or the conduct or competence of a lawyer, former lawyer or articled student, whether or not a complaint has been received under subsection (1).

(3) For the purposes of subsection (4), the benchers may designate an employee of the society or appoint a practising lawyer or a person whose qualifications are satisfactory to the benchers.

(4) For the purposes of an investigation authorized by rules made under subsection (2), an employee designated or a person appointed under subsection (3) may make an order requiring a person to do either or both of the following:

(a) attend, in person or by electronic means, before the designated employee or appointed person to answer questions on oath or affirmation, or in any other manner;

(b) produce for the designated employee or appointed person a record or thing in the person's possession or control.

(5) The society may apply to the Supreme Court for an order

(a) directing a person to comply with an order made under subsection (4), or

(b) directing an officer or governing member of a person to cause the person to comply with an order made under subsection (4).

(6) The failure or refusal of a person subject to an order under subsection (4) to

(a) attend before the designated employee or appointed person,

(b) take an oath or make an affirmation,

(c) answer questions, or

(d) produce records or things in the person's possession or control

makes the person, on application to the Supreme Court by the society, liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court.

88 (1) [Repealed 2012-16-46(a).]

(1.1) A person who is required under this Act or the rules to provide information, files or records that are confidential or subject to a solicitor client privilege must do so, despite the confidentiality or privilege.

…

(2) Despite section 14 of the *Freedom of Information and Protection of Privacy Act*, a person who, in the course of exercising powers or carrying out duties under this Act, acquires information, files or records that are confidential or are subject to solicitor client privilege has the same

> obligation respecting the disclosure of that information as the person from whom the information, files or records were obtained.
>
> (3) A person who, during the course of an investigation, audit, inquiry or hearing under this Act, acquires information or records that are confidential or subject to solicitor client privilege must not disclose that information or those records to any person except for a purpose contemplated by this Act or the rules.

Position of the Petitioners

[17] The petitioners seek relief on the basis that the production provisions of s. 26 of the *LPA*, when considered in light of common law statutory interpretation principles and in light of provisions of the *Charter*, do not apply to them. They argue that there are two categories of individuals who could be subject to production orders issued pursuant to s. 26 of the *LPA*. The first category includes those people who are either regulated by the Law Society or directly connected with lawyers. This group includes lawyers, articled students, employees of law firms, and clients of lawyers who are being investigated (the "Regulated Group") following a complaint. The petitioners say they are part of a group of people in the second category, including the media and members of the public, who are only indirectly related to any investigation of a member of the Law Society (the "Non-Regulated Group"). The petitioners say that s. 26(4) does not extend to members of the Non-Regulated Group and that an investigator appointed by the Law Society does not have the jurisdiction to make an order under that section against the Non-Regulated Group.

[18] The petitioners argue that s. 26(4) must be given a restricted reading so that it does not apply to the Non-Regulated Group. Extending s. 26(4) to the Non-Regulated Group would be contrary to the principles of statutory interpretation because it would be inconsistent with the legislative purpose of the amendments to the *LPA*. The legislative intent was to ensure that law firms, as well as lawyers, could be investigated by the Law Society. The subsection does not have to be read broadly in order to achieve the legislative purpose. In addition, a narrow reading is required to ensure that solicitor-client privilege is not violated. Further, if the section is not read restrictively, it would be inconsistent with the *Charter* and thus unconstitutional if applied to the Non-Regulated Group. This is because members of

the Non-Regulated Group are constitutionally entitled to the prerequisites for a production order as set out in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145. In other words, any production order should be made on reasonable grounds by an impartial arbiter.

[19] Alternatively, the petitioners say that on a purely administrative law analysis, the production orders should be set aside as unreasonable because Mr. Wedel exercised his discretion improperly by failing to take into account relevant factors. In particular, he did not properly consider: s. 2(b) *Charter* values of freedom of expression and of the press; the impact of the order on the outstanding litigation against the petitioners; and the requirement that solicitor-client privileged documents be accessed only to the extent absolutely necessary.

[20] In reply to the Law Society's argument that any issues arising from the FPO are moot, the petitioners say it is clear that the FPO does relate to solicitor-client privileged materials: Messrs. Mulgrew and Munro both attest to that fact and assert privilege over any such material. The petitioners did not provide evidence of privileged materials because they would not need to do so unless the FPO is upheld by this Court. The petitioners say the Law Society's position is disrespectful and peculiar.

[21] In the alternative, if the issues arising from the FPO are moot, the petitioners argue that this Court should exercise its discretion to consider the FPO and the issues which arise from that order. They say there is no further factual foundation required to incorporate solicitor-client privilege into the s. 26(4) analysis. Further, the issues which arise under the SPO are very similar to those which arise under the FPO. This is evident from the fact that the Law Society continues to take the position that it may want to interview Mr. Mulgrew under s. 26(4). There is also nothing speculative about the possibility that the Law Society could issue further production orders to the petitioners, other members of the media, or other third parties seeking materials covered by solicitor-client privilege. Indeed, the Law Society created and continues to use the "template" which includes the reference to s. 88(1.1) of the *LPA*

and requires that documents must be produced, even if they are subject to solicitor-client privilege. In these circumstances, the Court should exercise its discretion to consider the issues arising under both the FPO and SPO.

Position of the Law Society

[22] In accordance with the provisions of the *LPA*, the Law Society is required to uphold and protect the public interest in the administration of justice in the province through regulation of the legal profession. In the course of fulfilling that statutory mandate, it must conduct investigations into the conduct of its members. Section 26(4) authorizes the Law Society to compel the production of files and records not only from members of the Law Society, articled students and law firms, but also from clients of members and third parties such as the petitioners. By its clear terms, s. 26(4) is not limited to the Regulated Group; it provides that an investigator may require "a person" to produce files and records. The Law Society says there is no legal or logical basis for restricting the production powers as suggested by the petitioners.

[23] With regard to the argument relating to s. 8 of the *Charter*, the Law Society accepts that a production order is a seizure but says the petitioners have an attenuated privacy interest in the files and records which it seeks. Further, it says the *LPA* creates a regulatory scheme and is not criminal in nature. The Law Society has no ability to sanction the petitioners or other third parties. Accordingly, it argues that s. 26(4) does not need to meet the *Hunter* standard for seizures.

[24] The Law Society says that Postmedia Network Inc. has no standing to invoke s. 7 of the *Charter*, and that Mr. Mulgrew's s. 7 argument fails at the first stage of the analysis because s. 26(4) is not causally connected to any deprivation of his liberty. He can only be deprived of his liberty if: i) he does not comply with an outstanding *LPA* order; ii) the Law Society applies to this Court for an order to find Mr. Mulgrew in contempt; and iii) this Court makes an order committing him for contempt. Of course, this Court would have to act in accordance with the principles of fundamental justice in any contempt proceeding.

[25] The Law Society says that the arguments advanced by the petitioners which are premised upon the suggestion that the production orders could have resulted in the seizure of files and records subject to solicitor-client privilege should be disregarded. This is because the FPO was rescinded and the SPO explicitly excludes privileged files and records from its ambit. As a result, all privilege issues are moot. In addition, the Law Society never intended to seize privileged files or records, even under the FPO. Further, the Law Society says it is not apparent from the evidence that there were any privileged files and records which would have to be produced pursuant to the terms of the FPO. Accordingly, the Law Society says the privilege issues raised by the petitioners are worse than moot; they never arose in the first place. In these circumstances, the Law Society says this Court should not exercise its discretion to hear these moot issues.

[26] The Law Society submits that s. 26(4) fulfils a critical regulatory function which assists it in protecting the public. It says that the investigator, Mr. Wedel, exercised his discretion reasonably, taking into account all relevant factors when he issued the SPO. Accordingly, there is no basis upon which to set aside that order.

Position of the AGBC

[27] The AGBC submits that there is no ambiguity in the language of s. 26(4) and no basis on which to exclude the “Non-Regulated Group” or any other class of persons from the discretion granted to the Law Society. The petitioners’ suggested interpretation of the subsection is unworkable and little more than an unwarranted attempt to rewrite the legislation.

[28] The AGBC argues that the proper focus when considering the constitutionality of the provision is not on the legislation but on the disputed production orders. This is because the legislation confers a broad statutory discretion which raises no general question of *Charter* inconsistency. It argues that constitutional issues regarding the validity of the provision will only arise in certain exceptional circumstances where use of the provision could overshoot the level of reasonableness (within the meaning of s. 8 of the *Charter*). In the situation before

this Court, the AGBC says the *Charter* analysis should concentrate on the particular exercise of the discretion. It cautions that the petitioners' arguments invite the Court to adjudicate not only the constitutionality of s. 26(4)'s application in the particular factual circumstances that are before the Court, but also the limits of the provision's constitutionality for the purposes of all hypothetical circumstances in which it might apply in future. The AGBC stresses that constitutionality should not be decided in a factual vacuum.

[29] With regard to s. 8 of the *Charter*, the AGBC says that s. 26(4) is a standard administrative subpoena provision found within statutory regulatory schemes in connection with investigation and inquiry powers. The petitioners' suggestion that s. 26(4) of the *LPA* is, on its face, an unreasonable seizure power contrary to s. 8 of the *Charter* is untenable. The granting of power to a regulator to obtain information for investigative purposes not only from the persons directly engaged in the regulated activity, but also from third party witnesses who have had interactions with those regulated persons in ways that are relevant to the regulator's mandate, is patently sensible and necessary, and does not pose a constitutional problem. The standard of reasonableness applied in the case of a search and seizure under criminal law is not appropriate in the administrative context.

[30] With regard to s. 7 of the *Charter,* the AGBC says the petitioners' argument does not stand up to scrutiny. The petitioner, Postmedia Network Inc. has no liberty interest at stake. In order to establish a *Charter* infringement, Mr. Mulgrew would have to establish: first, that the government action (issuance of the production order) engages life, liberty or security of the person; and second, that any limitation to his life, liberty or security of the person is not in accordance with the principles of fundamental justice. He is unable to establish either of these preconditions.

[31] The possibility of imprisonment as a sanction can support an argument that liberty interests are engaged, but imprisonment must be more than a remote consequence. Here, the possibility of imprisonment is too remote a consequence to engage the petitioners' liberty interests. The suggestion that after-the-fact judicial

review is inadequate to protect against abuse of a discretionary power has been rejected by the Supreme Court of Canada in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425. Here, there is no doubt that no order could be made which would affect liberty interests without judicial review. Pursuant to s. 26(6) of the *LPA*, the Law Society could seek to have the petitioners found in contempt for failure to respond to a production order. However, the court hearing any such application would consider the reasonableness of the order, the validity of legislation under which it was issued and any other issue raised by the application. In other words, there could be no committal except through the court's processes. Accordingly, the AGBC says that any deprivation that might be suffered could only take place in accordance with the principles of fundamental justice.

Issues

[32] Given these circumstances and the positions of the parties, the following issues must be determined:

1. Are the issues raised by the FPO moot? If so, should this Court nevertheless determine those issues?

2. On the basis of common law statutory interpretation principles, does s. 26(4) of the *LPA* apply to the Non-Regulated Group?

3. Should the SPO be set aside or quashed because the provisions of s. 26(4) offend the *Charter* or, alternatively, because the SPO was issued in violation of the *Charter*?

4. Should the SPO be set aside as being an unreasonable exercise of the examiner's discretion?

[33] For the following reasons, I have concluded that the issues raised by the FPO are moot and that I should not exercise my discretion to consider those issues. I have concluded that the impugned section of the *LPA* is not unconstitutional and

does not offend the *Charter*. Further, the issuance of the SPO did not violate the *Charter* rights of the petitioners. Finally, I have concluded that there is no basis on which to set aside or quash the SPO on purely administrative grounds.

Issue 1. Are the issues raised by the FPO moot? If so, should this Court nevertheless determine those issues?

[34] The doctrine of mootness and its proper application were explained in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. As noted at 353, courts will generally decline to hear cases which raise merely hypothetical or abstract questions, but retain a discretion to depart from that practice if it is warranted by the circumstances:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice.

[35] The issue of mootness is to be approached by a two-step analysis: first, the court must determine whether the issue involves a live controversy or not; and second, if the issue is found to be moot, the court must determine whether it should nevertheless exercise its discretion to address the moot issue. In determining whether the court should continue to decide the issue, the court should be guided by the rationalia behind the practice of the courts to, generally, only determine issues that present a live controversy: the central importance of an adversarial context with parties who have a stake in the outcome, the concern for judicial economy, and awareness of the court's proper law-making function: *Borowski*, at 358-363. I will examine the issues raised by the FPO by applying this analysis.

Mootness

[36] There is no question that the FPO was rescinded and is no longer operative. The petitioners are not required to produce the materials set out in the FPO and the Law Society cannot rely on that production order. As a result, there is no longer any live controversy between the parties with respect to the FPO. The validity of the FPO is moot as it no longer has any force or effect.

[37] These circumstances have some similarity to what occurred in *Loke v. British Columbia (Minister of Advanced Education)*, 2015 BCSC 413. The Chief Justice determined that the issues raised by the petition to set aside the conditional approval of the Minister to the establishment of the Trinity Western University law school were moot because the Minister had revoked that approval. The Court declined to hear the matter as no remedy was sought which could have a practical effect on the petitioner.

[38] However, the present circumstances are different from those in *Loke* in one important respect: in *Loke*, the petitioner did not challenge the constitutionality of the legislation; he merely sought to quash the ministerial approval. Here, the petitioners challenge the constitutionality of the *LPA* and they do so with regard to both production orders. The issue of the constitutionality of the *LPA* might affect other parties in the future and, indeed, must be considered with regard to these parties in the context of the SPO.

[39] The circumstances also have some similarity to the situation which arose in *Toronto Star Newspapers Ltd. v. Canada*, 2009 ONCA 59. A mandatory publication ban was made at a bail hearing at the request of one of a number of accused. Members of the media challenged the constitutionality of the mandatory ban, but by the time the matter proceeded to a hearing, the mandatory ban had been replaced by a discretionary publication ban. The discretionary ban was not challenged. The court acknowledged that the issues raised were moot in that the court ruling would have no impact on the rights of the accused. The court nevertheless decided to hear

the appeal and did so after considering and applying the second stage of the *Borowski* analysis.

[40] The challenge to the *LPA* arises from both of the production orders. The real question raised by the mootness argument is whether the Court should consider the possibility that a production order issued under s. 26(4) can require the production of material which is subject to solicitor-client privilege. That issue is raised only by the FPO. In these circumstances, I must apply the second stage of the *Borowski* analysis in order to decide whether to consider the solicitor-client privilege issues raised by the FPO.

Exercise of Discretion

[41] The first rationale to consider is the extent to which there is an adversarial context which allows the court to have the benefit of hearing full argument by parties who have a stake in the outcome.

[42] The petitioners refer to *Vic Restaurant Inc. v. City of Montreal*, [1959] S.C.R. 58 as a comparable case. In *Vic Restaurant*, the appellant brought an action for the renewal of a licence to operate a restaurant as was required under impugned municipal bylaws. The restaurant was sold before the appeal, rendering the issue technically moot, as the appellant no longer owned the restaurant and thus no longer required a licence. However, the Court found that the existence of ten outstanding prosecutions against the appellant for operating the restaurant without a licence was a collateral consequence which provided the appellant with a continuing interest in the appeal which otherwise would have been lacking.

[43] The petitioners say there is a collateral consequence here; the possibility that the Law Society could issue similar production orders against it in the future and that it could do so in the context of this investigation of Mr. Harding. The Law Society says this is pure speculation and there is no basis for it. Further, the Law Society says it is not possible for the solicitor-client privilege issue to be well and fully argued when there is not a proper foundation of fact before the Court.

[44] I agree with the Law Society's position. It is evident that there are many different circumstances under which the Law Society might issue a production order for records in a party's possession which might be subject to solicitor-client privilege. It is difficult to consider the issues that could arise from such circumstances in the absence of a proper factual foundation. As I will explain, this is highlighted by the circumstances of this case where the parties do not agree that the FPO sought solicitor-client documents or that there were any such documents in existence which might be caught by the order.

[45] The petitioners say they have documents over which they claim solicitor-client privilege that were in existence when the FPO was made. The Law Society says it never intended to seek production of documents which might be privileged, and, in any event, when it issued the FPO, it was not seeking production of such materials. I accept these statements of fact, none of which are contradicted. However, this situation did not lend itself to a hearing where there could be full argument regarding the issue which the petitioners wish to raise regarding the FPO and the constitutionality of the *LPA*. This is because the parties are not in agreement that the FPO required the production of privileged documents or that the Law Society was attempting to obtain such documents. In its arguments, the Law Society addressed the latter issues, rather than the former. In these circumstances, the proper adversarial context to deal with issues arising from the existence of a production order seeking solicitor-client privileged documents was lacking.

[46] The petitioners also say that the circumstances here are similar to those in *Toronto Star* to the extent that the media will have a continuing interest in the issues raised by the FPO. In *Toronto Star*, the court decided that the constitutionality of the mandatory publication ban remained a live issue for the media and the public and stated at para. 18:

> [18] … Members of the media are keenly interested in having the issue settled and Canada needs to know whether its legislation is valid. The issue will have to be determined at some point and this court has had the benefit of full factums and complete oral argument.

[47] This is very different from the present case. First, the issue is not obviously one which will "have to be determined at some point". Second, as I have already noted, the Court has not had the "benefit of full factums and complete oral argument". Rather, the parties argued about whether or not the issue actually arises. While the petitioners made substantive arguments about this issue, the respondents did not do so in a detailed way. It is well established that *Charter* issues should not be decided unless there is a proper factual foundation to support the required analysis. For example, in *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, the Court stated at 1099:

> This Court has been vigilant to ensure that a proper factual foundation exists before measuring legislation against the provisions of the *Charter*, particularly where the effects of impugned legislation are the subject of the attack.

[48] In *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, the Court emphasized at 361 that the presentation of facts is not a mere technicality:

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void.

[49] I accept the submission of the AGBC; what the petitioners are attempting to do is have the Court engage in an unworkable exercise by attempting to define a hypothetical set of fringe circumstances in which the Law Society's exercise of the s. 26(4) discretion might exceed the limits of the provision's constitutional application. That is not the proper way to approach the possibility that a particular production order infringes the *Charter*. In this regard, I agree that the focus of the inquiry must be on the particular exercise of discretion and not on the validity of the legislation. Accordingly, a consideration of "potential questions and concerns" is not adequate to ground a constitutional challenge: *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, per LeBel J. at para. 58.

[50] The first rationale thus weighs against consideration of the issues raised by the FPO. There is not an existing factual foundation and I have not had the benefit of full argument on the issue from the Law Society.

[51] The second rationale to consider is the concern for judicial economy. As noted in *Borowski*, there is a need to ration scarce judicial resources. A court should exercise its discretion to use those scarce resources to decide moot issues only where the decision may have some practical effect on the rights of the parties or where the case is one which is likely to recur frequently with only a brief window of opportunity to consider a live issue.

[52] Neither of those situations applies here. As I have indicated, I am not satisfied there is any basis for a conclusion that a decision on the issues raised by the FPO would have some practical effect on the rights of the parties. I must consider the issues raised by the SPO and that will have an effect on the rights of the parties. However, I am not satisfied that the solicitor-client privilege issue will need to be considered, no matter what further steps the Law Society takes in its investigation of Mr. Harding. Further, there is no basis on which I can conclude that it is likely that the issue will arise in the future. It may do so, but that is a possibility, not a likelihood.

[53] Even if I am wrong and it is likely to recur frequently, that is not sufficient reason to consider it here. As noted in *Borowski* at 361:

> … The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.

[54] With regard to the latter point, if the issue does arise again, it will not be in a case which has a brief duration as was the situation in *Toronto Star*. If the Law Society genuinely seeks documents which may be privileged, the issue will have to proceed to a hearing. I reject the petitioners' argument that the issue will be evasive

of review merely because the Law Society has the power to rescind a production order.

[55] In these circumstances, the second rationale also weighs against consideration of the moot issues raised by the FPO.

[56] The last of the three rationalia, the court's need to be aware of its proper law-making function, is of less significance here. However, pronouncing judgments regarding interpretation of legislation in the absence of a live dispute should be avoided.

[57] When I consider the extent to which the three rationalia for enforcement of the mootness doctrine are present here, I decline to exercise my discretion to rule on the solicitor-client privilege issues which the petitioners say arise under the FPO.

Issue 2. On the basis of common law statutory interpretation principles, does s. 26(4) of the *LPA* apply to the Non-Regulated Group?

[58] This issue raises the question of the proper interpretation of the subsection without consideration as to whether it is unconstitutional. The petitioners say that, properly construed, s. 26(4) does not authorize an investigator to seek production of materials from the Non-Regulated Group.

[59] It is difficult to see how the statutory provision could be read restrictively in this way. The designated investigator is authorized under the subsection to "make an order requiring a *person* to" either attend to answer questions or produce a record or thing in the person's possession or control. The word, "person" is, of course, very broad. It is not ambiguous as used in the section or elsewhere in the *LPA*. Its ordinary meaning would clearly include both lawyers and non-lawyers regardless of their connection to an investigation. In addition, the word is broadly defined in the *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 29: "In an enactment: … 'person' includes a corporation, partnership or party, and the personal or other legal representatives of a person to whom the context can apply according to law".

[60] In making the argument, the petitioners refer to the legislative history of the amendments and say that the legislative intent of the 2012 amendments to the *LPA* was to extend to law firms those obligations which were previously confined to lawyers. They refer to legislative debates in support of this argument. The following quote from the Honourable Shirley Bond, the Minister responsible for Bill 40 (the amending legislation) is representative of the Hansard references relied upon:

> The rationale is that if the Law Society is going to have the ability to regulate law firms effectively, they need to be able to have a process where they can accept and investigate complaints about law firms in order to enforce those regulations. They need a process by which they can receive that complaint.
>
> If you look at paragraph (c), the most important advance is that it empowers the Law Society investigators to compel non-lawyers to disclose information and produce documents. In essence, it gives the Law Society the ability to compel the production of those documents in the case of a non-lawyer.
>
> British Columbia, Legislative Assembly, *Hansard* 39th Parl., 4th Sess., Vol. 37 No. 5 (9 May 2012) at 11757 (Hon. Shirley Bond)

[61] A court must always be cautious about resolving questions of interpretation by referring to Hansard, as no single participant in the legislative process speaks for the legislature as a whole: Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, ON: Butterworths, 2002) at 489. In these circumstances, there is no need to resolve an interpretive issue by referring to Hansard as there is no ambiguity or difficulty of interpretation. However, consideration of the passages cited leads to the ready conclusion that they are of little value in resolving this issue. There is nothing in the above reference or the other Hansard references which suggests an intent to restrict the application of the section to a limited class of persons.

[62] Of course, the modern approach to statutory interpretation is the oft-quoted principle described by Elmer A. Driedger in *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[63] Reading the term “person” in its grammatical and ordinary sense within the scheme of the *LPA* does not lead to a restricted interpretation. As the Law Society notes, the use of the word “person” elsewhere in the *LPA* is consistent with persons generally and not a smaller subset of persons. For example, see ss. 5(1); 15(1); 19(1); and 26(1). In addition, where the *LPA* refers to persons employed by or associated with law firms it does so explicitly: see for example ss. 15(2); 32(2); and 41(2).

[64] Further, the suggested interpretation of “person” in the subsection is imprecise and unworkable. In that regard, I quote and adopt the argument of the AGBC:

> 39. The interpretation of s. 26(4) of the *LPA* that the petitioners seek involves the articulation of one or more class exclusions from the scope of the Law Society’s discretion. To paraphrase the petitioners’ drafting (in para. 2 of the amended petition and para. 177(c) of the petitioner’s argument), the classes of persons to be excluded from being subject to a s. 26(4) order, once the provision is “interpreted” to resolve ambiguity, are:
>
> a. generally, any person outside the circle of: (i) the lawyer who is under investigation, (ii) the co-workers of that lawyer at his or her law firm, and (iii) the clients of the lawyer;
>
> b. a person adverse in interest in a separate legal proceeding to the complainant who sparked the Law Society investigation against the lawyer;
>
> c. a journalist or other member of the media involved in news gathering; and/or
>
> d. a person “other than a client of the lawyer against whom a claim has been brought who has claims of privilege” (no paraphrase is attempted given the obscurity of the petitioners’ wording).
>
> 40. To reach the foregoing interpretation of the provision, the petitioners invoke *Charter* consistency as a means of resolving statutory ambiguity, but also say that the interpretation of s. 26(4) as subject to these class exclusions “would flow even without a *Charter* analysis” (petitioner’s argument, para. 88).
>
> 41. The AGBC responds to the petitioners’ interpretive arguments only to note that the class exclusions they have framed are imprecise – taken individually and all the more so cumulatively given the scattershot presentation of alternative class exclusions on an “and/or” basis – as well as sweeping in their potential to exclude a set of witnesses broader than simply “persons in the Petitioners’ situation”. In the petitioners’ attempt to articulate an interpretation of the provision that addresses their three overlapping concerns of (a) the petitioners’ status as persons other than members of the regulated profession, (b) the petitioners’ status as members of the press, and

> (c) solicitor-client privilege, they have failed to achieve any precise correspondence between their arguments and the exclusions they articulate.
>
> 42. Before the court issues a declaration, it must be satisfied that the terms on which it is doing so will be judicially manageable and capable of providing meaningful guidance, a standard that the declarations sought by the petitioners do not meet.
>
> *Chaudhary v. Canada (Attorney General)*, 2010 ONSC 6092 at paras. 13 and 17
>
> 43. Moreover, the exclusions drafted by the petitioners appear too radical in their reconstruction of s. 26(4) to be available as a matter of common law statutory interpretation. In effect, the petitioners seek to rewrite the provision, adding detailed terms of qualification that the Legislature cannot be presumed to have intended.

[65] The petitioners' suggested interpretation of "person" would not be judicially manageable or capable of providing meaningful guidance. It is an unwarranted attempt to rewrite the statutory provision. Further, it is contrary to the clear and unambiguous meaning of the word and the provision. As used in s. 26(4), "person" includes lawyers, employees of lawyers, clients of lawyers and non-lawyers regardless of the person's connection with a Law Society investigation. In short, the section is not ambiguous, does not need to be interpreted in a narrow way, and does apply to the petitioners.

Issue 3. Should the SPO be set aside or quashed because the provisions of s. 26(4) offend the *Charter* or, alternatively, because the SPO was issued in violation of the *Charter*?

[66] The petitioners seek a finding that the provisions of s. 26(4) necessarily offend ss. 7 and 8 of the *Charter*, as a result of which they should be found to be unconstitutional and quashed; or, alternatively, that they be read down so as not to include the Non-Regulated Group or, at the very least, not to include members of the media. The argument does not distinguish between the constitutionality of the relevant provisions of the *LPA* and the validity of the exercise of discretion of Mr. Wedel as investigator under the authority of s. 26(4). The focus of the petitioners' submissions was the alleged invalidity of the legislation rather than on an allegedly wrongful exercise of the discretion. I accept the submission of the AGBC that it is important to draw the distinction between those two types of *Charter* violations. I

also agree that the real issue here is whether the production orders issued by Mr. Wedel as investigator infringed the petitioners' *Charter* rights.

[67] The proper approach to these questions was set out in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1078:

> … As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s. 1. Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and he exceeds his jurisdiction if he does so.

[68] These comments are relevant here. Section 26(4) confers a broad discretion to an investigator to obtain statements, records and things from a person which, as I have found, includes both regulated members of the Law Society and others. It is not controversial that in many circumstances this power could be exercised without violating anyone's *Charter* rights. The first question is whether it is possible to interpret s. 26(4) as being consistent with the *Charter*. If it is possible to do so, then the Court should consider whether the *Charter* rights of the applicant were infringed by the exercise of discretionary power granted by the legislation. I propose to consider these issues by first considering s. 8 of the *Charter*, as the parties focused their arguments on the seizure powers granted to the Law Society investigator. I will then provide my analysis of the petitioners' s. 7 arguments.

Section 8

[69] Section 8 of the *Charter* provides:

> 8. Everyone has the right to be secure against unreasonable search or seizure.

[70] The first stage in the analysis is to consider if the petitioners have a reasonable expectation of privacy in the material sought by the SPO. This has been conceded by the Law Society: the petitioners have a reasonable expectation of privacy in the materials and the SPO amounts to a seizure within the meaning of s. 8.

[71] However, as the Law Society argued, I find that the petitioners' privacy interest is attenuated. The SPO does not seek to obtain, and would not require production of, personal information about Mr. Mulgrew or proprietary corporate information about Postmedia Network Inc. The SPO targets the dealings between Mr. Mulgrew and Mr. Harding as opposed to any broader subject or category of documents or information. The information sought relates to the Mulgrew Article which had already been made public by the time the production orders were issued. In addition, the petitioners knew that Mr. Harding's comments about Dr. Toor contributed to a mistrial, but nevertheless decided to publish the Mulgrew Article. They would have known that by doing so they may have inserted themselves into a dispute with Dr. Toor, or possibly a regulatory investigation of Mr. Harding. In these circumstances, the petitioners' expectation of privacy is at the low end of the spectrum.

[72] Contrary to the petitioners' argument, the fact that they are journalists does not significantly bolster their reasonable expectation of privacy. Mr. Harding was not a confidential source and once the Mulgrew Article was published, much information was in the public domain. Further, the regulation of professions is a compelling objective. As noted by LeBel J. in *Pharmascience Inc. v. Binet*, 2006 SCC 48 at para. 36, the Court has emphasized the important role that professional regulators play in protecting the public:

> [36] This Court has on many occasions noted the crucial role that professional orders play in protecting the public interest. As McLachlin J. stated in *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, "[i]t is difficult to overstate the importance in our society of the proper regulation of our learned professions" (p. 249). The importance of monitoring competence and supervising the conduct of professionals stems from the extent to which the public places trust in them.

[73] There is no doubt that members of the media do have an expectation of privacy in relation to their work product and that courts must be careful to protect s. 2(b) *Charter* rights. However, the expectation of privacy must be considered in the factual context. Here, the request for documents and information takes place in the context of the regulation of the legal profession. The petitioners face no jeopardy in the investigation and the *LPA* contains considerable safeguards which protect the confidentiality of the information provided. In all of the circumstances, when the public interest in proper regulation of the legal profession is balanced against the rights of the petitioners as journalists, there is no reason to prefer the petitioners' rights in a way which would elevate their privacy interests.

[74] The second stage of a s. 8 inquiry asks whether the search and seizure was reasonable. Much of the petitioners' argument focused on the question as to whether the criteria set out in *Hunter* apply to s. 26 of the *LPA*. The petitioners argue that s. 26(4) does not meet these criteria and is thus unconstitutional. In *Hunter*, the Court applied the criteria to determine that provisions in the *Combines Investigation Act* were unreasonable and contrary to s. 8. The *Hunter* criteria for a valid search and seizure were summarized by Wilson J. at 499 in *Thomson Newspapers*:

> (a) a system of prior authorization, by an entirely neutral and impartial arbiter who is capable of acting judicially in balancing the interests of the State against those of the individual;
>
> (b) a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has reasonable grounds, established under oath, to believe that an offence has been committed;
>
> (c) a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has reasonable grounds to believe that something which will afford evidence of the particular offence under investigation will be recovered; and
>
> (d) a requirement that the only documents which are authorized to be seized are those which are strictly relevant to the offence under investigation.

[75] Section 26(4) of the *LPA* is a standard administrative subpoena provision found within the regulatory schemes of a wide array of statutes, in connection with investigation and inquiry powers. The AGBC provided reference to 29 provisions in provincial legislation which contain similar or identical provisions, none of which

have been found to be unconstitutional. For example, similar provisions are found in the *Employment Standards Act*, R.S.B.C. 1996, c. 113, ss. 84 and 84.2, the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, ss. 44 and 44.2, and the *Labour Relations Code*, R.S.B.C. 1996, c. 244, ss. 145.1 and 145.3.

[76] The validity of such subpoena powers when used by regulatory authorities to carry out the "seizure" of private materials within the meaning of s. 8 of the *Charter*, is well established. The *Hunter* criteria for the "reasonableness" of a seizure power do not apply inflexibly in the regulatory context: "the standard of reasonableness which prevails in the case of a search or seizure made in the course of enforcement of the criminal law will not usually be appropriate to a determination of reasonableness in the administrative or regulatory context": *Thomson Newspapers* at 506.

[77] The petitioners' argument ignores the difference between a regulatory power of search and seizure and one which is directed by the state at an individual who is accused of committing a criminal or quasi-criminal offence. As noted in *Thomson Newspapers* at 507-08: "For reasons that go to the very core of our legal tradition, it is generally accepted that the citizen has a very high expectation of privacy in respect of such [criminal] investigations." But that is not the situation in the present circumstances. Indeed, there are significant differences between a criminal investigation and the investigation by Mr. Wedel pursuant to s. 26 of the *LPA*. These include:

> (a) A third party witness subject to an order made under s. 26(4) is in no jeopardy in the Law Society's process as a result of the compulsion. He or she is merely a witness within a regulatory process. The state is not seeking to access Mr. Mulgrew's information in order to investigate him in respect of a criminal act or other offence. Rather, the Law Society is investigating Mr. Harding in respect of his professional conduct in accordance with its obligations to the public.

(b) Although it is possible that a s. 26(4) order may be directed to materials in the hands of a third party witness that engage a particularly high level of privacy or a dynamic of adversity interest in parallel litigation, the *LPA* and the *Law Society Rules* contain provisions which protect privacy and confidentiality within the Law Society's process including its investigations. These provisions include:

(i) Records created as part of investigations are not generally compellable or admissible in any proceeding (*LPA*, s. 87(4)).

(ii) Information or records that form part of an investigation of a complaint or the review of a complaint may not be disclosed, except for the purpose of complying with the objectives of the *LPA* or the *Law Society Rules* and subject to several narrow exceptions of the Executive Director (*Law Society Rule* 3-3(1)-(2)).

(iii) Personal information collected by the Law Society incidentally or in error that is unrelated to its investigation must be returned or destroyed (*LPA*, s. 37.1).

(iv) Law Society staff and officials who are involved in investigations cannot be compelled to disclose information that they obtain as part of those investigations, except with the permission of the Executive Director of the Law Society (*LPA*, s. 87(5)).

(v) Law Society staff and officials who receive confidential information, including privileged information, as part of an investigation have a duty not to disclose that information and they cannot do so unless authorized by the *LPA*, the *Law Society Rules*, or a court order. (*Law Society Rule* 10-2, *LPA*, ss. 88(1.1)-(1.3)). It is an offence for a person who acquires such confidential information to disclose it unless authorized to do so by the *LPA* or the *Law Society Rules* (*LPA*, ss. 85 and 88(3)).

[78] In *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, the Court considered provisions in the *Income Tax Act* with some similarity to s. 26(4) which allowed for compelled production of a wide array of documents. The Court confirmed that the provisions applied to third parties who were not the subject of the investigation (just as the s. 26(4) provisions apply to third parties like the petitioners). Madam Justice Wilson rejected the contention that the *Hunter* criteria should be applied to the *Income Tax Act* subpoena provisions and stated at 648:

> … [I]t is evident that the *Hunter* criteria are ill-suited to determine whether a seizure under s. 231(3) of the *Income Tax Act* is reasonable. The regulatory nature of the legislation and the scheme enacted require otherwise.

[79] One of the relevant considerations in *McKinlay* was the need for random monitoring of taxpayers. While that consideration is not present here, the *LPA* is regulatory in nature and the scheme enacted, as set out above, is such that the *Hunter* criteria are inapplicable. The concept of "reasonable and probable grounds" relating to the commission of an offence is not in issue. Section 26(4) enables the Law Society to investigate complaints made by any person pursuant to s. 26(1). The Law Society receives a range of complaints. Without the ability to conduct a preliminary investigation into the merits of a complaint by means of s. 26(4) and similar provisions, the Law Society's ability to fulfil its mandate of protecting the public would be diminished.

[80] A provision comparable to s. 26(4) was recently considered in *Sazant v. College of Physicians and Surgeons of Ontario*, 2012 ONCA 727. The claimant in that case brought a s. 8 *Charter* challenge against a provision that Simmons J.A., for the unanimous court, summarized as follows at para. 8:

> [8] Under s. 76(1) of the [Health Professions Procedural Code, being Sch. 2 of the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18], a College investigator has the same investigatory powers as a commission under the *Public Inquiries Act*, 2009, S.O. 2009, c. 33, Sch. 6. Such powers include the power to issue, without prior judicial authorization, a summons to any person, requiring that person to give or produce relevant evidence to the investigator.

[81] The documents which could be compelled "include records that may contain highly personal information belonging to a member or to third parties, including cellphone records, psychiatric records, bank records and school records.": para. 111. The provision could be applied to compel members of the public as well as individuals in the regulated profession. The Court of Appeal rejected the claimant's argument that the *Hunter* criteria applied.

[82] Simmons J.A. noted at para. 154 that the provision in issue was "a reasonable power, properly constrained by the requirement that it be used solely to obtain information that is relevant to a duly authorized investigation into specified professional misconduct, and further restricted by the requirement that the information sought cannot be privileged." Simmons J.A. was alive to, but unconcerned by, the use of the provision against members of the public: "As for members of the public, they are not the target of the investigation and an investigator has a broad duty of confidentiality in relation to the information they provide" (para. 181).

[83] The petitioners say that the decision in *Sazant* supports their position because s. 26(4) of the *LPA*, unlike the legislation under consideration in that case, does not exempt privileged information from the ambit of the subpoena power. On first blush, this difference in the legislation would appear to be important. However, the nature of the legal profession is such that the Law Society could not investigate complaints about its members without access to privileged information. Accordingly, the grant of the investigative powers in the *LPA* could not have that kind of exception. The fact that the power granted by s. 26(4) could result in the subpoena of privileged information means that the exercise of discretion by the investigator might be subject to challenge depending on the circumstances. However, as I have determined, that issue is not raised in relation to the SPO.

[84] The decision in *Greene v. Law Society of British Columbia et al.*, 2005 BCSC 390, is also instructive. The Court considered whether the provisions of the *LPA* (prior to the amendments in 2012) violated the *Charter* or the constitutionally

protected right to solicitor-client privilege. The case involved a practice review conducted by the Law Society rather than the investigation of a complaint. However, that is not a difference of any consequence. Madam Justice Gerow ultimately concluded that the subpoena provisions in the *LPA* did not violate s. 8 of the *Charter* and so she did not apply the *Hunter* criteria to this regulatory context.

[85] In concluding that there was no violation, Gerow J. stated at paras. 39 and 40:

> [39] In light of the protection provided by the *Act* and the *Rules* against disclosure of information obtained in a practice review, other than for purposes of the *Act* and the *Rules*, the client's information remains confidential.
>
> [40] The Supreme Court of Canada has made it clear that the standard of reasonableness to be met in the context of regulatory investigations is much lower than in the context of criminal or quasi-criminal investigations.

[86] In arriving at those conclusions, Gerow J. referred to the decision of this Court in *McPherson v. Inst. of Chartered Accountants of B.C.* (1988), [1989] 33 B.C.L.R. (2d) 348 (S.C.), aff'd (1991), 55 B.C.L.R. (2d) 286 (C.A.). In that case, Gow J. emphasized the paramount consideration of public interest in regulation of the professions at 377:

> … What should never be lost sight of is that the paramount consideration is the public interest and, for the protection of that interest, the need to maintain appropriate standards of professional practice, *Charbonneau v. College of Physicians & Surgeons of Ont.* (1985), 52 O.R. (2d) 552 .... Maintenance of appropriate professional standards compels a system of practice review. If such a system "is reasonable", then it cannot be characterized as an unreasonable search and seizure, *R. v. Bichel*, 4 B.C.L.R. (2d) 132 at 144…per Macfarlane J.A.

[87] The petitioners say that the decision in *Greene* is supportive of their position because of the reliance the Court placed on s. 89 of the *LPA*. That section provided that if a lawyer objected "to producing or providing access to a document on the grounds that the document is confidential and that a client objects to its disclosure", the document could be sealed and unless privilege was waived it would not be disclosed. In the 2012 amendments to the *LPA*, s. 89 was repealed. The petitioners say that the absence of such a provision is an obvious flaw in the *LPA* and that

Greene is distinguishable on this basis. I do not agree. The lack of such a provision in the current iteration of the *LPA* might be relevant in circumstances where a production order was seeking privileged documents from a member of the profession. This could be significant if the client objected to the production of the privileged documents. However, that issue did not arise in relation to the FPO, and no privilege issues arise in relation to the SPO.

[88] The *Hunter* criteria have been found to be applicable to searches in a regulatory context in some circumstances. For example, in *Arkinstall v. City of Surrey*, 2010 BCCA 250, the court found an infringement of a homeowner's rights under s. 8 of the *Charter*. *Arkinstall* concerned provisions in the *Safety Standards Act*, S.B.C. 2003, c. 39, which permitted warrantless entry into and inspection of residential premises for the regulatory purpose of inspecting electrical systems for safety risks related to marihuana grow-operations. The court concluded that the *Hunter* criteria applied due to (i) the invasive nature of a thorough search of a residence and a high expectation of privacy; (ii) the elevated stigma of being targeted for a search to find an alleged drug grow-operation; and (iii) the availability and usefulness of a warrant.

[89] In *Arkinstall* at para. 60, Finch C.J. summarized the proper approach to determining whether the *Hunter* criteria should be applied in a regulatory context:

> [60] Thus, the greater the reasonable expectation of privacy and the more intrusive a search is into that expectation of privacy, the more likely the *Hunter* criteria will be required; the less intrusive a search and the lower the expectation of privacy, the less likely the *Hunter* criteria will be required. As Wilson J. stated, in the regulatory context a lesser standard of reasonableness *may* apply *depending* upon the legislative scheme under review. This means that in some regulatory circumstances the *Hunter* criteria may be required. Thus, there is a sliding scale of reasonableness within the regulatory context. [Emphasis in original.]

[90] Similar comments were made in *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 at para. 52:

> [52] Therefore, it is clear that the standard of reasonableness which prevails in the case of a search and seizure made in the course of enforcement in the criminal context will not usually be the appropriate

> standard for a determination made in an administrative or regulatory context: *per* La Forest J. in *Thomson Newspapers*. The greater the departure from the realm of criminal law, the more flexible will be the approach to the standard of reasonableness. The application of a less strenuous approach to regulatory or administrative searches and seizures is consistent with a purposive approach to the elaboration of s. 8: *Thomson Newspapers*.

[91] As I have found, the petitioners' reasonable expectation of privacy in these circumstances is attenuated. In addition, the provisions in s. 26(4) are not unreasonable in relation to the object and intent of the legislation. Further, the seizure required by a production order issued to a third party, including the SPO issued to the petitioners, is not intrusive. The context of the issuance of a production order under s. 26(4) is far removed from the realm of criminal or quasi-criminal law. Here, the two production orders have no criminal or quasi-criminal aspects. The petitioners face no jeopardy, but are merely compelled as witnesses to the investigation of a complaint by the Law Society. Of course, in issuing the production order, the Law Society was fulfilling its public interest mandate as established by the *LPA*. When I consider this context in general, it is clear that the *Hunter* criteria do not apply to seizures authorized under s. 26(4). That remains my conclusion when I consider the particular circumstances of this case.

[92] In summary, the subpoena powers in question are reasonable and properly constrained by the requirement that they be used solely to obtain information relevant to a duly authorized investigation into specified professional misconduct. Section 26 of the *LPA* is not inconsistent with, and does not violate, s. 8 of the *Charter*. Further, the issuance of the SPO does not violate the s. 8 *Charter* rights of the petitioners.

Section 7

[93] Section 7 of the *Charter* provides:

> 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.

[94] The petitioners say that Mr. Wedel breached s. 7 of the *Charter* by proceeding as he did in issuing the FPO "in relation to solicitor-client privileged documents". Two requirements must be met to establish a violation of s. 7: (1) an infringement of life, liberty or security of the person; and (2) a deprivation in a manner contrary to the principles of fundamental justice. The petitioners say that the FPO provides for an infringement of liberty because it specifically refers to the language in s. 26(6) of the *LPA* which provides that the failure to produce records or things in a person's possession "makes the person liable to be committed for contempt on application to the Supreme Court." The petitioners say that this makes the petitioners liable for criminal contempt. As criminal contempt may result in imprisonment, this is a denial of liberty which, if contrary to the principles of fundamental justice, infringes s. 7 of the *Charter*.

[95] There is no substance to this argument for a number of reasons. First, it is based on the assumption that the FPO was seeking solicitor-client privileged documents. I have not made any finding in that regard and do not need to do so as the issue is not before the Court in relation to the SPO. Second, the petitioner, Postmedia Network Inc., as a corporation, has no right to bring an application based on s. 7 of the *Charter*. Third, the argument fails on the second requirement. There is no possibility that Mr. Mulgrew could be deprived of liberty in a manner which is not in accordance with the principles of fundamental justice. If Mr. Mulgrew refused to comply with a production order and the Law Society applied to the British Columbia Supreme Court to seek a remedy, that application would be conducted in accordance with the principles of fundamental justice. It is well established in British Columbia that, on a regulatory body's application to court to enforce a subpoena it has issued, the court will entertain argument about the necessity or reasonableness of the subpoena, or indeed about the validity of the legislation under which it was issued. The court would insist that contempt be proved beyond a reasonable doubt. Further, if solicitor-client privilege were in issue in relation to any such subpoena, that fact would be a governing constraint for the court being asked to impose a contempt sanction. A Law Society investigative subpoena that unnecessarily and

inappropriately sought to capture privileged materials would not be recognized as valid, let alone enforced by way of imprisonment.

[96] In these circumstances, the possibility of deprivation of liberty is remote and could not occur in a manner contrary to the principles of fundamental justice. Section 26 of the *LPA* is not inconsistent with and does not violate s. 7 of the *Charter*. Further, the issuance of the SPO does not violate the s. 7 *Charter* rights of the petitioners.

Issue 4. Should the SPO be set aside as being an unreasonable exercise of the examiner's discretion?

[97] The petitioners' alternative argument seeks an order in the nature of certiorari setting aside or quashing a decision made in the exercise of a statutory power. This is based on traditional administrative law remedies, within the authority of s. 2(2) of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 ("*JRPA*"). The SPO is an exercise of a "statutory power of decision" within the meaning of the *JRPA* and as such is subject to judicial review.

[98] The petitioners appear to seek this remedy alternatively on administrative law grounds or, as noted above, under s. 24(1) of the *Charter*. They cite both the *JRPA* and s. 24(1) in the legal basis section of the amended petition. However, there is no need to reconsider the *Charter* issues I have already considered above, given the conclusions I have arrived at under Issue 3.

[99] The petitioners' argument on a purely administrative law basis is that the SPO was unreasonable or incorrect on the analysis directed by *Dunsmuir v. New Brunswick*, 2008 SCC 9. Specifically, they say that Mr. Wedel failed to properly take into account in his exercise of discretion:

> (a) factors that have been developed when considering production orders against the media, including under s. 2(b) of the *Charter* (freedom of expression and the press); or
>
> (b) the outstanding litigation against the Petitioners by Mr. Toor, and his ability to access the Petitioners' documents if produced to the Law Society investigator.

[100] I will examine these two factors separately as the second does not involve any consideration of *Charter* rights or values.

Balancing s. 2(b) Charter Protections

[101] The proper framework for a reasonableness analysis of an administrative decision considering *Charter* guarantees is set out in *Doré v. Barreau du Quebec*, 2012 SCC 12. This approach was succinctly summarized in *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at para. 4:

> Under *Doré*, where a discretionary administrative decision engages the protections enumerated in the *Charter* — both the *Charter*'s guarantees and the foundational values they reflect — the discretionary decision-maker is required to proportionately balance the *Charter* protections to ensure that they are limited no more than is necessary given the applicable statutory objectives that she or he is obliged to pursue.

[102] In arguing that the SPO fails to proportionately balance s. 2(b) *Charter* guarantees, the petitioners rely on three decisions, all of which consider situations where search warrants were issued against journalists under the *Criminal Code*: *R. v. Dunphy*, [2006] O.J. No. 850 (S.C.J.); *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459; and *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421. I have already set out above why the SPO does not violate s. 8 of the *Charter*. In doing so I emphasized that the context of the issuance of the production order under s. 26(4) was far removed from the criminal law. Most of the petitioners' arguments under this part of the application also miss the mark as they are focused on criminal law search warrants and the balancing that is required in that context. In this regard, I accept the following statement set out in the Law Society's argument:

> Contrary to the Petitioners' submissions, judicial decisions under *Criminal Code* provisions authorizing the issuance of warrants are *not* similar to administrative decisions under LPA s. 26(4). An administrative decision-maker, such as Mr. Wedel, is tasked with *fulfilling* the objectives of the legislation under which he or she is empowered, albeit with due respect for *Charter* values. *Doré* sets out an *administrative* law framework for reviewing his or her decision, in which deference plays a significant role. By contrast, an authorizing justice under the *Criminal Code* acts *judicially*, as an *impartial* arbiter of whether the evidence meets the requirements for issuing a warrant

> and as a bulwark for citizens against the potentially overwhelming power of law enforcement.

[103] The petitioners say that the issuance of the SPO engages the guarantees set out in s. 2(b) and the values those guarantees protect. The Law Society says it does not. I need not consider this issue closely. This is because even if the issuance of the SPO does engage s. 2(b), the circumstances of this case are such that Mr. Wedel struck an appropriate proportionate balance between the statutory objective of the *LPA* and freedom of expression and freedom of the press. This is because the s. 2(b) guarantees are not seriously challenged in the circumstances of this case. It is difficult to see how the SPO could have any impact on the petitioners' reporting, publishing or gathering of the news.

[104] The petitioners emphasize the comments of Justice McLachlin in *Lessard* at 453:

> … I cannot accept that the fact that a portion of the material seized may have been published negates the chilling effect seizure might have on informants and the press itself.

[105] The circumstances of this case are very different from the context in *Lessard* and in other criminal cases. Mr. Harding was not, in any sense, a confidential source. The statements in the Mulgrew Article were directly attributed to him. The SPO only compelled production of files and records relating to communications between a journalist and a public source long after the news item had been published. The SPO covered a very limited time period and did not require disclosure of privileged material. When issuing the SPO, Mr. Wedel was required to consider not only the possible impact of the production order on the petitioners' *Charter* guarantees, but also the statutory objectives of the *LPA*, including the protection of the public interest and the need to investigate complaints against members. The communications in question were part of the very conduct that the Law Society was investigating. In these circumstances, the issuance of the SPO did not limit the s. 2(b) *Charter* guarantees any more than necessary in order to fulfil the statutory objectives.

Outstanding Litigation against the Petitioners by Mr. Toor

[106] The Law Society advised the petitioners that the information obtained pursuant to the production order "may be disclosed to Dr. Toor and Mr. Harding". Of course, those are the two parties with whom the petitioners were involved in the Defamation Action. The petitioners' counsel indicated that the petitioners did not want to be involved in a "parallel proceeding" and provided informal responses to the requests for information. He asked that the Law Society refrain from making an order while the litigation was extant. In light of the unresolved litigation involving the petitioners, Mr. Harding and Dr. Toor, and the fact that any information obtained from the SPO could be released to the other litigants, the argument that the SPO was unreasonable has some resonance.

[107] As the petitioners note, there were other sources of information: Mr. Harding; and the transcripts from the discovery and trial proceedings which were likely to be available in due course. The informal responses provided by the petitioners, the admissions that Mr. Harding made the statements attributed to him, and the apologies issued by Mr. Harding and the petitioners suggest that there was not a lot of other relevant information which might be made available through the SPO. In these circumstances, the petitioners question the reasonableness of the production order.

[108] In spite of these concerns, I must conclude that the SPO should not be quashed or set aside. In doing so, I recognize that the fact of the ongoing litigation can also be seen as a reason why the production order is not onerous or unreasonable; much of the information requested would likely be made available to the parties through discovery of documents and examinations for discovery. In other words, to the extent that there is some possibility the information could be disclosed to the other parties if the SPO is not set aside, that would likely occur in any event in the course of the litigation. Further, I note that it is now four years since the Mulgrew Article was published. The Defamation Action has apparently not proceeded to trial and may never proceed. Thus, the SPO may be the only way that the information will become available. As noted by Mr. Wedel, "the actual communication between

Mr. Harding and Mr. Mulgrew was part of the very conduct that the Law Society is investigating".

[109] The reasonableness standard of review as described in *Dunsmuir* is a deferential standard animated by the principle that discretionary decisions faced by administrative decision-makers may not lend themselves to a specific, particular result. On judicial review, reasonableness is concerned with justification, transparency and intelligibility. It is concerned with whether the exercise of discretion falls within a range of possible acceptable decisions which are defensible based on the facts and the law: *Dunsmuir* at paras. 47-49.

[110] Having concluded that the s. 8 and s. 2(b) *Charter* guarantees were not violated by the decision to issue the SPO, it becomes difficult to conclude that the production order should be set aside or quashed because of the existence of the Defamation Action. Considerable deference is owed to this particular exercise of discretion. Mr. Wedel has intimate knowledge of the complaint and he formed the view that the information requested was relevant to the investigation.

[111] While the fact of the ongoing litigation is a factor to be considered, it is not the only factor. Mr. Wedel swore that he took that factor into account and was of the view that obtaining information about "Mr. Harding's communication to Mr. Mulgrew would assist the Law Society's investigation by providing evidence relevant to a determination of the content and context of Mr. Harding's communication with Mr. Mulgrew – and, by implication, the extent to which Mr. Mulgrew's July 3, 2012 article accurately and fully conveys the content of Mr. Harding's communication." I cannot find that the exercise of discretion to issue the SPO in these circumstances was unreasonable.

Summary

[112] I have answered the issues raised by the parties as follows:

a) The issues raised by the FPO are moot. In the circumstances, I decline to exercise my discretion to decide the questions which would

otherwise be posed by that production order. There is an insufficient adversarial context and it is inadvisable to determine *Charter* issues in a factual vacuum.

b) On the basis of common law statutory interpretation principles, the word "person" in s. 26(4) of the *LPA* is not ambiguous and should not be interpreted narrowly. It includes lawyers, employees of lawyers, clients of lawyers and non-lawyers regardless of the person's connection with a Law Society investigation. It includes the petitioners.

c) The provisions of s. 26(4) of the *LPA* do not offend either s. 7 or s. 8 of the *Charter*. The exercise of discretion which resulted in the issuance of the SPO did not violate the s. 7 or s. 8 *Charter* rights of the petitioners.

d) The administrative decision-maker, Mr. Wedel, struck the appropriate balance between the statutory objective of the *LPA* and the *Charter* guarantees set out in s. 2(b) in his decision to issue the SPO. Also, despite issuing the SPO in the midst of the Defamation Action, Mr. Wedel's exercise of discretion was reasonable. There is no basis on which to set aside or quash the SPO.

[113] The Law Society is entitled to the costs of this proceeding against the petitioners. No costs were sought and none are awarded with respect to the participation of the AGBC.

"Butler J."