

## Investigative Summonses

By: Richard Steinecke  
April 2011 - No. 155

There has been a stream of court decisions in recent years giving a broad and purposeful interpretation to the investigative powers of professional regulators. The courts have, at least in recent years, consistently taken the position that regulatory bodies protecting the public interest need to have the tools to do their job.

The most recent example of this trend is *Sazant v. The College of Physicians and Surgeons*, 2011 ONSC 323 (CanLII). In that case the Divisional Court held that the power of a regulatory body to summons evidence during an investigation was constitutional. The case is also noteworthy for its discussion of a number of other issues including: undue delay (where evidence was, in fact, lost), the definition of disgraceful, dishonourable and unprofessional conduct, and consideration of a member's failure to acknowledge the conduct when imposing sanction.

The disciplinary tribunal concluded that Dr. Sazant had engaged in acts of professional misconduct that were sexual in nature with three boys, one of whom had been a patient. The Committee revoked Dr. Sazant's licence to practise medicine and ordered him to pay costs in the amount of \$92,812.00 to the College.

The investigator summoned documents from the police investigation of Dr. Sazant. Dr. Sazant submitted that the investigator's powers offended the protections against an unreasonable search and seizure under the *Canadian Charter of Rights and Freedoms* because there is no requirement for prior authorization by an entirely neutral and impartial arbiter, such as a judge, who is capable of acting judicially in balancing the interest of the public against those of the individual. According to Dr. Sazant, all materials seized should be returned to his attention and the College should be prohibited from relying upon that evidence in his prosecution for misconduct.

The Divisional Court's analysis demonstrated why courts tend to give deference to a regulator's investigative powers. To begin, the Divisional Court reminded Dr. Sazant that the power was being exercised in the context of a regulatory proceeding. As the Court notes: the investigator's power to summons evidence "exists not to collect evidence with a view to laying a criminal charge, but rather to take proceedings against a doctor in a regulatory context for the purpose of removing or restricting his licence to practise medicine.... College prosecutions cannot result in imprisonment".

Second, the power under consideration is a power to summons, not a power of "search and seizure" which is a power that is much less intrusive than that which is contemplated under s. 8 of the *Charter*. In this case, the subject of the summons can challenge the summons through the Court before being obliged to answer it.

Third, there is a need to assess the regime within which the power is granted. Here the provision limits the powers of the investigator. An investigator must be appointed by the Registrar who "believes, based on reasonable and probable grounds, that a member has committed an act of professional misconduct or is incompetent". The Registrar must seek approval of the Executive Committee before appointing an investigator. The Executive Committee is the body that is asked to exercise the judicial or quasi-judicial powers to determine if there are reasonable and probable grounds that an act of misconduct has been committed.

Once an investigator is appointed, his or her power to summons is not unbridled. An investigator's power to summons is restricted to the evidence that is both relevant and admissible. Finally, any witness who is summonsed must also be informed of his or her right to object to answer any question under s. 5 of the *Canada Evidence Act*.

Finally, the Court noted that the power is being exercised in the context of a self-governing professional regulatory scheme which has important public protection responsibilities. Regulators have a duty to protect the public by regulating its members so as to ensure that the public is not exposed to members who are incompetent or

---

### FOR MORE INFORMATION

This newsletter is published by Steinecke Maciura LeBlanc, a law firm practising in the field of professional regulation. If you are not receiving a copy and would like one, please contact: Richard Steinecke, Steinecke Maciura LeBlanc, 401 Bay Street, Suite 2308, P.O. Box 23, Toronto, ON M5H 2Y4, Telephone: 416-626-6897  
Facsimile: 416-593-7867, E-Mail: [rsteinecke@sml-law.com](mailto:rsteinecke@sml-law.com)

### WANT TO REPRINT AN ARTICLE

A number of readers have asked to reprint articles in their own newsletters. Our policy is that readers may reprint an article as long as credit is given to both the newsletter and the firm. Please send us a copy of the issue of the newsletter which contains a reprint from Grey Areas.

# Grey Areas

who may take advantage of their position to commit acts of misconduct, some of which could amount to criminal acts (such as sexual impropriety with clients).

For all those reasons, the Divisional Court upheld the constitutionality of the provision.

Regulators are granted a wide range of legislative powers to allow them to fulfil their regulatory functions. Given this it is not unreasonable to expect that investigators need to have the power to conduct their investigations, otherwise regulators could be hampered in their ability to protect the public by obtaining evidence necessary to take regulatory action.

The *Sazant* case is under appeal. However, last month a single judge of the Ontario Court of Appeal declined Dr. Sazant's motion to stay the revocation of his registration. In part the refusal was based on the view that the Divisional Court's reasons were persuasive and the chance of success for the appeal was remote.

The *Sazant* case can be found at: [www.canlii.org](http://www.canlii.org).

---

#### FOR MORE INFORMATION

This newsletter is published by Steinecke Maciura LeBlanc, a law firm practising in the field of professional regulation. If you are not receiving a copy and would like one, please contact: Richard Steinecke, Steinecke Maciura LeBlanc, 401 Bay Street, Suite 2308, P.O. Box 23, Toronto, ON M5H 2Y4, Telephone: 416-626-6897  
Facsimile: 416-593-7867, E-Mail: [rsteinecke@sml-law.com](mailto:rsteinecke@sml-law.com)

#### WANT TO REPRINT AN ARTICLE

A number of readers have asked to reprint articles in their own newsletters. Our policy is that readers may reprint an article as long as credit is given to both the newsletter and the firm. Please send us a copy of the issue of the newsletter which contains a reprint from Grey Areas.