

# LAW SOCIETY HAS NO POWER TO IMPOSE BAN ON PUBLICATION: DIVISIONAL COURT

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THE LAW Society of Upper Canada lacked the authority to ban publication of disciplinary proceedings conducted against one of its members, Ontario's Divisional Court has ruled.

The successful court challenge of a decision of the Law Society's discipline committee last June was brought by a number of media organizations who argued that the committee had no jurisdiction to issue the order, made to protect the reputation of a Toronto lawyer who is also facing criminal charges.

The committee had issued the publication ban despite objections from lawyers for the *Globe and Mail* and the *Toronto Star*.

Although the three-judge court panel quashed the ban, the judges also ruled that the Law Society had no legal responsibility to radically improve the information it provides the media on upcoming disciplinary hearings, as the news organizations had sought.

The court challenge was made by the *Globe and Mail* and the Cambridge Ont., *Daily Reporter* (both of which are owned by Canadian Newspapers Co. Ltd.), Toronto Star Newspapers Ltd., and Southam Inc.

In their reasons Justices Marvin Catzman, John White and John Holland noted the apparent inconsistency in the discipline committee's powers. While it may make a more intrusive order for an *in camera*, it does not have the right to issue a publication ban that would allow reporters to remain.

That view had been expanded upon during the three-day hearing by John I. Laskin, counsel for a Toronto lawyer facing discipline charges. The lawyer sought the ban with the support of counsel for the Law Society.

"This is the least intrusive of orders that might be made," Mr. Laskin told the

court. "This is a pretty minor infringement in the scheme of things . . . It is in effect a deferral of the press's entitlement to publish."

Nevertheless, the judges concluded "it is our view that the discipline committee lacked jurisdiction" to make the non-publication ruling and they set aside the order of Benchers Laura Legge, Mary Weaver and Reginae Tait.

The jurisdiction conferred on the discipline committee by s. 23(1) of the *Statutory Powers Procedure Act* (SPPA) to make orders it considers proper to prevent the abuse of its processes does not authorize the making of such non-publication orders, the judges said.

But the judges concluded that the SPPA and the guarantees of freedom of expression in the *Canadian Charter of Rights and Freedoms* are not infringed by the failure to give the extensive notice of disciplinary hearings sought by the applicants.

The media organizations had asked the judges for a declaration that the Law Society provide to them and the public information on upcoming hearings that would include the name of the lawyer involved, his or her area of practice, a full description of the complaint and charges, and the date and place of the hearing.

During the court hearing, there had been frequent discussion about the role the media plays in printing information about lawyers facing disciplinary action.

Mr. Justice White wondered: "Has the press a moral responsibility to protect a lawyer's reputation . . . that can be destroyed overnight?"

Peter Jacobsen, the lawyer for Canadian Newspapers, responded that lawyers "have to take their lumps like anyone else."

Mr. Justice White's concerns seemed to be primarily aimed at publicity

surrounding investigations that occur before formal complaints are issued by the Law Society.

But Mr. Jacobsen noted that matters do not become public until the Law Society decides a hearing is warranted. Statistics show that lawyers who reach that stage are almost invariably guilty of some misconduct, he said.

Until last February, Ontario disciplinary hearings were held in private unless the lawyer under investigation wished otherwise. Now such hearings are presumed open unless there is an overriding reason to close them.

Stephen Sherriff, counsel for the Law Society, told *Lawyers Weekly* that this case was the first in which the discipline committee had imposed a publication ban.

Since the new policy came into effect, about 75 percent of the hearings have been open to the public, he said.

But in his submissions, Brian Rogers, the lawyer for Southam and the *Toronto Star*, had minimized the effects of the recent change in policy.

In balancing the interests of the public's right to learn about the proceedings and the lawyer's right to protect his or her reputation, the Law Society still bends over backwards for those under investigation, Mr. Rogers said.

"The Law Society is saying we must protect this whole process from public scrutiny because there are three percent of people charged who will ultimately be found innocent," Rogers said.

The Law Society has always felt that it is sufficient for the media to get the decision of Convocation in individual cases of misconduct, he argued.

"Their attitude remains trust us . . . They are saying 'we are better than the courts and judges of this land.'" ●